

## CHAPTER ONE: FEDERALISM

### KEY CONCEPTS FOR THE CHAPTER

- VIRTUALLY ALL FEDERAL SYSTEMS HAVE CONSTITUTIONAL PROVISIONS TO THE EFFECT THAT VALID LEGISLATION ENACTED BY THE FEDERAL GOVERNMENT TRUMPS CONTRARY LEGISLATION ENACTED BY STATES OR PROVINCES;

THUS, THE KEY CONSTITUTIONAL ISSUES WITH REGARD TO FEDERALISM ARE:

- (1) WHEN SHOULD THERE BE A CONSTITUTIONAL LIMIT ON THE ABILITY OF THE FEDERAL GOVERNMENT TO ENACT STATUTES THAT FEDERAL LAWMAKERS BELIEVE REFLECT SOUND PUBLIC POLICY?
- (2) WHEN SHOULD THERE BE A CONSTITUTIONAL LIMIT ON THE ABILITY OF STATE/ PROVINCIAL GOVERNMENTS TO ENACT STATUTES — IN THE ABSENCE OF CONTRADICTORY FEDERAL LAW — THAT THESE LAWMAKERS BELIEVE REFLECT SOUND PUBLIC POLICY?

- IN REVIEWING THESE MATERIALS, CONSIDER THE FOLLOWING:

(a) *What does the concept of “states’ rights” or “provincial rights” mean? Are there policies that you would want to be enacted locally but not nationally?*

(b) *Why do various supreme courts given broader construction to some powers and narrower construction to others?*

## I. The Concept of Federalism

Australia, Canada and the United States are unusual (though not unique) among the world’s nations in their birth as a confederation of formerly independent colonies. (In contrast, for example, when South Americans united under Simon Bolivar achieved independence from Spain, independent nations were created roughly corresponding to the boundaries of Spanish imperial administrative districts.) As a result, unlike many nations, the *United States Constitution*, the *British North America Act*,\* and the *Commonwealth of Australia Constitution Act* all create a national government with sovereign power constitutionally limited to specified areas of substantive governmental regulation, while state or provincial power over some matters are constitutionally guaranteed. In considering these issues, it is important to carefully distinguish between constitutionally-mandated federalism and the sort of decentralization or delegation of powers that occur in unitary states like France or in the delegation by state or provincial governments to local or regional units of government: constitutionalism federalism precludes the federal government from exercising certain powers even if federal officials think it would be better if they can do so.

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\* With apologies to Canadian nationalists whose sensibilities may take offense, these materials use the historical name given to this Act, an enactment of the British Parliament. When the constitution was re-patriated to Canada in 1982, the founding constitutional act of Canada was formally renamed the *Constitution Act, 1867*. Because the newly enacted and repatriated constitution is formally named the *Constitution Act, 1982*, these materials use the historical name to avoid confusion among uninitiated readers.

The key details of this division of power differ in some significant ways: (1) which matters are assigned to the federal or state/provincial governments; (2) the role of courts in policing the divisions; and (3) the effect of modern values about national or regional solutions to social problems. As with other topics, this book's thesis with regard to federalism concepts is that they can be best understood by examining them in comparison with a close, but different, alternative approach.

## II. The Federalism of the Constitutional Texts

### A. Canada

The basic principles of Canadian federalism are set forth in Part VI of the *BNA Act* (see your Supplemental Appendix). Provinces may only legislate regarding areas enumerated in ss. 92, 92A, 93, and 95. In cases of ambiguity, provinces may not legislate in areas deemed to be within federal jurisdiction under s.91. In cases of overlap, legislation that is within the federal power under s. 91 is paramount over inconsistent provincial legislation. In addition, s.91 provides that Parliament may legislate with regard to the "Peace Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Three assignments of power are most significant for purposes of this chapter. Section 91 (2) assigns jurisdiction for legislation relating to "trade and commerce" to Parliament. Section 91(27) assigns the criminal law to Parliament as well. Section 92(13) assigns "property and civil rights" to the provinces. An appreciation of Canadian federalism requires a brief historic overview of the significance of the concept of "property and civil rights." The phrase includes all laws governing the relationships between individuals (most generally covered by the law of property, contracts, and torts), as opposed to the law which governs the relationship between citizens and government. The term first appeared in s. 8 of the *Quebec Act, 1774*, which restored French civil law as the private law in Canada.\*\* *The phrase was used again, following the British Parliament's division of "Canada" into a predominantly English-speaking Upper Canada (roughly Ontario) and a predominantly French-speaking Lower Canada in the Constitutional Act, 1791*, by the first Act of the elected assembly of Upper Canada, which declared that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same." Accordingly, when the framers of Confederation divided powers between the federal and

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\*\* This concession to civil law in an English colony, combined with unprecedented recognition of the Catholic Church and political and religious rights for practicing Catholics, was widely understood as a significant factor in the British success in keeping Quebec from joining with the colonies to the south in the Revolutionary War. Among the "Facts" to be "submitted to a candid world" to demonstrate that King George III's rule was a history of "repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States," the Declaration of Independence noted that he had combined with the British Parliament for acts of "pretended Legislation," include one "abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule in these colonies."

provincial governments and, in s.91(13), assigned “property and civil rights” to the exclusive jurisdiction of the provinces, they were consciously continuing a constitutional bargain that had been present at the beginning of the concept of a Canadian nation to permit Québec to use civil law. The evolution of judicial interpretation of that phrase, and its intersection with the broad textual grant of authority to the federal government under s.91(2) to regulate “trade and commerce,” is discussed in the *City National Leasing* case excerpted below.

Historically, it is essential to appreciate the critical compromise reflected in the assignment of powers between the federal and provincial governments. Prior imperial legislation had united Upper and Lower Canada, but with a parliament that assured equality of representation between the two. As Upper Canada grew larger, there was increasing demand for representation by population. However, the idea of a single population-based legislature for “the two Canadas” was completely unacceptable to the Quebecois, who believed that it would put “our civil law and religious institutions at the mercy of the fanatics.” By creating a separate province of Quebec, the *BNA Act* “puts under the exclusive control of Lower Canada [Quebec] those questions which we did not want the fanatical partisans of [George Brown, the Liberal leader in Ontario] to deal with.”\*\*\*

*Although the restoration of French civil law was seen as an essential element in maintaining the loyalty of French Canadians to the British crown, there was little opposition to the importation of English criminal law in the 18<sup>th</sup> Century. English law was seen as more lenient and certain, while French law at the time including features such as the preclusion of circumstantial evidence but use of confessions secured by torture. While Blackstone praised the genius of the English common law of crime, Voltaire and other enlightenment figures criticized the French system. Thus, the English conquest ended the application of French criminal law in North America. At confederation, this division between criminal and civil law was continued, so that, while s.92 (13) gave Quebec the right to continue to use the French civil code, s. 91 (27) maintained English criminal law by assigning this matter to Parliament.*

## B. United States

The *United States Constitution* deals with federalism in a bit sparser and more implicit way. Art. I, §8 sets forth a list of powers authorized to the federal Congress. For purposes of this chapter, the most significant authorized power is the one to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Sections 9 and 10 of that Article limit the power of both Congress and state legislatures. The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

In addition, several of the rights-creating constitutional amendments (most notably the “Civil War Amendments” that abolished slavery, required states to provide equal protection of the laws and due process to its citizens, and prohibited racial discrimination in voting) each contain provisos that authorize Congress to enforce the amendment by “appropriate legislation.” This basis of congressional authority has no counterpart in Canada -- Parliament

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\*\*\* See A.I. Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Univ. of Toronto Press 1982) p40, quoting *Réponses aux censeurs de la Confédération* (St-Hyacinthe: Le Courrier 1867).

has no special power (perhaps with the exception of an emergency declaration under the POGG power, discussed in Part III-D below) to protect Canadians against constitutional deprivations by provincial governments. Obviously, the difference is a legacy of the American Civil War. With the exception of linguistic rights specifically protected in ss. 16-19 and s. 23 of the Canadian Charter (we discuss this below in Chapter Five), there is no reason to believe that the Canadian federal government will be more or less hospitable to the rights of citizens than provincial governments. In contrast, the Civil War Amendments clearly reflect the view that the rebel states could not be trusted to protect the rights of former slaves.

Another reason for federal legislation to enforce constitutional rights is the dual court system in the United States. The most visible example today of the use of congressional power in this regard is 42 U.S.C. §1983, which creates a federal cause of action (a tort claim) for violations of constitutional or federal statutory rights by those acting under color of state law. Absent this exercise of congressional power under §5 of the Fourteenth Amendment, constitutional torts would have to be litigated in state courts, by elected judges or those appointed by local officials. The ability to bring constitutional tort claims before federal judges with life tenure is a critical aspect in protecting constitutional liberties in the United States. In contrast, Canada has a unitary court system. While minor claims can be adjudicated by provincial courts, all significant claims in law and equity are heard before judges with life tenure appointed by the Governor General (i.e. the federal government).

The Congressional power to enforce constitutional rights has been recently circumscribed by the Supreme Court. An earlier decision suggested that this congressional power was indeed broad. The Voting Rights Act of 1965, for example, included a section that barred those with at least a 6<sup>th</sup>-grade education from Puerto Rican schools from being denied the right to vote because of an inability to speak English. English literacy tests had been previously upheld against a challenge that this violated the equal protection rights of those unable to pass such tests. But in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld the power of Congress to condemn that which the Court had previously upheld under its broad power to enforce §5 of the Fourteenth Amendment. More recently, though, the Court has trimmed back on this authority. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act provisions imposing a heavier burden on government to sustain laws of general applicability that “substantially burden” the exercise of religion than Court held was required under the First Amendment); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (striking down provisions of Age Discrimination in Employment Act imposing a heavier burden on employers to justify discriminatory treatment of workers on basis of age, as applied to state and local government, than Court held was required under the Equal Protection Clause of the Fourteenth Amendment).

### C. Australia

The federation of the Australian colonies under the *Commonwealth of Australia Constitution Act 1900* (Imp)<sup>+</sup> was the culmination of many years of inter-colonial initiatives,

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<sup>+</sup> The parenthetical refers to the legislature enacting the statute. “Imp” refers to the British parliament acting in its imperial power for now-former colonies. “Cth” refers to the Australian federal parliament in Canberra (the federal government in Australia is often referred to as the “Commonwealth”).

plus a final decade of formal steps. By 1890, all the colonies were self-governing, independent of each other, and protective of their autonomy. Once they began seriously to consider federating, there was no prospect of their agreeing to a unitary state, or to a powerful federal government: the principal “framers” whose support was essential included colonial premiers and other colonial political leaders who were not going to give up their own political power base. Australia’s Constitution’s approach to federalism was, thus, based on the model found in the United States. Australia’s framers shared Canada’s commitment to parliamentary government under the Crown, but they rejected Canada’s version of federalism. The majority were advocates of “States rights” and did not consider the *British North American Act* to be adequate for the protection of the existing colonies as these were transformed into States. They believed the Canadian federal legislature to be too powerful, and the Canadian system of government over-centralized.

As in the United States, the Australia Constitution expressly allocates powers to the federal legislature (the Commonwealth Parliament). Unlike the Canadian model, with a very few exceptions, Australia’s constitution does not enumerate or restrict the powers of the State arms of government. However, the Constitution does not contain a provision analogous to the U.S. Tenth Amendment. Most Commonwealth powers were intended to be “concurrent”, albeit subject to the supremacy provision, s 109, which provides for Commonwealth laws to prevail over inconsistent State laws where these are on the same subject.

It was assumed by the Constitution’s framers that the enumeration of Commonwealth legislative powers meant a limitation on Commonwealth power and, by implication, that the States were free to exercise any residual powers. This principle, known as the doctrine of “reserved State powers”, prevailed from the time of the creation of the High Court of Australia in 1903 until 1920 when, in the celebrated “Engineers’ Case” the HCA rejected it (along with its companion doctrine, the “implied immunities of intergovernmental instrumentalities”).

***Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd***

**(1920) 28 CLR 129**

JUSTICES ISAACS, RICH AND STARKE said of the doctrine of ‘reserved State powers’:

“It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which, when stated, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions. This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead—and in fact has already led—to divergencies and inconsistencies more and more pronounced as the decisions accumulate. Those who rely on American authorities for limiting [Commonwealth power] in the way suggested, would find in the celebrated judgment of Marshall C.J. in *Gibbons*

v. Ogden two passages militating strongly against their contention. One is at p. 189 in these words: "We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." The other is at p. 196, where, speaking of the commerce power, the learned Chief Justice says: 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.' In *Keller v. The United States* it is said of the State police power: 'That power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation.' Passing to one of the latest American decisions, *Virginia v. West Virginia*, the pre-eminence of federal authority within the ambit of the text of the Constitution is maintained with equal clearness and vigour.

But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution. For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government. The combined effect of these features is that the expression 'State' and the expression 'Commonwealth' comprehend both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism...

In the words of a distinguished lawyer and statesman. Lord Haldane...:—'The difference between the Constitution which this bill proposes to set up and the Constitution of the United States is enormous and fundamental. This bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the Legislature. This is not so in America, but it is so with all the Constitutions we have granted to our self-governing colonies. On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, and permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features.' With these expressions we entirely agree... [It] is plain that, in view of the two features of common and indivisible sovereignty and responsible government, no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country...

The settled rules of construction which we have to apply have been very distinctly enunciated by the highest tribunals of the Empire. To those we must conform ourselves...

What, then, are the settled rules of construction? The first [is the] 'golden rule' or 'universal rule' as it has been variously termed ...Lord Haldane L.C... made some observations very pertinent to the present occasion. His Lordship, after stating that speculation on the motives of the Legislature was a topic which Judges cannot profitably or properly enter upon, said:—'Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity. I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration. I think that the only safe course is to read the language of the statute in what seems to be its natural sense.' ...

With respect to the interpretation of a written Constitution, the Privy Council has in several cases laid down principles which should be observed by Courts of law, and these principles have been stated in the clearest terms. In *R. v. Burah*, Lord Selborne, in speaking of the case where a question arises as to whether any given legislation exceeds the power granted, says:—'The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.' ...

The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: that is pure legal construction. But, once their true meaning is so ascertained, they cannot be further limited by the fear of abuse. The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court. But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth," they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper. Therefore, the doctrine of political necessity, as means of

interpretation, is indefensible on any ground. The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se.*"

Henceforth, the Commonwealth was free to exercise its powers to their fullest extent without any implication that these were restricted by powers "reserved" to the States. (See below for the evolution of this perspective.)

#### **D. Scope note on interpreting constitutional texts**

One of the controversies that surrounds any discussion of constitutional interpretation is the relevance of the intent of the constitutional drafters. (Discussion of this issue is found at the end of this Chapter). Constitutional hermeneutics are discussed in some of the cases excerpted in this Part, such as Justice Thomas' concurrence in *Lopez* arguing for a return to the intent of the framers.

The High Court of Australia does not engage directly in debate about interpretive methodology to anywhere near the degree that is found in North America. Although it has not been unusual for Justices to refer to the framers' intentions, this has rarely been systematic. The pre-"Engineers" doctrine of States' reserved powers (and "implied immunities") represents an exception, in which the framers' intentions were taken to be decisive (this was assisted by the fact that the first Justices of the High Court had themselves been framers). The "Melbourne Corporation" doctrine was also based on a commitment to preserving the original design of the Constitution, but did not entail a debate about originalism as such. Only in 1988 (with *Cole v Whitfield* (1988) 365 CLR 160) did the HCA engage in a sustained discussion of the place of history in constitutional meaning. This case concerned s 92, which guarantees free trade and commerce among the States. Like the earlier cases, its subject was, essentially, federal relations.

In a (rare) unanimous judgment, the High Court departed from an 85 year old self-imposed "prohibition" on referring to the debates of the Federal Conventions of the 1890s, at which the Constitution was written. The Court, however, was careful to point out that its conclusion about the meaning of s 92 was not drawn from the original intent of the Constitution's framers. The Court said:

Reference to the history of s.92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

Methodological debate about constitutional rights and freedoms has been much rarer.

However, in a couple of recent cases - notably *Singh v Commonwealth* (2004) 222 CLR 322 – individual Justices have grappled with each other on the merits of originalism (or “textualism”) versus “progressivism.”

Also consider some of these cases in the context of the ongoing debate about whether an interpretive method that emphasizes text, rather than broader judicial discretion, serves to meaningfully limit judges. For example, many believe that despite the textualist approach to the interpretation of ss. 91 and 92 of the *BNA Act*, the original intent of the Fathers of Confederation was completely ignored by the Privy Council, most notably in *Parsons*.

### III. Basic Principles of Canadian Federalism

This Part reviews the basic doctrines of Canadian federalism. Several things become apparent after this review. The early and controversial holdings come from the body that was the final interpreter of Canadian law until 1949, the Judicial Committee of the British Privy Council (better known in the English context as the “law lords”). These holdings have two prominent features – a narrow interpretation of the federal power to regulate “trade & commerce” and a broad interpretation of the provincial power over “property & civil rights.” Even as these holdings have been modified, we see that Canadian courts still actively engage in review of legislative material to ensure that a fair federal/provincial balance is maintained.

#### A. Early Doctrine: Narrow Construction of the Trade & Commerce Power

The first Privy Council case to shape Canadian federalism by limiting federal power related to an Ontario regulatory statute, which was challenged on the grounds that the matter related to trade and commerce and thus was exclusively within the jurisdiction of the federal Parliament. In *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96 (1881), the Privy Council established some early principles. First, their Lordships acknowledged that in real life there was no “sharp and definite distinction” between the powers assigned to Parliament by s. 91 of the *BNA Act* and those assigned to provincial legislatures by s. 92 of the Act. Second, the court held that the framers could not have intended the federal powers to broadly trump any provincial power; the court reasoned that the federal power over marriage and divorce in s.91 (26) had to be read in conjunction with s. 92 (12)’s assignment of the “solemnization of marriage” to the provinces. Thus:

In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and,

where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

Third, the Lords established the principle of narrow construction of the Trade & Commerce power (s.91(2)) and the broad construction of the Property & Civil Rights power (s.92(13)). The “fair and ordinary meaning” of “civil rights” included rights arising from contract, and the Lords noted that the assignment of authority relating to a host of commercially-related topics in s. 91 would be superfluous if these fell within the federal Trade & Commerce authority. Most significantly, the Lords added an important historical reason for this principle:

If, however, 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.

Given the paramountcy of federal law, broad construction of provincial authority was not enough; the federal power had to be limited to “political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.”

The next case confirmed the limited federal role.

#### **IN RE THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919**

**[1922] 1 A.C. 191**  
**PRIVY COUNCIL**

[Before Viscount Haldane, Lord Buckmaster, Viscount Cave, Lord Phillimore, and Lord Carson]

The judgment of their Lordships was delivered by VISCOUNT HALDANE.

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The second of these statutes, the *Combines and Fair Prices Act*, enables the Board established by the first statute to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces of Canada as the Board may consider to be detrimental to the public interest. The Board may also restrict, in the cases of food, clothing and fuel, accumulation of these necessities of life beyond the amount reasonably required, in the case of a private person, for his household, not less than in the case of a trader for his business. The surplus is in such instances to be offered for sale at fair prices. Certain persons only, such as farmers and gardeners, are excepted. Into

the prohibited cases the Board has power to inquire searchingly, and to attach what may be criminal consequences to any breach it determines to be improper. An addition of a consequential character is thus made to the criminal law of Canada.

[The Court put aside the question whether such a statute could be enacted “to meet special conditions in wartime.”] It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For normally, the subject-matter to be dealt with in the case would be one falling within s.92. Nor do the words in s. 91, the “Regulation of trade and commerce,” if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity of interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under s. 92.

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As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be *ultra vires* for the reasons now discussed. [Ed. note: Because Canada’s constitutional scheme of federalism contained in ss. 91 and 92 of the *British North America Act* divides legislative matters between the federal and provincial governments, Canadian courts use the term “*intra vires*” (within the power) to describe legislation properly enacted under one of the constitutionally-delegated powers, and “*ultra vires*” (beyond the power) to describe legislation whose subject matter has been allocated elsewhere.]\*\*\*

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Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by s. 91. \*\*\* For throughout the provisions of [the *BNA Act*] there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen*, both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. [Ed. note: *Russell* upheld a federal law authorizing local governments to ban alcohol; it has subsequently been distinguished as within the federal authority because of the “emergency” facing the company because of the “evils” of alcohol, a distinction that many find unpersuasive.] In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the cooperation of the Provincial Legislatures. \*\*\*But even this consideration affords no justification for interpreting the words of s. 91, sub-s. 2, in a fashion which would, as was said in the argument on the other side, make them confer capacity to regulate particular trades and businesses.

## B. The modern view of Trade & Commerce

The Privy Council's jurisprudence narrowing the power of the new central government was sufficiently contrary to what scholars believe were the expectations of the Canadian drafters of the *BNA Act* that one scholar referred to the Law Lords as the "wicked stepfathers of Confederation." Hogg, §5.3(c) (quoting constitutional scholar E. A. Forsey).<sup>\*\*\*\*</sup> The notion that this early jurisprudence may have reflected a refusal or inability of British Lords to appreciate the special Canadian circumstances is hinted at in this modern reappraisal by a Supreme Court of Canada no longer answerable to Westminster.

### GENERAL MOTORS OF CANADA LTD. v. CITY NATIONAL LEASING

[1989] 1 S.C.R. 641

SUPREME COURT OF CANADA

[Before Dickson C.J. and Beetz, McIntyre, Lamer, Le Dain, La Forest and L'Heureux-Dube JJ. Le Dain J. took no part in the judgment.]

The judgment of the Court was delivered by

THE CHIEF JUSTICE--The principal issue in this appeal is the constitutional validity of s. 31.1 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Section 31.1 creates a civil cause of action for certain infractions of the *Combines Investigation Act*. It is this fact which makes the section constitutionally suspect: a civil cause of action is within the domain of the provinces to create. [The legislation permits damage recovery for any "person who has suffered loss or damage as a result of conduct" that is illegal under Part V of the *Combines Investigation Act*. Part V prohibits price fixing, bid-rigging, and, relevant to this case, price discrimination – sales at different prices. In this case the plaintiff City National Leasing ("CNL") alleged that General Motors ("GM") illegally provided discriminatory support for low-interest car loans to CNL's competitors, in violation of the price discrimination provisions of the Act. The civil cause of action is basically a tort remedy: providing money damages for those injured by wrongful conduct. Jurisdiction over torts is quintessentially an aspect of "property and civil rights" within provincial jurisdiction.] The essential question raised by this appeal is whether s. 31.1 can, nevertheless, be upheld as constitutionally valid by virtue of its relationship with the *Combines Investigation Act*. Answering this question requires addressing two issues: first, is the Act valid under the federal trade and commerce power, expressed in s. 91(2) of the *Constitution Act*, 1867; and second, is s. 31.1 integrated

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<sup>\*\*\*\*</sup> The reference is to Peter Hogg's treatise, *Constitutional Law of Canada*. The work is available in libraries in a comprehensive loose-leaf edition, and also a one-volume paperback "student edition." The section references are the same in both versions (although the student edition omits some chapters).

The term "framers" is a bit more complex in the context of the *BNA Act* than in the context of the American Constitution. The legislation was originally drafted by leading Canadian politicians in meetings at Quebec and Charlottetown, but the final version of the Act was tinkered with by British drafters before its eventual adoption by the UK Parliament in 1867. A focus on "original intent" usually looks at the views of the Canadians.

with the Act in such a way that it too is *intra vires* under s. 91(2).

For the reasons which follow, I have found s. 31.1 to be *intra vires* the federal Parliament. \*\*\*

#### IV

##### The General Trade and Commerce Power

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[The Court first made reference to *Citizens' Insurance Company of Canada v. Parsons*. Chief Justice Dickson next referred to his own separate opinion in an earlier case, *Attorney General of Canada v. Canadian National Transportation*, 2 S.C.R. 206, 258 (1983), reading *Parsons* as having established three important propositions with regard to the federal trade and commerce power:

"... (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce"; (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... (it) would include general regulation of trade affecting the whole dominion"; (iii) it does not extend to regulating the contracts of a particular business or trade."

Dickson then observed that on only two prior occasions had legislation been upheld under the second proposition (the best precedent was *Attorney-General for Ontario v. Attorney-General of Canada (Canada Standards Trade Mark)*, [1937] A.C. 405, where the Privy Council upheld a federal scheme creating a national trade mark to be used in conjunction with federally established commodity standards under the general trade and commerce power. He acknowledged that, with these exceptions, "the general trade and commerce power met with consistent rejection by the courts.")

The treatment of the general trade and commerce power in the cases just mentioned was no doubt strongly influenced by earlier Privy Council decisions on s. 91(2) and in particular what Anglin C.J. referred to in *The King v. Eastern Terminal Elevator Co.*, [(1925) S.C.R. 434, 441], as "... their Lordships' emphatic and reiterated allocation of 'the regulation of trade and commerce' to ... [a] subordinate and wholly auxiliary function ...." As Professor McDonald observed in his article "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969), 47 Can. Bar Rev. 161, at p. 189:

"The *British North America Act* was framed with a greater interest in central control than motivated the constitutional fathers to the south. Reaction in the founding provinces to the consequences of decentralized control in the United States has been well documented. The broad and unqualified language of section 91(2) reflected the basic interest that strength from economic unity replace the floundering provincial economies. Yet, as the American courts broadened their commerce clause until it meant essentially what the Fathers of Confederation had sought for Canada, so have the Privy Council and the Canadian courts reacted against the hopes of the framers of their constitution and have decentralized commercial control.

At least until relatively recently the history of interpretation of the trade and commerce power has almost uniformly reinforced the federal paralysis which resulted from a series of Privy Council decisions in the years 1881-1896. The predominant view was that section 91(2) did not in any way go to either general commerce, contracts, particular trades or occupations, or commodities so far

as those things might be intraprovincial. The test for the local nature of a transaction was abstractly legal, divorced from commercial effect."

Since 1949 and the abolition of appeals to the Privy Council, the trade and commerce power has, I think it fair to say, enjoyed an enhanced importance ....

In examining cases which have considered s. 91(2), it is evident that courts have been sensitive to the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights. Balancing has not been easy. \*\*\*

The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless.

[Dickson then proceeded to set for a modern standard for the exercise of Parliament's Trade and Commerce Power under s. 91(2), borrowing from the majority opinion in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 (upholding most provisions of the *Trade Marks Act* but struck down as *ultra vires* a catch-all provision that prohibited anyone from adopting "any other business practice contrary to honest industrial or commercial usage in Canada") and his own minority opinion in *Canadian National Transportation, supra.*] First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry. \*\*\*

[Fourth], the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and [fifth] the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. These [requirements] serve to ensure that federal legislation does not upset the balance of power between federal and provincial governments. In total, the five factors provide a preliminary check-list of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These indicia do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative.

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V

Approach to Determining Constitutionality

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In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. [T]he question in this appeal of how far federal legislation may validly impinge on provincial powers is one part of the general notion of the "pith and substance" of legislation; i.e., the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa). On page 334 of his book *Constitutional Law of Canada, supra*, Professor Hogg explains this in the following way:

"The pith and substance doctrine enables a law that is classified as "in relation to" a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body."

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The steps in the analysis may be summarized as follows: First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent (if it does not intrude, then the only possible issue is the validity of the act). Second, the court must establish whether the act (or a severable part of it) is valid; in cases under the second branch of s. 91(2) this will normally involve finding the presence of a regulatory scheme and then ascertaining whether that scheme meets the requirements articulated in *Vapor Canada, supra*, and in *Canadian National Transportation, supra*. If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is *intra vires* Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the second branch of s. 91(2). \*\*\*

[The Court then examined the Act and concluded that, although it did encroach on the significant provincial power to establish civil actions under s.92(13), it was a permissible encroachment in light of the limited remedy to specific violations of federal law. The Court next found that the Act's regulation of anti-competitive activities operates under the watchful gaze of a regulatory agency, and it is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity.].

### **C. The Limits to the "POGG" and Agriculture power**

The effort to protect the broad provincial power over "property & civil rights" might also have been significantly evaded had Canadian courts permitted Parliament a wide berth in passing legislation under their residual power to legislate, in regard to matters not expressly assigned to the provinces, "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." To preserve significant limits on federal power, the POGG power has been limited to three areas. First, Parliament may legislate in areas unspecified by the distribution of powers in ss. 91 and 92. Examples include legislation mandating bilingualism in the federal government and regulation of offshore minerals beyond provincial boundaries. Second, Parliament may legislate regarding matters of "national concern." Examples include aeronautics, regulation of the national capital region (Ottawa and its environs are fully part of the provinces of Ontario and Quebec, unlike Washington, DC), and marine pollution. As a general matter, these involve topics where provincial governments are deemed unable – either because of formal limits or practical politics – to legislate. Finally, Parliament may exercise its POGG power in emergencies, even when intruding on matters of provincial concern. Thus, wartime price and rent controls have been sustained, and, more

controversially, controls to limit the inflationary spiral of the 1970s were also upheld. The latter is seemingly difficult to reconcile with the “New Deal” cases, discussed in Hogg §17.4(a), which held that measures taken during the Great Depression could not be sustained under POGG.

Significantly for comparative purposes, although the precise contours of the national concern test are unclear, Professor Hogg suggests, §17.3(b), that it the POGG power exists to permit legislation when national uniformity is not only desirable but essential, in that the problem cannot be dealt with at a provincial level. Thus, an essential aspect of a federal system is that some laws will be non-uniform even if a national majority prefers a uniform rule, but there are circumstances when provinces have an insufficient incentive to act because legislation is needed to solve a problem where the mischief is felt primarily extra-territorially. Thus, the inability of Quebec and Ontario to cooperate in the well-planned development of the national capital region around Ottawa would have harmed the national interest. Environmental protection is a critical area in this regard (and a source of significant practical and theoretical controversy in the United States): provinces will not seriously consider the environmental harm beyond their own territory in requiring sacrifices and increased costs for industry. In both these situations, the POGG power applies. Of course, any national government has to have the power to act when problems cannot be dealt with at a decentralized level. Consider later how Americans and Australians try to resolve this problem.

The Court’s desire to protect unfettered provincial control over all local trade also led to substantial judicially-created limits on the textually-broad declaration in s. 95 of the *BNA Act* that “the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces” and that provincial laws relating to agriculture are only effective “as long and as far only as it is not repugnant to any Act of the Parliament of Canada.” Yet in the *Margarine Reference*, [1949] S.C.R. 1, 52, Rand, J. struck down a federal law banning manufacturing of margarine as unrelated to agriculture; rather, the legislation was deemed to relate to “a product of agriculture” and thus beyond federal jurisdiction.

#### **D. The breadth of the criminal law power**

As noted above in Part II-A, federal power over criminal law dates to the compromise permitting civil law to remain in Quebec while English criminal law was substituted for the French without opposition. The plenary authority of Parliament to regulate anti-social conduct through criminal law has been consistently upheld. Thus, although regulation of anti-consumer business practices under the Trade & Commerce power was struck down in *Board of Commerce, supra*, when Parliament criminalized price fixing and monopolization it was upheld under the criminal law power. *Proprietary Articles Trade Ass’n v. A.-G. for Canada*, [1931] A.C. 310 (P.C.) Their Lordships held that s. 91(27) included “the criminal law in its widest sense” so would be upheld as long as “Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest.”

Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality - unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.\*\*\* The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. The Board considered that the *Combines and Fair Prices Act of 1919* came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights.\*\*\*



**MORGENTALER v. THE QUEEN ("Morgentaler I")**

**[1975] 1 S.C.R. 616, 53 D.L.R. 3d 161**

**SUPREME COURT OF CANADA**

[Before Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpre, JJ.]

**[Note: The Anglo tradition is to list the Justices' opinion in the order of their seniority, regardless of whether the senior-authored opinion is in the majority. This may appear confusing for American readers.]**

LASKIN, C.J.C. (dissenting) :--This appeal, which is before this Court as of right under s. 618(2) of the *Criminal Code*, presents the highly unusual, if not the singularly exceptional, situation of an appellate Court itself entering a conviction after setting aside a jury verdict of acquittal.\*\*\*\*\* The appellant, Dr. Henry Morgentaler, was acquitted on the verdict of a jury of unlawfully procuring the miscarriage of a

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\*\*\*\*\* [Ed. Note: Canadian practice permits the prosecutor (referred to as "the Crown") to appeal from acquittals of criminal defendants, just as defendants can appeal from convictions. This was not changed by the double jeopardy provision of *Charter of Rights and Freedoms*, s. 11(h), which provides that defendants the right, "if finally acquitted of the offense, not to be tried for it again" (emphasis added), and this has been held to preserve the Crown's right of appeal. Following *Morgentaler I*, Parliament amended s. 686(4)(b)(ii) of the *Criminal Code*, which governs Crown appeals of verdicts favorable to the accused, to permit the court of appeal to enter a verdict of guilty only where the acquittal was from a bench trial. Where the accused was acquitted by a jury, a meritorious appeal would result in a new trial.]

female person, contrary to s. 251 of the *Criminal Code*. That verdict was set aside and a conviction was entered by the Quebec Court of Appeal which found it unnecessary to send the case back for a new trial.

[**Ed. note:** Section 251 of the *Criminal Code* is discussed in detail in Chapter Two. It provided for life imprisonment for anyone to intentionally cause an abortion, and for two years imprisonment for a woman to intentionally obtain an abortion. However, the proscription did not apply to any doctor or patient if permission for an abortion was first obtained from a hospital committee who determined that a continued pregnancy would endanger the woman's life or health.]

[First, rejecting the claim that the statute unconstitutionally interfered with the provincial authority contained in s. 92(7) over hospitals, the Court concluded that this argument would not suffice if the legislation constituted the valid exercise of Parliament's criminal law power.

[Next, the Court reaffirmed the "wide scope" of the federal criminal law power. Those opposed to the exercise of broad power must turn to the political process] unless it is made plain to the Court that the use of the penal sanction was a colourable or evasive means of drawing into the orbit of the federal criminal law measures that did not belong there, either because they were essentially regulatory of matters within exclusive provincial competence or were otherwise within such exclusive competence.

[The Court rejected the appellant's argument that original anti-abortion legislation was based on the dangers to women's health and that new procedures alleviate this concern. The Court rejected the argument that health protection was Parliament's exclusive concern. ]

\*\*\* What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation. It has done this in respect of gaming and betting by prescribing for lawful operation of pari-mutuel systems (s. 188), by exempting agricultural fairs or exhibitions from certain of the prohibitions against lotteries and games of chance (s. 189(3)) and by expressly permitting lotteries under stated conditions (s. 190). I point also to the *Lord's Day Act*, R.S.C. 1970, c. L-13, as an illustration of a federal statute drawing its validity from the criminal law power which contains various exemptions.  
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[Nonetheless, Laskin would allow the appeal, set aside the conviction registered by the Quebec Court of Appeal and restore the jury's verdict of acquittal, based on his judgment that the jury reasonably concluded that the accused established the statutory defense under the Act and the common law defense of necessity.]

MARTLAND, J., concurs with PIGEON and DICKSON, JJ.

JUDSON, J., concurs with LASKIN, C.J.C.

RITCHIE, J., concurs with PIGEON and DICKSON, JJ.

SPENCE, J., concurs with LASKIN, C.J.C.

PIGEON, J.:—[Justice Pigeon did not address the constitutional issue discussed by Laskin, other than to note that the Court unanimously agreed that this issue did not even merit hearing oral argument from the Crown. He then discussed why the accused, who admitted performing abortions without consulting with the appropriate committee per s.251(4) of the Act, was guilty as a matter of law and why the statute permitted a judgment of guilt to be imposed by the appellate court. Finally, the justice noted: “Since writing the above, I have had the advantage of reading the reasons written by Mr. Justice Dickson and wish to add that I agree with the further views he has expressed on the merits of this case.”]

DICKSON, J.:—It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two extremes, (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere, and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder. The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

**[Ed. Note: This case arose prior to the establishment of a *Charter of Rights* in Canada in 1982. The same doctor successfully invoked *Charter* protections to invalidate the statute in a subsequent case, which is excerpted below in Chapter Two.]**

BEETZ and DE GRANDPRE, JJ., concur with PIGEON and DICKSON, JJ.

Appeal dismissed.

### **E. Judicial Reasoning in Policing Federalism**

The complexities of modern society make it impossible to unambiguously categorize legislation as having only one topic. As illustrated by *Parsons* and *Board of Commerce*, many areas of government regulation of business could constitute “Trade & Commerce” subject to federal jurisdiction as well as “Property & Civil Rights” subject to provincial authority; *Morgentaler I* could arguably fall within federal “Criminal Law” power or the provincial “Hospital” power. Judges in some cases resolved this issue simply by declaring one power (e.g. Trade & Commerce) to be narrower; in other cases they found that as long as the authority fell within the designated assignment, it was permissible. The more typical Canadian practice, however, is to resolve the federalism issue by identifying the “pith and substance” of the legislation and then placing the legislation into a single category.

The path-marking case is *Reference as to the Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference)*, 1949 S.C.R. 1. The Court considered a federal criminal statute prohibiting the manufacture, importation, or sale of margarine. The importation of margarine

was upheld under the Trade & Commerce power, which under its narrow scope could not be used to prohibit domestic manufacture. The Court rejected the use of the criminal law power in this manner. It noted that margarine was originally barred explicitly on health grounds.

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular trade within the provinces.

The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject matter and follows the latter in its allocation to the one or other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction.

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Then undoubtedly the dairy industry has an aspect of concern to this country as a whole, but . . . if the fact of such an interest or that the matter touched the peace, order and good government of Canada was sufficient to attach the jurisdiction of Parliament, "there is hardly a subject enumerated in sec. 92 upon which it might not legislate, to the exclusion of the provincial legislatures". There is nothing before us from which it can be inferred that the industry has attained a national interest, as distinguished from the aggregate of local interests, of such character as gives it a new and pre-eminent aspect. Until that state of things appears, the constitutional structure of powers leaves the regulation of the civil rights affected to the legislative judgment of the province.

What was critical to the Court's conclusion was not just that it questioned whether margarine posed genuine risks to Canadian consumers, but that the lack of apparent harm suggested another, illegitimate legislative purpose to protect dairy farmers, which is the sort of political issue assigned to provinces. This point is illustrated by *Reference re the Firearms Act*, [200] 1 S.C.R. 783, upholding a federal requirement for firearms registration under the criminal law power.

The Court explained its thinking:

[16] The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

[17] A law's purpose is often stated in the legislation, but it may also be ascertained by reference to

extrinsic material such as Hansard [the transcript of legislative debates—in the U.S. called Congressional Record] and government publications: see *Morgentaler, supra, at pp. 483-84*. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight. Purpose may also be ascertained by considering the "mischief" of the legislation -- the problem which Parliament sought to remedy.

[18] Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament.\* Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra, at pp. 487-88*, and *Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373*. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law. In other words, a law may say [\*798] that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

Because the legislative record suggested a genuine concern with safety, the "pith and substance" was criminal. The Court noted that the criteria used by Parliament supported the claim that its focus was criminal rather than the regulation of property, and emphasized that

\*\*\* What the law does not require also shows that the operation of the scheme is limited to ensuring safety. For instance, the Act does not regulate the legitimate commercial market for guns. It makes no attempt to set labour standards or the price of weapons. There is no attempt to protect or regulate industries or businesses associated with guns (see *Pattison*, at para. 22). Unlike provincial property registries, the registry established under the Act is not concerned with prior interests, and unlike some provincial motor vehicle schemes, the Act does not address insurance. In short, the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership. We therefore conclude that, viewed from its purpose and effects, the Firearms Act is in "pith and substance" directed to public safety.

Finally, the Court rejected the argument that the law was an undue intrusion into provincial authority. The only intrusion is to eliminate the ability of provinces to choose to have no regulation of firearms, which the Court found to be "an inherent feature of the 'double aspect' doctrine that "permits

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\* [Ed. note: In contrast, the efficacy of legislation *is* considered when a statute is constitutionally challenged as impairing a right guaranteed by the Charter. This is discussed in later chapters.]

both levels of government to legislate in one jurisdictional field for two different purposes.”

### F. Limits on Provincial Power

Given the breadth of several subsections of s.92, such as the authorization for provinces to adopt legislation with regard to “Property & Civil Rights,” “Local Works and Undertakings,” and “all Matters of a merely local or private Nature in the province,” almost any legislation contemplated by a province could arguably be *intra vires*. The pith and substance approach does most of the work in establishing judicial limits on provincial power.

#### HER MAJESTY THE QUEEN V. MORGENTALER [*Morgentaler III*]

SUPREME COURT OF CANADA  
[1993] 3 S.C.R. 463

[Before Lamer C.J. and La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.]

The judgment of the Court was delivered by SOPINKA J.--

#### Introduction

The question in this appeal is whether the *Nova Scotia Medical Services Act*, R.S.N.S. 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital.

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#### Facts and Legislation

In January 1988, this Court ruled that the Criminal Code provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [**Ed. note**; This case is called *Morgentaler II*- excerpted in Chapter Two]. At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (*Morgentaler I* (1975)). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January 1989, it was rumoured in Nova Scotia that the respondent intended to establish a free-standing abortion clinic in Halifax. Subsequently, the respondent publicly confirmed his intention to do so.

[T]he Nova Scotia government took action to prevent Dr. Morgentaler from realizing his intention. \*\*\* [The response culminated in passage of the *Medical Services Act*. The Act stated its purpose as to “prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians,” and prohibited the provision of “designated medical services” other than in a hospital. Shortly thereafter, the government issued regulations authorized by the Act, designating the following medical services for the purposes of the Act: "(a)

Arthroscopy; (b) Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy); (c) Upper Gastro-Intestinal Endoscopy; (d) Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion; (e) Lithotripsy; (f) Liposuction; (g) Nuclear Medicine; (h) Installation or Removal of Intraocular Lenses; (i) Electromyography, including Nerve Conduction Studies"]

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[Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. He was charged with 14 counts of unlawfully performing a designated medical service, to wit, an abortion, other than in a hospital approved as such under the *Hospitals Act*, contrary to s. 6 of the *Medical Services Act*. The respondent challenged the constitutionality of the statute as *ultra vires* the province of Nova Scotia. He argued that abortion regulation was exclusively the province of the federal Parliament under the criminal law power; Nova Scotia argued that it could regulate abortions under its jurisdiction over Hospitals, Property & Civil Rights, and "Matters of a merely local or private Nature." He was acquitted at trial after the trial judge held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in pith and substance criminal law. This decision was upheld by the Nova Scotia Court of Appeal.]

#### Analysis

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#### B. Classification of Laws

##### (1) "What's the 'Matter'?"

Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act*, 1867. This process of classification is "an interlocking one, in which the *British North America Act* and the challenged legislation react on one another and fix each other's meaning": B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955), 11 U.T.L.J. 114, at p. 127. Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science": F.R. Scott, *Civil Liberties and Canadian Federalism* (1959), at p. 26.

A law's "matter" is its leading feature or true character, often described as its pith and substance. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. See Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization, [citations omitted] it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity.

##### (2) Purpose and Effect

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##### (a) "Legal Effect" or Strict Legal Operation

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The analysis of pith and substance is not, however, restricted to the four corners of the legislation. Thus the court "will look beyond the direct legal effects to inquire into the social or economic purposes

which the statute was enacted to achieve", its background and the circumstances surrounding its enactment and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation. The ultimate long-term, practical effect of the legislation will in some cases be irrelevant.

#### (b) The Use of Extrinsic Materials

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. This clearly includes related legislation (such as, in this case, the March regulations and the former s. 251 of the *Criminal Code*), and evidence of the "mischief" at which the legislation is directed: *Alberta Bank Taxation Reference*, [Attorney-General for Alberta v. Attorney-General for Canada] [1939] A.C. 117, at pp. 130. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, [[1976] 2 S.C.R. 373] wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

\* \* \*

I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se. I will return to the evidence below.

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#### (3) Scope of the Applicable Heads of Power

The issue we face in the present case is whether Nova Scotia has, by the present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

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#### C. Application of the Principles to the Case at Bar

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#### (2) Beyond the Four Corners

##### (a) Duplication of Criminal Code Provisions

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Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power.\*\* The duplication of *Criminal Code* language may raise an inference that the province has

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\*\* [Ed note: Section 92(15) gives provinces the power to impose criminal punishment for the purposes of enforcing an otherwise valid provincial statute. Thus, if the Court determined that the challenged statute was *intra vires* because it related to health and not criminal law, the fact that the statute contained criminal provisions not be significant.]

stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein. The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which are present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course, inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be *intra vires*, no problem of paramountcy arises.

In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) Background and Surrounding Circumstances

The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The Course of Events

It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. [First, the government responded by issuing regulations which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. These were challenged in court by an abortion-rights group. Shortly before the hearing on that litigation, and days before the end of the annual legislative session, the government introduced and rushed the challenged Act through the House of Assembly.]

(ii) Hansard

I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. Both the trial judge and Freeman J.A. referred extensively to excerpts from Hansard. [The court quoted the Opposition Health Clinic in reaffirming her party's agreement with the Health Minister that "the Morgentaler clinic should not be set up in this province. I want to make

that point very clear. (Applause).” The Liberals’ equivocation about the specifics of the legislation were criticized by the Health Minister as “the most weak-kneed, weak-hearted support for the question of the control of free-standing abortion clinics that I heard yet in this entire session of the Legislature.” In contrast, he made his position clear: “as the Minister of Health and I, as an MLA, am not supportive of free-standing abortion clinics. (Applause).” He pledged to “do everything in our effort to stop” abortion clinics.]

The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics per se. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed -- privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services -- were conspicuously absent throughout most of the legislative proceedings. They were emphasized by the Minister, Mr. Nantes, on moving second reading of the bill on June 12, 1989. This does not, however, in my view, detract significantly from the overall impression left by the debates.

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### (iii) Searching for Provincial Objectives

At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical services so as to avoid duplication and reduce public costs. \*\*\*

[The court rejected the argument that the impugned legislation furthered objectives related to these legitimate matters of provincial concern. First, there was no evidence that in-hospital abortions are safer. Second, the Throne Speech delivered earlier in the year made no mention of government policy with regard to privatization. A commissioner report, indeed, has recommended moving as many services as possible out of hospitals to reduce costs. Third, there was no increase in public costs in reimbursing Dr. Morgentaler: the fee is the same paid to a hospital. Finally, although the Court did not weigh this heavily, the Court took note of the severe penalties for violating a public health-oriented regulation.]

If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *Westendorp v. The Queen*, [[1983] 1 S.C.R. 43], Laskin C.J. held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

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## D. Conclusion

### (1) Pith and Substance

\*\*\* The legislation meets the tests set out in the *Margarine Reference*, *supra*, and of *Morgentaler*

(1975) and *Morgentaler* (1988), *supra*. The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes, to echo Cannon J.'s words in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 144 (appeal dismissed as moot in *Alberta Bank Taxation Reference*, *supra*, at pp. 127-28):

"I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity."

\* \* \*

Thus, the "watertight compartments" that had in the early years been used by the Privy Council to restrain Ottawa are now being used to limit the provinces. A note of dissent in this regard was voiced in a related abortion case. New Brunswick's response to Dr. Morgentaler, seeking to legislate squarely within the provincial authority to regulate hospitals and the traditional provincial power to regulate trades and professions, was to enact legislation suspending the license of a physician who performed an abortion outside a hospital. The Court of Appeal held the statute *ultra vires* under the authority of *Morgentaler III*. *MORGENTALER V. NEW BRUNSWICK (ATTORNEY-GENERAL)*, 121 D.L.R. 4th 431(1995). Rice, J.A., dissented, though. He argued:

That the legislators may have perceived the practice of abortion as having moral overtones and that it may have to a certain extent triggered these amendments to the *Medical Act* does not in my view ipso facto invalidate the legislation.

In a "co-operative federal system" ... legislation will overlap on certain subjects and so will purposes and concerns which prompted the legislation. It is not always possible in these overlapping legislations to segregate the objectives of the legislators so that one can say that the concern was solely related to the purpose commensurate to the head of powers the legislators purport to exercise. Criminal law in the circumstances of this case had established that performing abortions outside of a hospital was a crime and expressed Canadians' repulsion at the practice. It would be ludicrous to say that the legislators did not treat that activity as a socially undesirable thing. It had been so declared by Parliament and was the law of the land. However, it is another thing to say that by amending the *Medical Act* as they did, the legislators were creating, establishing, stiffening or supplementing a power exclusively assigned to the domain of criminal law. That proposition, in my view, would render impossible any exercise of provincial powers which affects the practice of abortion.

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The following passage from Professor Lederman's article "The Concurrent Operation of Federal and Provincial Laws in Canada" *supra*, at p. 199 (fn. 39) is apposite:

"As Dr. J.A. Corry has pointed out, our country is increasingly moving away from the older classical federalism of 'watertight compartments' with provincial legislatures and federal parliament carefully keeping clear of one another. We seem to be moving towards a co-operative federalism. 'The co-ordinate governments no longer work in splendid isolation from one another but are increasingly engaged in cooperative ventures in which each relies heavily on the other.'"

## IV. Basic Principles of U.S. Federalism

### A. Scope of deference

To be sure, just as the Supreme Court of Canada does not second-guess parliamentary judgments about whether conduct is sufficiently anti-social to warrant prohibition (*Morgentaler I*), the U.S. Supreme Court defers to congressional judgments about whether legislation is necessary to accomplish some objective that is within federal legislative authority. The question, of course, is how to determine the scope of the authority assigned to Congress. A landmark early decision showed a broad deference to Congress.

#### MCCULLOCH V. MARYLAND

SUPREME COURT OF THE UNITED STATES  
17 U.S. (4 Wheat.) 316 (1819)

[This landmark case arose as a challenge to a State tax imposed on bank notes, made particularly questionable because the tax was higher on notes of the federally-chartered Bank of the United States. McCulloch, the cashier of the Bank, refused to pay these taxes and (presumably financed by the Bank) hired U.S. Senator and legendary advocate Daniel Webster to represent him. In a holding not relevant here, the U.S. Supreme Court held that this state tax was unconstitutional if the Bank of the United States had been lawfully created by Congress. The excerpt below provides the Court's reasoning for its conclusion that the legislation creating the Bank was within the federal legislative authority conferred by the Constitution, even though the Constitution did not expressly authorize the creation of the bank or, for that matter, the chartering of any federal corporation.]

[Before Marshall, C.J., and Washington, Johnson, Livingston, Todd, Duvall and Story, JJ.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

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Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments

resulting from the insertion of this word in the articles of confederation,<sup>\*</sup> and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. \*\*\* It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

[Significantly, the Court rejected Maryland's argument that the Bank of the United States was not constitutional, because the final clause in Art. I, §8's conferral of federal legislative authority empowered Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and the Bank was not *necessary* to accomplish these goals. (Indeed, the need for such a bank was a major political controversy in the United States dating back to original proposals in the Washington administration for the Bank made by Secretary of the Treasury Alexander Hamilton and fervently opposed by Secretary of State Thomas Jefferson.) Marshall, C.J., employing a variety of interesting interpretive tools, concluding that read in context the word "necessary" did not mean essential.]\*\*

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\* [Ed. note: Article II of the *Articles of Confederation*, the document governing the original confederation of the thirteen states forming the U.S., provides: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled." (emphasis added).

\*\* As counsel for McCulloch, Daniel Webster argued that "necessary and proper" were synonymous terms meaning

\*\*\* To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. \*\*\*

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But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. In purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. \*\*\* Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

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We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

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"suitable and fitted to the object." Thus, the "question is not whether a bank be necessary, or useful, but whether Congress may not constitutionally judge of that necessity or utility." Webster characterized the argument by counsel for Maryland that branches of banks were unnecessary as insisting on a requirement

that the power of establishing such a monied corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution so strict and literal, would render every law which could be passed by Congress unconstitutional: for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted tending to the same object, though not equally well adapted to attain it. 20 L.Ed. at 53-54.

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### B. Scope of the Commerce Clause

As Rotunda & Nowak observe, the interpretation of the Commerce Clause “has played a significant role in shaping the concepts of federalism and the permissible uses of national power throughout our history.” §4.1. [The reference is to the multi-volume *Treatise on Constitutional Law* by Professors Ronald Rotunda and John Nowak.] This is because the Constitution did not expressly grant Congress either a general police power, nor an inherent right to act on subject matters thought to promote the health, safety, or welfare of the people across the nation. Nor even did they confer a power, akin to the “Peace, Order & Good Government” authority given to the Canadian Parliament, to enact laws when national solutions are required. Justice Joseph Story, in his influential book, *Commentaries on the Constitution of the United States* [Vol. I, p. 507 of the 5<sup>th</sup> ed.], explained why the authority of Congress to “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States” found in Art. I, §8, did not permit Congress to enact any legislation that would “promote the general welfare.” Such a broad construction would, in Story’s view, alter the structure of the federal government to one of general and unlimited powers.

Thus, throughout American history, when important national legislation was enacted, it was justified as part of Congress’ authority to “regulate Commerce ... among the several States”, generally referred to as “interstate commerce.” For almost a century, there was little judicial attention to the scope of congressional power over interstate commerce. Rather, like the first Privy Council case involving Parliament’s Trade & Commerce power (*Parsons, supra*), the landmark American precedent arose in the context of a challenge to a state statute as *ultra vires*. This landmark decision established a very different approach to interpreting Art. I, §8 of the U.S. Constitution than we saw from the Privy Council’s interpretation of s. 91(2) of the BNA Act (conferring on Parliament power over “Trade & Commerce”).

#### GIBBONS v. OGDEN

SUPREME COURT OF THE UNITED STATES  
22 U.S. (9 Wheat.) 1 (1824)

[Before Marshall, C.J., and Washington, Johnson, Todd, Duvall, Story, and Thompson, JJ.]

[Ogden was the assignee of rights originally an assignment of a right granted by the New York state legislature to famed inventors Robert Livingston and Robert Fulton for the exclusive right to navigate steam-fired boats within New York state waters. Gibbons ran a rival steam-fired ferry from Elizabeth, New Jersey, to New York City. Ogden sued and obtained desired relief in New York courts; Gibbons hired Daniel Webster, who again and secured a reversal from the U.S. Supreme Court. Gibbons’ defense was that the New York grant was contrary to a valid federal statute under which he had a right to operate his ferry service. Such a statute, if valid, trumped the New York law under the Supremacy Clause in Article VI, which provides that laws of the United States made pursuant to the Constitution “shall be the supreme law of the land” binding state and federal judges, “anything in the Constitution or laws of any State to the contrary notwithstanding. Thus, the Court had to decide whether Congress could regulate transportation within the territorial waters of a state.]

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

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The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

We are now arrived at the inquiry -- What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the

United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

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Having read the Canadian cases, what is of course striking about *Gibbons* is the absence of any notion that the scope of the Commerce Clause should be interpreted in light of the Tenth Amendment's express reservation of power to states. While the federal Trade & Commerce power of the *BNA Act* was construed, and narrowly so, in order to accommodate the provincial Property & Civil Rights power, John Marshall declared that Congress' power of interstate commerce is the same as that vested in a unitary, non-federal government.

The *Gibbons* decision avoided the question whether commerce that was interstate was beyond the reach of state legislation when Congress had not specifically legislated on the subject. The Court rejected the "water-tight compartment" approach in the following case.

### **COOLEY v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA**

SUPREME COURT OF THE UNITED STATES

53 U.S. 299; 13 L. Ed. 996; 12 How. 299 (1851)

Mr. Justice CURTIS delivered the opinion of the court.

[The excerpted opinion below discusses the constitutionality of a Pennsylvania statute requiring ships using the Port of Philadelphia to use a local pilot, or to pay half the pilotage fee "for the use of the society for the relief of distressed and decayed pilots and their families." In this opinion, the court rejects the claim that the state law is invalid in light of the constitutional assignment to Congress of the regulation of interstate commerce. The Court quickly established that Congress had the authority to regulate navigation into a major international port, and that this authority included regulatory authority over pilots. What made the case interesting was that the relevant federal statute did not directly regulate pilots, nor did it simply incorporate by reference existing state laws, but in addition required pilots to conform to "such laws as the States may respectively hereafter enact."]

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the

grant of the commercial power to Congress, did per se deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, (Federalist, No. 32) \*\*\*\* and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. [citations omitted].

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration

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\*\*\*\* [Ed. Note: After the Philadelphia convention, the U.S. Constitution was submitted to each of the 13 states for ratification. Ratification was controversial; supporters were referred to as “Federalists” and opponents as “Anti-federalists.” (This can be somewhat confusing, because after ratification and the emergence of political parties in the United States, those under the leadership of John Adams and Alexander Hamilton who favored a strong central government and creation of a manufacturing base were also called “federalists,” in contrast to those under the leadership of Thomas Jefferson and James Madison who favored a weaker government and promotion of an agrarian economy, who were called “republicans.”) Three constitutional federalists - Hamilton, Madison, and John Jay - wrote influential arguments in favor of ratification that came to be known as the Federalist Papers. These papers have traditionally been relied on for insights into the original meaning of the Constitution.]

by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. \*\*\*

How then can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive.\* \* \*

Mr. Justice McLean and Mr. Justice Wayne dissented; and Mr. Justice Daniel, although he concurred in the judgment of the court, yet dissented from its reasoning. [These decisions are omitted.]

### **C. Judicial Limits on Federal Legislative Power: the shifting interplay between the Commerce Clause and States' Rights**

The cases presented to date suggest a broad grant of authority to Congress, while recognizing that states maintain plenary police power over matters solely within their territories. Judicial review of federal legislative power has seen a remarkable ebb and flow in American legal history. As Rotunda & Nowak detail, §§4.5-4.7, from 1888-1936, the Supreme Court used the Tenth Amendment as a tool to limit congressional power. Several early cases distinguished "commerce" subject to federal regulation from "production," "manufacturing," or "mining" that were exclusively subject to state legislation. The Court also developed a distinction between commercial activities that "directly" affected interstate commerce, and those with only an "indirect" effect that could not be regulated by Congress. An illustrative case was *United States v. E.C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249 (1895). The Court held that the federal antitrust laws could not constitutionally apply to monopolization of the manufacturing and sale of sugar, because manufacturing was not interstate commerce. Distinguishing between commerce and manufacturing was essential to maintain our federal system, Fuller, C.J., reasoned:

If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry. For is there one of them that does not contemplate, more

or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests -- interests which in their nature are and must be local in all the details of their successful management.

*Id.* (quoting *Kidd v. Pearson*, 128 U.S. 1, 20, 9 S.Ct. 6).

The narrow judicial interpretation of the Commerce Clause was supported during this era by emphasis on the Tenth Amendment's reservation of rights to states. In two 5-4 decisions issued in 1936, the Court struck down New Deal legislation to deal with the economic crisis of the Great Depression. These cases led to what historians call the "Crisis of 1937." Frustrated by the invalidation of New Deal legislation, President Franklin Delano Roosevelt proposed (to a Congress that was overwhelmingly Democratic and supportive of the New Deal) an infamous plan to pack the Court with additional justices. (Unlike justices of the Supreme Court of Canada, who must retire at age 75, American justices serve as long as they choose to do so. Ironically, although President Roosevelt's unprecedented four terms in office allowed him to eventually appoint a record number of Supreme Court justices, during his first 4½ years in office no justice left office, locking in a majority in favor of active judicial restraint on federal power.) In what has been called the "switch in time that saved nine," Justice Owen Roberts reversed his previous position and voted to uphold the National Labor Relations Act in **NATIONAL LABOR RELATIONS BOARD V. JONES & LAUGHLIN STEEL CORP.**, 301 U.S. 1, 57 S.Ct. 615 (1937). Departing from prior cases, the new Court majority held intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate." *Id.* at 37. The Court effectively overruled *E. C. Knight & Co.* several years later, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), applying the federal antitrust laws to anticompetitive conduct among sugar refiners. Within a few years, the elderly conservative justices now in the minority retired from the bench and Roosevelt was able to appoint a solid majority that would uphold modern social and economic regulation. \*\*\*\*\*

Significantly, the Court explicitly reversed the reasoning of earlier decisions that the Tenth Amendment operated to narrow the scope of Congressional power. In **UNITED STATES V. DARBY**, 312 U.S. 100, 123-24, 61 S.Ct. 451 (1941), a case upholding federal minimum wage and maximum hours laws for workers engaged in the manufacturing of goods destined for interstate commerce, the Court declared that its recognition of the breadth of congressional power "is unaffected by the Tenth Amendment." Rather, that Amendment's purpose was simply "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." Likewise, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), upholding the application of

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\*\*\*\*\* The decisions in 1937 signaled an end to a period of jurisprudence -- the so-called "Lochner era" -- where the Supreme Court frequently invalidated progressive social welfare legislation, both on federalism grounds discussed in text but also for interfering with what was then a constitutionally-protected economic liberty of freedom-of-contract. The scope of constitutional protection for economic rights is considered below in Chapter Six.

federal employment legislation to state employees, the Court rejected as “not tenable” the claim that otherwise valid regulatory legislation might exceed constitutional authorization because of the need to protect matters of state concern. Justice Harlan expressly rejected the notion that there is a general “doctrine implied in the Federal Constitution that ‘the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.’” *Id.* at 195 (quoting *Case v. Bowles*, 327 U.S. 92, 101 (1946)). See also *Lake Shore & Michigan Southern R. Co. v. Ohio*, 173 U.S. 285, 297-298 (1899) (“When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government”).

Perhaps the apex of judicial support for broad congressional power over commerce came in **WICKARD v. FILBURN**, 317 U.S. 111, 63 S.Ct. 82 (1942), upholding the constitutionality of a federal statute that regulated the production and consumption of wheat grown by a farmer for his family’s personal use. The Court observed that the cumulative economic effect of wheat grown by American farmers for personal consumption had the requisite impact on interstate commerce. The Court reasoned:

Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' *Id.* at 125.

#### **D. Lack of requirement that Commerce Clause power be exercised only for commercial regulatory concerns**

One other issue raised by Canadian jurisprudence remains to be explored – the doctrine of “colourability.” This was expressly addressed in *United States v. Darby, supra*. The defendant argued that the purpose of the statute was not to regulate the goods in commerce (as in prior cases upholding federal bans on noxious or stolen goods), but rather to exclude non-objectionable goods simply because they were made by labor under employment conditions Congress deemed undesirable, although local employment was a matter for state rather than federal regulation. The Court rejected this argument:

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. “The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.” *Veazie Bank v. Fenno*, 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden

substandard labor conditions is within the constitutional authority of Congress. 312 U.S. at 115.

The *Darby* opinion went on to expressly overrule an earlier decision, *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529. The court explained:

The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force.

Congressional authority to invoke its Commerce Clause power when motivated by non-commercial ends was graphically re-affirmed in **HEART OF ATLANTA MOTEL, INC. v. UNITED STATES**, 379 U.S. 241; 85 S. Ct. 348 (1964), which upheld the constitutionality of Title II of the Civil Rights Act of 1964, prohibiting racial discrimination in public accommodations, including hotels serving five or more guests. The appellant owned a motel in downtown Atlanta, readily accessible to several major interstate highways. Successfully soliciting guests through magazines and billboards, approximately 75% of its registered guests were from out of State. Noting congressional findings about the significant adverse effect of racial discrimination on the ability of millions of African Americans to travel interstate, the Court had no difficulty concluding that the regulated activity had the requisite substantial affect on interstate commerce. Since the Senate Commerce Committee, in its report on the legislation, made it clear that the fundamental purpose of this title was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments," the Court next turned to Congress' motive.

That Congress was legislating against moral wrongs in many of [the statutes previously upheld under the Commerce Clause] rendered its enactments no less *valid*. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

As Justice Black noted in a concurring opinion, the Court had frequently upheld the use of the commerce power to advance other ends not entirely commercial.\*

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\* For example: *United States v. Darby*, 312 U.S. 100 (Fair Labor Standards Act); *United States v. Miller*, 307 U.S. 174 (National Firearms Act); *Gooch v. United States*, 297 U.S. 124 (Federal Kidnaping Act); *Brooks v. United States*, 267 U.S. 432 (National Motor Vehicle Theft Act); *United States v. Simpson*, 252 U.S. 465 (Act forbidding shipment of liquor into a "dry" State); *Caminetti v. United States*, 242 U.S. 470 (White-Slave Traffic [Mann] Act); *Hoke v. United States*, 227 U.S. 308 (White-Slave Traffic [Mann] Act); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (Pure Food and Drugs Act); *Lottery Case*, 188 U.S. 321 (Act forbidding interstate shipment of lottery tickets).

In a related case, the Court held upheld the application of the Civil Rights Act to a segregated local barbecue shop in Alabama patronized by few if any interstate customers, based on a finding that significant portions of food was purchased from out-of-state suppliers (again, regardless of the actual congressional motivation for the statute). *Katzenbach v. McClung*, 379 U.S. 294 (1966). The Court found that Congress had a rational basis for concluding that more food would flow in interstate commerce if segregated local restaurants opened their doors to minority race customers.

Within the last decade, the pendulum has begun to swing back. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a federal prohibition on possessing a gun near a school, finding the link between gun possession and interstate commerce too tenuous. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court struck down a provision of the Violence Against Women Act creating a federal cause of action for tortious assaults that were gender-related. Again, the majority found the logic linking domestic and gender-related violence to interstate commerce to create an unduly expansive federal power. In both cases, the majority emphasized the extent to which these statutes intruded in traditional areas of state domain: general criminal law, general tort law, and educational policies. The debate and reasoning is explained in this excerpt from *Morrison*.

**UNITED STATES v. MORRISON  
BRZONKALA v. MORRISON**

**SUPREME COURT OF THE UNITED STATES**

**529 U.S. 598, 120 S. Ct. 1740 (2000)**

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined.

[The majority held unconstitutional the portions of the federal Violence Against Women Act of 1994 (VAWA) that create a federal cause of action for compensatory and punitive damages against any person "who commits a crime of violence motivated by gender." The court thus dismissed a federal claim brought by a female student at Virginia Tech who alleged that Morrison and a co-defendant, both members of the football team, had brutally raped her, and that Morrison later bragged about his desire "to get girls drunk and [here the Court simply referred to "boasting, debased remarks .. that cannot fail to shock and offend."] After the plaintiff learned via the school newspaper that Virginia Tech's provost had overturned the school's punishment against Morrison, she dropped out of the University, later filing an action against Morrison under VAWA and against the University under another federal statute prohibiting universities receiving federal funds from discriminating on the basis of sex. The court of appeal dismissed the VAWA claim on constitutional grounds.]

[The Court began its analysis of whether VAWA was a proper exercise of federal legislative authority under the Commerce Clause by adverting to its prior historical exegesis in *Lopez*. The majority there wrote:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State

governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

[*Lopez* had acknowledged that the New Deal decisions "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause." This reflected both a recognition of the increasing amount of interstate commerce, so that previously local activities "had become national in scope," and partly "reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." However, *Lopez* explicitly noted that Congressional power was still subject to "outer limits."]

[In *Lopez*, the government defended the statute as within the Congressional power to regulate "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end." *United States v. Darby*, 312 U.S. 100, 118 (1941). The government argued that gun possession leads to violent crime, which costs money throughout the economy; it reduces the willingness of individuals to travel to unsafe areas; gun violence near schools harms the quality of education which results in a less economically-productive citizenry. The majority definitively rejected these arguments. First, in a key footnote the Court emphasized, citing several prior precedents, that in "our federal system, the "States possess primary authority for defining and enforcing the criminal law." Thus, when "Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction." The majority also quoted a signing statement by President George H.W. Bush complaining that this provision "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress." Second, the Court explained why the causal impact of gun possession on the economy was insufficient to fall within congressional power to regulate activities that "substantially affect" interstate commerce:

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

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To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a

general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden*, supra, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel*, supra, at 30. This we are unwilling to do.

[In this case, the Court rejected congressional findings about the economic impact of gender-motivated violence on victims and their families, concluded that Congress relied "so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." As in *Lopez*, the majority found that its concern "that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."]

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.<sup>7</sup> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. *Lopez*, 514 U.S. at 568 (citing *Jones & Laughlin Steel*, 301 U.S. at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 426, 428, 5 L. Ed. 257 (1821) (Marshall, C. J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. See, e.g., [\*34] *Lopez*, 514 U.S. at 566 ("The Constitution . . . withholds from Congress a plenary police power"); *id.*, at 584-585 (THOMAS, J., concurring) ("We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

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#### IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor

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<sup>7</sup> [The majority's rejection of Justice Souter's political process argument in this footnote is summarized in the narrative following this case.]

under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is affirmed.

JUSTICE THOMAS, concurring.

The majority opinion correctly applies our decision in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

[In *Lopez*, Justice Thomas set out his views in greater detail. There, he argued that Congress should not have the authority to regulate intrastate matters "affecting" interstate commerce. He concluded that when the Constitution was drafted, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes, in contrast to productive activities such as manufacturing and agriculture. He made several other textual arguments to support his view that "commerce" denoted sale and/or transport rather than business generally. For example, he noted that the Court's understanding of congressional power under the Commerce and Necessary & Proper clauses rendered many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous if the Commerce Clause included the power to regulate intrastate activities "affecting" interstate commerce. Moreover, he argued that the breadth of the post-New Deal scope of the Commerce Clause comes close to "turning the Tenth Amendment on its head."]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

[Noting the voluminous data that Congress assembled to show the adverse economic effect of violence against women, the dissent concluded that VAWA] would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. § 8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. \*\*\*

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The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a *non sequitur*. From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific

character of the activity, or the authority of a State to regulate it along with Congress.<sup>12</sup> My disagreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupported in theory.

A

[In Justice Souter's view, the "attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near-tragedy" that the Court had previously caused.] In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. [citing cases].

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Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary, but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though [*Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)] had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

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B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct

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<sup>12</sup> To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, e.g., *Lake Shore & Michigan Southern R. Co. v. Ohio*, 173 U.S. 285, 297-298, 43 L. Ed. 702, 19 S. Ct. 465 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States v. California*, 297 U.S. 175, 185, 80 L. Ed. 567, 56 S. Ct. 421 (1936) ("We look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

in question is not itself aimed directly at interstate commerce or its instrumentalities. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. \*\*\* The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons's* explanation of the national commerce power as being as "absolute as it would be in a single government," *9 Wheat. at 197*.<sup>14</sup>

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy. Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties), Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he took care in *The Federalist No. 46* to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." *The Federalist No. 46, at 319*. James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 *Elliot's Debates 438-439*. The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties. In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. \*\*\*

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<sup>14</sup> The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "the internal police . . . ought to be infringed in many cases" and was voted down eight to two. 2 *Records of the Federal Convention of 1787*, pp. 25-26 (M. Farrand ed. 1911) (hereinafter *Farrand*). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall . . . be affected in its internal police." 5 *Elliot's Debates 551-552*. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 *Farrand 493* ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard*, for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "he made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard*, 317 U.S. at 120 (citation omitted). Hence, "conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.*, at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. [Here, Justice Souter refers to the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), rejecting an argument that the Tenth Amendment limited Congress' ability to regulate relations between states and their employees.] After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty," *id.*, at 548. It concluded that

"the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*, at 552.

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[Justice Souter concluded by calling the majority's reliance on traditional state regulation "odd" in light of the overwhelming support of the VAWA by state attorneys general and their support for the conclusion that state remedies for dealing with violence against women were inadequate.]

JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I-A, dissenting.

[Justice Breyer's dissent begins with a critique of the difficulty applying the economic/non-economic distinction created by the majority. Thus, he argued that] Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and

categories. Not /surprisingly, the bulk of American law is still state law, and overwhelmingly so.

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One of the key arguments in Justice Souter's dissent – that the political process will adequately ensure that the federal/state balance is preserved in American politics, was sharply disputed by justices in the majority in *Lopez* and *Morrison*. Concurring in *Lopez*, Justice Kennedy (joined by Justice O'Connor) explicitly rejected this argument:

the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. [T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Specifically, Justice Kennedy averted to the reduced political accountability if the federal government took over "entire areas of traditional state concern." In footnote 7 of his *Morrison* opinion, Chief Justice Rehnquist was even more explicit in rejecting Justice Souter's argument. This "remarkable" argument "undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power." Although the political branches "have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text." The majority concluded that *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. [Justice Souter's] assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power within that power's outer bounds. As the language surrounding that relied upon by JUSTICE SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary.

These issues were again considered in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), where a 6-3 majority upheld federal legislation prohibiting the local cultivation and use of marijuana for medical purposes in compliance with state law. Justice Stevens relied in *Wickard* in finding that Congress had a rational basis to conclude that failure to regulate medical marijuana could affect, via diversion to illegal channels, interstate commerce in the controlled substance. In contrast to *Lopez*, the marijuana ban was an "essential part of a larger regulation of economic activity." Justice O'Connor, joined by Rehnquist, C.J., and Thomas, J., dissented. She wrote:

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation

She emphasized that "because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where 'States lay claim by right of history and expertise.'" She criticized the majority for using "a dictionary definition of economics to skirt the real problem of drawing a meaningful line between 'what is national and what is local.'" Writing separately, Justice Thomas concluded: "One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States."

#### **D. Limits on state legislative power**

The text of the U.S. Constitution does not provide an exclusive grant of authority for state legislation. Rather, subject to a few explicit exceptions contained in Article I, §10, states enjoy a plenary "police power" to enact legislation. State authority is subject to the supremacy of federal legislation, so that, for example, Congress can enact bankruptcy law that has the effect of pre-empting state debtor-creditor law. (There is a rich body of constitutional doctrine in all three countries we study here concerning when a validly enacted state/ provincial law is pre-empted by a validly enacted federal law. The basic concepts are the same: if a federal statute is valid and if it appears as a matter of statutory interpretation that Congress/Parliament meant to pre-empt a challenged state/provincial law, the latter is struck down. See generally Hogg chapter 16 and Nowak & Rotunda chapter 9.)

State authority is also significantly limited by two judicially-created doctrines interpreting the Commerce Clause. When the Supremacy Clause is combined with the broad congressional power under the Commerce Clause, many areas of business regulation are preempted by federal law. (We've seen this already in *Gibbons v. Ogden*, finding New York's monopoly steamship grant preempted by a valid federal statute.)

We saw in *Cooley v. Board of Wardens, supra*, that states can regulate and even discriminate with regard to interstate commerce when doing so pursuant to a valid federal statute. The Constitution provides no textual limits to the extent of a state's regulation of commerce not solely internal to that state when Congress has not legislated. As Rotunda & Nowak detail, §11.1, the Court could have held that federal power is exclusive, and that congressional silence is indicative of a federal design to leave commerce unregulated. Or, alternatively, the Court could have inferred an intent to defer to state regulation from congressional inaction. Instead, the Court has steered an intermediate course. *Cooley* bars state action in an area of commerce where national uniformity is essential. Otherwise, states can legislate. Thus, while Congress could clearly regulate (and pre-empt conflicting state laws) concerning when and where passenger trains are required to take on and discharge passengers, an Ohio law to this

effect was legitimate absent conflict federal regulation. *Lake Shore & M.S. Ry. v. State of Ohio*, 173 U.S. 285 (1899): "This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended." (Note that this sort of provincial legislation would be clearly unconstitutional in Canada, because s. 92(10)(a) specifically exempts railways from provincial regulation.

Section 92 of the Australian Constitution, which provides that trade commerce and intercourse among the States shall be "absolutely free," restricts both State and Commonwealth power to discriminate with respect to interstate commerce. After more than 80 years of case law, in *Cole v Whitfield* (1988), the HCA over-ruled all earlier judgments and held that this provision prohibited State laws that imposed a discriminatory burden of a protectionist kind – meaning laws that sought to confer an advantage on the legislating State's trade and commerce, or remove an advantage from other States' trade and commerce.

The Court drew its conclusions from the history of the Australian federation movement. It also made some observations on the United States commerce clause:

[H]istory demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade...

The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism, that is, the protection of domestic industries against foreign competition. Such protection may be achieved by a variety of different measures - e.g., tariffs that increase the price of foreign goods, non-tariff barriers such as quotas on imports, differential railway rates, subsidies on goods produced and discriminatory burdens on dealings with imports - which, alone or in combination, make importing and dealings with imports difficult or impossible. Sections 92, 99 and 102 were apt to eliminate these measures and thereby to ensure that the Australian States should be a free trade area in which legislative or executive discrimination against inter-State trade and commerce should be prohibited. Section 92 precluded the imposition of protectionist burdens: not only inter-State border customs duties but also burdens, whether fiscal or non-fiscal, which discriminated against inter-State trade and commerce. That was the historical object of s.92 and the emphasis of the text of s.92 ensured that it was appropriate to attain it...

We have not made earlier reference to the interpretation of the United States commerce clause because we do not consider that its interpretation provides any assistance in the elucidation of the meaning of s.92. In so far as the context of earlier events and provisions is concerned, that meaning turns very largely on the history of the

Australian federal movement and not at all on the commerce clause and its interpretation at the hands of the Supreme Court of the United States. But it should be mentioned, in the light of Dixon J.'s reliance [in an earlier judgment] on *Freeman v. Hewit*, that in two decisions in the last quarter of the nineteenth century, Field J., delivering the opinion of the court in *Welton v. Missouri* [1875] USSC 187; (1875) 91 US 275, at pp 280, 282 and in *Mobile v. Kimball* [1880] USSC 40; (1880) 102 US 691, at p 697, justified the negative commerce clause doctrine by reference to a purpose in the constitution to ensure uniformity against discriminating State legislation...

It is perhaps more significant that the doctrine enunciated by Frankfurter J. in *Freeman v. Hewit* has since been discarded by the Supreme Court. In *Complete Auto Transit, Inc. v. Brady* [1977] USSC 54; (1977) 430 US 274 in an opinion by Blackmun J., the court unanimously overruled *Freeman v. Hewit*, accepting that the rule laid down in that case was open to the comment that it was "a triumph of formalism over substance, providing little guidance even as to formal requirements" and acknowledging that inter-State trade may be made to pay its way (at p 281). According to the current decisions, the negative aspect of the commerce clause has an anti-discriminatory focus. (See *Hunt v. Washington State Apple Advertising Commission* [1977] USSC 124; (1977) 432 US 333; *CTS Corp. v. Dynamics Corp. of America* (1987) 95 Law Ed 2d 67, at p 84 ("The principal objects of (negative) Commerce Clause scrutiny are statutes that discriminate against interstate commerce.").)

The question of "national benefit" does not enter the picture, but to some extent the non-commercial benefit of the legislating State is a consideration. In *Cole* (and subsequent cases, such as *Castlemaine Tooheys* (1990) 199 CLR 436) the HCA held that the protection (or preservation) of essential State resources, or the fundamental welfare of the State could provide a legitimate reason for laws that had a discriminatory effect on interstate trade and commerce. The concept of "police powers" has never been employed in Australia, but this may be an approximate analogue (although only with respect to restrictions on free trade and commerce).

At the Commonwealth level, the HCA has identified a vague, but significant power, known by constitutional lawyers as the "nationhood power"; it does not permit the Commonwealth to do things that the Constitution otherwise prohibits, but it does allow the Commonwealth to pass laws for important national projects, or potentially for the protection of the Commonwealth (this latter has not been established yet). For the former, the leading cases are *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 and *Davis v Commonwealth* (1988) 166 CLR 79. In *Davis* the HCA upheld the Commonwealth's creation of the Bicentennial Authority, created as an official body to administer the celebrations for the 200<sup>th</sup> anniversary of the establishment in 1788 of the colony of New South Wales.

In a joint judgment, Chief Justice Mason, and Justices Deane and Gaudron stated:

If we ask the question whether the commemoration of the Bicentenary is a matter falling within the peculiar province of the Commonwealth in its capacity as the national and federal government, the answer must be in the affirmative. That is not to say that the States have no interest or no part to play in the commemoration. Clearly they have such an interest and such a part to play, whether as part of an exercise in co-operative federalism or otherwise. But the interest of the States in the commemoration of the Bicentenary is of a more limited character. It cannot be allowed to obscure the plain fact that the commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power.

Implicit in what we have just said is a rejection of any notion that the character and status of the Commonwealth as the government of the nation is relevant only in the ascertainment of the scope of the executive power in the area of Australia's external relations. In the legislative sphere the nature and status of the Commonwealth as a polity has sustained legislation against subversive or seditious conduct: *Burns v. Ransley* [1949] HCA 45; (1949) 79 CLR 101, at p 116; *R. v. Sharkey* [1949] HCA 46; (1949) 79 CLR 121, at pp 148-149; see the *Communist Party Case*, at pp 187-188. And there was no suggestion in the judgments in the *Australian Assistance Plan Case* (at pp 362, 375, 397 and 412-413) that the character and status of the Commonwealth as a national government was not relevant in ascertaining the scope of the executive power in its application domestically.

The U.S. Supreme Court has recognized that American states could significantly disrupt interstate commerce by enacting legislation that discriminates against out-of-state products or firms. Absent congressional approval, courts will invalidate such legislation under the “dormant” commerce clause. *Rotunda & Nowak* identify a key underlying principle of the “inner political check.” §11.11:

The Court recognizes that if a state regulation is designed so that its burdens fall primarily on those interests or persons who reside outside of the state, there is a greater reason for a more active judicial review, because the state’s internal political processes do not provide an adequate internal check on legislative excesses. In contrast, if the burden of regulation falls principally on those who live within the state ... the regulation is more likely to be checked by inner political restraints that ordinarily can be expected to bring about the repeal of undesirable legislation.

### **PIKE v. BRUCE CHURCH, INC.**

SUPREME COURT OF THE UNITED STATES  
397 U.S. 137; 90 S. Ct. 844; 25 L. Ed.2d 174 (1970)

[Before Burger, C.J., and Black, Douglas, Harlan, Brennan, Stewart, White, and Marshall, JJ.]

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act. A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must "be packed in regular compact arrangement in closed standard containers approved by the supervisor . . . ." Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional.

[The appellee spent over \$3 million developing Arizona farmland, and its cantaloupes are considered to be of higher quality than elsewhere in Arizona. Highly perishable, cantaloupes must be immediately harvested, processed, packed, and shipped. The appellee efficiently accomplished this by transporting the cantaloupes in bulk to its plant in Blythe, California, 31 miles away from its farm. The district court found that to comply with the challenged Arizona law would practically require the appellee to spend over \$200,000 to construct packing facilities in Arizona to duplicate the Blythe facilities. The district court enjoined enforcement of the Arizona law as an "unlawful burden on interstate commerce."]

[The appellant argued that a statute regulating goods prior to their introduction into interstate commerce could not interfere with such commerce.] If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such statutes have been consistently invalidated by this Court under the Commerce Clause. Thus it is clear that the appellant's order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally. Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. [The Court in that case upheld a statute requiring federally-licensed seagoing vessels to meet local water pollution standards.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761,<sup>21</sup> but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

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<sup>21</sup> In *Southern Pacific*, the Court struck down an Arizona law prohibiting long trains from operating within the state. Noting that over 90% of train traffic was interstate and this would seriously burden the Southern Pacific, the practical effect of the law would be to "control the length of passenger trains all the way from Los Angeles to El Paso." Although the state justified the law on safety grounds, the Court looked at the facts and concluded that fewer, longer trains were actually safer. In contrast, though, the Court had a few years earlier upheld a South Carolina law prohibiting very large trucks from operating on its highways. *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 58 S.Ct. 510 (1938). Here, the Court looked at the record and decided that safety concerns were legitimate.

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not "materially misrepresent" the quality of the lot as a whole. The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

We are not, then, dealing here with "state legislation in the field of safety where the propriety of local regulation has long been recognized," or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, *Pacific States Box & Basket Co. v. White*, 296 U.S. 176. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. *Parker v. Brown*, 317 U.S. 341. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is "not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution."

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately \$200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer. The appellant's order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected good will of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged. As the appellant's brief puts the matter, "It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona."

Although it is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded \$200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.

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\*\*\* If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

## V. Basic Principles of Australian federalism

Section 51 of the Australian Constitution is the principal source of federal (Commonwealth) power. It lists (under 39 “placita”) the subjects with respect to which the parliament may make laws for the “peace, order, and good government of the Commonwealth”. (The expression “peace, order, and good government” does not suggest an evaluation of the quality of the laws passed by the Parliament, or establish any grounds to challenge Commonwealth laws. It is a traditional formula used in British constitutional enactments. It signifies merely that the parliament has plenary power.) The States can make laws with respect to any subject on, or outside this list, provided that it is not a subject exclusive to the Commonwealth (or otherwise allocated to the Commonwealth – see sections 114 and 115). However, in the case of an inconsistency between otherwise valid Commonwealth and State laws on the same subject, the Commonwealth law prevails (s 109).

Exclusive Commonwealth powers are found in s 52 of the Constitution and s 90. The former concerns matters only of significance to the Commonwealth, and has had little impact on case law. In contrast, the latter, giving the power to impose customs or excise duties exclusively to the Commonwealth, has been of major importance in the development of fiscal federalism in Australia. The States’ powers to raise revenue have been incrementally reduced over the years by decisions of the High Court in which an increasingly broad definition has been given to “excise duties.” In 1997 – in *Ha v New South Wales* (1997) 189 CLR 465 - the final blow was struck to State schemes to raise revenue through so-called “Business Franchise Fees” when the HCA held that these came under the definition of excise duties.

The Commonwealth has also used its “grants power” (the equivalent of the U.S. “spending power”) – s 96 – very extensively since the Second World War to regulate areas that are outside its express constitutional powers (the funding and regulating of universities is an example). It has also used this power to augment its other fiscal powers. In 1942, in the “First Uniform Tax” case – *South Australia v Commonwealth* (1942) 65 CLR 373 – the HCA held valid a Commonwealth legislative scheme that required the States to cease imposing income tax as a condition for the receipt of grants under s 96. This scheme was reaffirmed by the HCA after war and the States have acceded to it, albeit often reluctantly, ever since.

The Commonwealth has also significantly expanded its legislative powers through the use of s 51 (xxix) – the “external affairs” power – which permits it to pass laws giving effect, among other things, to international treaties and conventions to which Australia is a party (See Chapter 4 on Equality Rights). The *Tasmanian Dam case* – *Commonwealth v Tasmania* (1983) 158 CLR 1 – concerned a Commonwealth Act that sought to prevent the State of Tasmania from building a dam for generating hydro-electricity on the Gordon-below-Franklin River, in a wilderness region in southern Tasmania. The Commonwealth has no constitutional powers over electricity, rivers, land, or forests, but was able to do this because the region in question had been listed under the Convention for the Protection of the World Cultural and

Natural Heritage, and Australia was a party to this Convention. Subsequent cases have confirmed that the power is very broad, and allows the Commonwealth to regulate almost anything that is of “international concern” provided only that the law in question is not used merely to expand the Commonwealth’s power, that it is bona fide, and not disproportionate to the object of the international obligation. This power has been controversial. CJ Brennan, in dissent the “War Crimes Act case” (*Polyukhovich v Commonwealth* (1991) 172 CLR 501) famously, and rhetorically, asked whether the Commonwealth could pass a law that made it a crime to drop litter on a Parisian street 40 years ago. The States have been unhappy with the broad scope given to this power, but it is fairly settled now (even with respect to laws that have extra-territorial effect; for example, laws prohibiting Sex Tourism: *XYZ v Commonwealth* (2006) 227 ALR 495).

Section 51 (xxxvii) of the Constitution has also contributed to the expansion of Commonwealth power, although it was always intended to do so. It permits the States to hand over, or “refer” to the Commonwealth the power to make laws with respect to any matter for which the Commonwealth does not have another constitutional source of power. This “reference power” rests on federal cooperation, and has been used for a wide range of matters where federal laws are thought appropriate (recent examples include anti-terrorism laws, and laws governing the incorporation of companies). The expansion of Commonwealth power has also been assisted by a limited number of successful referendums changing the Constitution: the most significant were in 1946 (adding a Commonwealth power – s 51 xxiii (A) – over a wide range of social welfare subjects), and 1967 (deleting part of s 51 (xxvi) that restricted Commonwealth powers to make laws for the Aboriginal people – See Chapter 7).

The growth of Commonwealth power has appeared at times to be inexorable and uni-directional, but it has not been entirely smooth. In 1947 – in *Melbourne v Commonwealth* (“State Banking Case”) (1947) 74 CLR 31 - the High Court elaborated the so-called “Melbourne Corporation Doctrine”, according to which the Constitution impliedly prohibits the Commonwealth from making laws that discriminate against a State or States, or impair essential State government powers. The HCA struck down a federal law barring state treasuries from banking with institutions unapproved by the federal government. The HCA reasoned that, in guaranteeing the continued existence of State Constitutions (s 106) and in its whole scheme for a federal polity, the Constitution impliedly protects Australia’s federal system. This doctrine has been evoked on a good number of occasions, but only successfully in a couple of cases since 1947, the most recent being in 2003 (*Austin v Commonwealth* (2003) 215 CLR 185).

The key constitutional question asked in Australia about federalism is rarely to do with policy – either about which level of government is best suited to regulate a particular field, or about which function the federal legislature should be constrained from performing. These questions were only asked during the framing of the Constitution, when a type of “categorical” approach was adopted to identifying the powers that should be allocated to the federal level; that is, some fields or functions were treated as “naturally” national, and others as belonging naturally, or inherently, to the States. Occasional debate surrounding proposals to amend the Constitution, or during referendum campaigns, has seen these questions raised again, since most referendums have been about proposals to increase the Commonwealth’s (federal) power, by creating a new head of federal power or removing a limitation on Commonwealth power. (The 1946 and 1967 referendums are striking, but rare examples of successful “re-categorisation” of federal powers.) The High Court of Australia very rarely engages in an explicit discussion about public policy, or whether there *should be* constitutional limits on either the Commonwealth or the States to enact statutes that they believe to reflect sound public policy. These are treated as political questions.

One recent exception – *Re Wakim* (1997) – concerned a so-called “cross-vesting” scheme. The states and Commonwealth had agreed to allow Federal Courts to rule on state laws where these arose in the course of hearings about a federal matter. (The powers “vested” were greater than those normally permitted through “accrued jurisdiction”). The High Court struck this down, as *ultra vires*, because, while the Constitution permits the “vesting” of federal jurisdiction in state courts, it is silent on the reverse (vesting of state jurisdiction in federal courts), and the silence is taken to be an implied prohibition. In this case, dissenting Justice, Michael Kirby, spoke at length about the value of a cooperative agreement between federal and state governments which, he said, made good policy sense and should not be ruled out for technical reasons, so long as it was consistent with the overall constitutional scheme.

This case also illustrates the “reference” power whereby much policy discussion indirectly takes place. Following the defeat of the cross-vesting scheme, the states referred their powers to the Commonwealth to make laws respecting the incorporation of companies. This referral was needed, because, while the Commonwealth has a constitutional head of power over foreign, trading and financial corporations (s 51 (xx)), this power is limited to corporations “formed within the limits of the Commonwealth.” “Formed” has been understood by the High Court (*Incorporation Case*) to mean *already* incorporated. Thus, without the referral of powers, only state law can govern incorporation.

The main HCA approach to federalism, unlike in the US, involves doctrinal questions about the scope and limits of power, and also about *characterization*. Characterization is a process (or the name for a process) of asking about the “character” of a statute, with respect to a constitutional power. The question is this: is the “impugned” or challenged law a law on the subject of X, a subject listed among the Commonwealth’s heads of power?

The test for finding the character of a law has shifted over the years. For most powers the question is whether the law can be fairly described as a law with respect to a constitutional subject, by looking at the legal rights, liabilities and duties that it creates, abolishes or alters (*Bank of NSW v Commonwealth* (“Bank Nationalisation case”) 76 CLR 1 (1948)). Some particular subjects of power have their own individual test. The defence power, s 51 (vi) is a special type of power, known as a “purposive” power. In determining whether a law is a law on the subject of defence, the HCA will look at the *purpose* of the law.

The HCA recognizes “dual characterization”, that is to say, a statute may be characterized as a law with respect to more than one subject. It doesn’t matter if one or more of these are on a subject matter that is not covered by a head of power, so long as one constitutional “character” can be identified (eg a law may be characterized as a law with respect to trade and commerce – for which there is a head of power - and also with respect to environmental protection – for which there is not. The fact that its purpose is to protect the environment (a state power) does not matter, so long as it is also a law with respect to trade and commerce (s 51 (i)). *Murphyores Inc Pty Ltd v Commonwealth* (“Fraser Island case”) (1976) 136 CLR 1. With the exception of “purposive” powers, the HCA is not interested in legislative purpose, but “only” in the scope of constitutional powers.

Most characterization concerns Commonwealth laws, since there are no state heads of power. However, state laws do need to be characterized with respect to powers exclusive to the Commonwealth. The main issue arises from s 90. As noted, this section gives the power over customs and excise duties exclusively to the Commonwealth. Therefore a state law that purported to impose a

tax of this kind would be invalid. There is little difficulty identifying a customs duty. The main case law – of which there was an abundance until 1997, when the (now) leading case, *Ha v NSW* (see above) settled the test – was concerned with excise duties. For a law to be a law with respect to customs duties, it needs first to be a law with respect to taxation. There are several specific tests for determining whether something is a tax. Then, it needs to be characterized as the particular type of tax that makes it an excise duty. In the words of the HCA, this is an “inland tax” on a step in manufacture or distribution, up to the point of consumption. The characterization of a Commonwealth law as a tax is important because the federal parliament is prohibited from “tacking” taxation measures onto other types of bill (s 55). So, in *Air Caledonie*, for example, an “immigration processing fee”, attached to the Migration Act, was held to be invalid because it was *really* a tax, not a “fee for service” as the Commonwealth claimed. Australian citizens could not be charged a fee for immigration services, since they had a right to enter the country and were not immigrants.

### ***Air Caledonie International v Commonwealth (1988) 165 CLR 462***

In a unanimous judgment, the High Court stated:

It is clear that the "fee" purportedly exacted by s.34A [of the *Migration Act* 1958 (Cth)] possessed all of the positive attributes which have been accepted in this Court as prima facie sufficient to stamp an exaction of money with the character of a tax: it was compulsory; it was exacted by a public authority (the Commonwealth itself) for public purposes (consolidated revenue: see Constitution, s.81); it (or its "amount") was enforceable by law. It is therefore necessary to consider whether there was something special about the fee (e.g. a "fee for services") or the circumstances in which it was purportedly exacted (e.g. as a penalty for an offence) which, notwithstanding the presence of those positive attributes, might preclude its characterization as "taxation".

If the fee had been exacted only in those cases where the arriving passenger was not an Australian citizen, it would have been arguable that, regardless of whether it was a "fee for services", it was not a tax. In that event, and notwithstanding the countervailing analogy of a customs duty which is clearly a tax, there might have been some force in an argument to the effect that it was to be seen as a charge imposed upon the passenger for the privilege of entering Australia or as a licence fee and that the requirement that the airline operator collect the fee (and pay the amount of it to the Commonwealth if not collected from the passenger) could not convert it into a tax. However, as has been seen, the fee was payable by, and in respect of, both citizens and non-citizens arriving on an international airline flight...The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive. In the case of such a returning citizen, the impost could not be regarded as a charge for the privilege of entry.., [T]he question whether the provisions of s.34A are properly to be characterized as a law "imposing taxation" must be answered on the basis that they applied indifferently with respect to returning citizens and visiting non-citizens. That being so, s.34A was a law "imposing taxation" if the fee which it purported to exact from, or with respect to, returning citizens was, for relevant purposes,

properly to be characterized as a tax. .. At least in a case of the ordinary Australian citizen returning by air from overseas, the description of the purported impost (see s.34A(1)) as a "fee for immigration clearance of that passenger" did not suffice to make the impost a "fee for services" in any relevant sense. As has been said, such a citizen had, under the law, the right to re-enter the country, without need of any Executive fiat or "clearance", for so long as he retained his citizenship... [T]he fee which s.34A purported to exact was, at least in so far as it related to passengers who were Australian citizens, a tax and the provisions of the section were, for relevant purposes, a law "imposing taxation".

The biggest "characterization" question for Australian federalism in recent years arose in the 2006 *Workchoices* case. At issue was, among other things, whether the Commonwealth could regulate terms and conditions of employment, by relying on section 51 (xx), the corporations power. Conditions of employment had, in the past, been subject to s 51 (xxxv), the so-called "industrial arbitration power". This power, however, included some limitations, and its scope was potentially not as great as s 51 (xx). The corporations power (with some few limitations) had grown much more expansive over the years and its potential was greatly enhanced by the fact that most employers are now incorporated. Thus, if the High Court upheld the law, the government could achieve its goal of effectively re-regulating industrial relations by this means. The government's strategy succeeded, with the HCA (with two robust dissents) upholding the law.

The trade & Commerce power (s 51 (i)) has never been the big federal battleground that the U.S. commerce clause proved to be. Nor has it been drawn upon significantly to expand Commonwealth power. (The Commonwealth has employed other heads, or avenues of power, to achieve the sort of regulation that the commerce clause has permitted in the U.S.) Section 51 (i), however, usefully illustrates the "incidental" power (analogous to the U.S. "necessary and proper" provision). The Commonwealth is limited to passing laws with respect only to interstate and overseas trade and commerce. It can, however, regulate intra-state trade where it is necessary "to effectuate the main purpose" of the power, or incidental to its operation.

*O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 concerned a Commonwealth law that regulated the conditions of state slaughterhouses "incidentally" to regulating the export trade in meat. The HCA held that the Commonwealth could reach as well into intra-state trade, if this was necessary or beneficial to support laws with respect to export.

In the words of Justice Fullagar (at p. 598):

"It is true that the Commonwealth possesses no specific power with respect to slaughterhouses. But it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it. It seems clear enough that the objectives for which the power is conferred may be impossible of achievement

by means of a mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go ...must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export. The "slaughter for export" of stock is such an act or process, and, in my opinion, the Commerce (Meat Export) Regulations are within the legislative power conferred upon the Commonwealth by s. 51 (i.).

As a result of these developments, and the long history of expanding Commonwealth power, many Australians believe that Australia has effectively become a unitary nation-state, and many – in the big States, at least – approve of this, and believe that it would be desirable to abolish the States. This perspective, however, is very unlikely to prevail. Section 128 of the Constitution sets out the means of altering the Constitution. This requires a successful referendum, and for a referendum to succeed, a majority of the votes in a majority of the States, in addition to a majority of the national vote, is required. At the end of the day, this provision may be the last – but still powerful – bastion against a Commonwealth monopoly of power.

## VI. Contrasting approaches to federalism: additional comparative notes and questions

**(1) Methods of Interpretation.** As noted above, the narrow construction given by the early Privy Council to the Scope of Parliamentary power led one to call their Lordships “the wicked stepfathers of Confederation.” Hogg, §5.3(c) (quoting constitutional scholar E.A. Forsey). The principal objection is that the narrow interpretation of federal powers was contrary to the understanding of the Canadian framers. (Even Québécois scholars, who tend to defend the provincial tilt of these decisions, acknowledge that the decisions frustrated the framers’ understanding. See, e.g., André Tremblay, *Les compétences législatives au Canada* (1967), at 47 (“*les intentions des pères de la fédération ... étaient de créer un régime fortement centralisé*” – the intention of the fathers of confederation was to create a strong central government)).

Although some scholars believe that this narrow text-based, anti-originalist interpretation reflected personal values of leading Lords (hostility to social welfare legislation enacted by the federal Parliament or an imperialist view that a weak central government would keep Canadians dependent on Westminster), their Lordships’ approach may well have been due in part to their insistence, prior to 1930, that the *BNA Act* was just an ordinary British statute. The landmark decision in *Edwards v. A.-G. Canada*, [1930] A.C. 124, 136 and 137, for the first time recognized that the *BNA Act* was a special statute, a “living tree capable of growth an expansion within its natural limits.” (The case held that women were “persons” capable of being appointed to the Senate, even though women could not vote and probably were not considered eligible for Senatorial appointment when the UK Parliament adopted the *BNA Act* in 1867.) In contrast, from the earliest days of the American Republic, Chief Justice John Marshall clearly distinguished between the work of the Philadelphia framers and an ordinary legal code, famously writing that “We must never forget, that it is a constitution we are expounding.” *McCulloch v. Maryland*, *supra*.

**(2) Spending power.** The practical effect of judicial limits on federal legislative power is substantially limited because the highest court in each country has granted the federal government broad leeway to strongly influence policy decisions made by, and within the jurisdiction of, the states provinces by a broad interpretation of the federal spending power. Because the doctrines are similar, they are not fully addressed in these materials, but each court has allowed the federal government to condition the receipt of federal funds by states/provinces on acceptance of a host of federal conditions, even when those conditions relate to matters solely within local authority. A prominent Canadian example is the *Canada Health Act*, which conditions vast sums of federal money provided to the provinces for health care on condition that the provinces adhere to a single-payer government health insurance plan, even though health care is clearly a legislative matter for the provinces. Likewise, the *No Child Left Behind Act* uses congressional spending to require a host of detailed tests and rules for American schools that receive federal funds.

In light of the judicial interpretation of the *B.N.A. Act* narrowly construing federal regulatory power, it is somewhat ironic that the Supreme Court of Canada has broadly interpreted the federal spending power. The best explanation for this broad interpretation is probably the constitutional reality that almost all parties accept that certain programs seen as essential parts of modern Canada would not be possible without federal funding, and Parliament is politically unwilling to fund significant programs without attaching conditions. This view has been severely criticized as inconsistent with the very concept of exclusive legislative jurisdiction contained in ss. 91 and 92 of the BNA Act.

The most cited critique of federal spending authority comes from Dean Andrew Petter, *Federalism and the Myth of the Federal Spending Power* (1989), 68 Can. Bar Rev. 448. Petter was a former minister in the left-wing New Democratic Party government of British Columbia. In his article, Petter dissects the doctrinal arguments made in support of federal spending regarding provincial matters, but then raises important values to explain his objection to increasing federal power. Petter begins by articulating the underlying rationale for constitutional federalism: “a belief that while some matters are better decided by the national political community, others should be left to regional political communities.”

Implicit in this belief is a view that, with respect to certain matters, regional governments can better reflect the political attitudes and aspirations of citizens. It is not hard to see why this might be the case. In a country as large and diverse as Canada, the opinions and priorities of the inhabitants of one region may well differ from those of other regions. A system of regional governments is more likely to be responsive to these regional variations than is a single central government. This is so not only because regional governments have more extensive knowledge of local conditions and preferences, but also because they depend for their existence upon local voter support. Thus while a central government can afford to ignore the preference of a particular region of the country (and may have to do so to garner voter support in other regions), a regional government cannot.

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The *raison d'etre* of the federal spending power (and of conditional grants in particular) is to permit the federal government to use fiscal means to influence decision-making at the provincial level. In other words, it allows national majorities to set priorities and to determine policy within spheres of influence allocated under the Constitution to regional majorities. Thus, both by design and effect, the spending power runs counter to the political purposes of a federal system.

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A third argument commonly made on behalf of the federal spending power is that such a power is necessary to promote new, and to protect existing, social programs and initiatives. Underlying this claim is an assumption that the central government is better trusted with the social welfare of Canadians than are provincial governments. \*\*\*

A major reason why Petter's critique has not proven persuasive, however, is that perhaps the one government policy to which Canadians have the greatest attachment -- national health care -- is the result of conditional spending by the federal government.

**(3) Active judicial policing of federalism and the national political process.** Justice Souter's dissenting opinions in *Lopez* and *Morrison* suggest that the earlier deference to congressional power (dating back to *Gibbons v. Ogden*) is based on a confidence that the structure of the American political process -- especially in the Senate -- provided sufficient protection for preserving state prerogatives in our federal system. This view builds upon an argument by Dean Jesse Choper, spelled out in his book *Judicial Review and the National Political Process* (U. Chicago Press, 1980) and more recently summarized in *Why the Supreme Court Should not have Decided The Presidential Election of 2000*, 18 Const. Commentary 335 (2001). Choper argues that many aspects of the political process effectively ensure that Congress does not overstep its proper authority and unduly tip the balance of our federal system: (1) most federal legislators move to Congress from service as elected officials in states; (2) the Senate is apportioned on an equal basis among states; (3) state legislative power to reapportion districts each decade gives them significant power over members of the House of Representatives; (4) each state has an organized "delegation" to represent state interests, and party leaders ensure that committee assignments fairly represent each state (so that often a member serves as her state's "representative" on an important committee); (5) (as vindicated by the 2000 election) Presidential elections are fought on a state-by-state basis; (6) Washington lobbying is characterized by a strong presence of organizations representing American governors, mayors, state legislators, and municipal officials. Indeed, he agrees that "far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states." *National Political Process* at 187 (quoting Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558 (1954)).

These arguments are not available in Canada. The Canadian Senate, by convention, does not exercise real political power (it is in this respect a more egalitarian version of the British House of Lords). Moreover, parliamentary voting is characterized by strict party discipline, which does not exist in the United States and, in addition to the factors cited by Dean Choper, is a powerful reason why state interests remain strong in Washington. Consider a proposal by the Clinton administration that was, in the opinion of Mayor Richard Daley of Chicago, unduly intrusive into state and local control in Illinois. Daley could well prevail on Senator Richard Durbin, a fellow Democrat, to vote against the legislation. In Canada, it would be unthinkable for a Liberal MP from Winnipeg to vote against a proposal by Prime Minister Jean Chretien regardless of the views of Winnipeg or Manitoba officials.

Because the political process does not protect Canadian provinces, in his outstanding book, *The Last Resort* (1974), Professor Paul Weiler has suggested that Canadian judges act in a manner analogous to interest dispute labor arbitration (a process that occurs in industries where strikes and lockouts are

unacceptable, such as police or firefighters). The result is not supposed to be principled, but rather a last resort against over-reaching:

The critical cases, the areas where judicial review must justify its existence, occur when a court decides to invalidate challenged legislation on the ground that another jurisdiction has a compelling claim to exclusive control. This is essentially a political controversy.... All that a court can really do is act on some intuitive sense that the immediate legislation just goes too far... Unfortunately, no one can propose any legal standards to tell us how far is too far. at p. 174<sup>22</sup>

Australia provides an example in which the American and the Canadian relationship between the political process and judicial policing is somewhat mixed. Unlike in America, it is relatively unusual for Australian politicians to make a successful transition from State to federal politics. It is even rarer for federal party leaders to emerge from State politics. Unlike in Canada, however, it is not uncommon for State governments to criticize federal government policy, even where the governments represent the same political party. The Council of Australian Governments (COAG) is a forum in which all State Premiers meet with the Prime Minister sometimes several times a year, in order to discuss matters considered to be of national importance or with respect to which State and federal cooperation is thought desirable. Sometimes these meetings lead to significant agreements and are followed by the adoption of common policy in all the States. Ministerial Councils also provide a regular avenue for policy coordination in specific State and federal portfolios (the enactment of uniform State laws restricting handgun ownership following the Port Arthur massacre in Tasmania in 1996 is an example). Just as often – perhaps more often – the Premiers leave a COAG meeting or the relevant ministers leave a Ministerial Council declaring that their State is opposed to Commonwealth policy (this happens less often, but still is not rare, when the Premiers and the Prime Minister are from the same party).

Unlike in Canada, the Australian Senate has real power, and exercises it frequently. The Senate has always been directly elected, and each State has the same numbers of Senators; since 1949, it has been elected by Proportional Representation, resulting in the frequent election (especially in recent times) of minority party Senators or Independents. These Senators may hold the balance of power, and not-infrequently do deals with Government or Opposition either to support or reject a Bill when it comes to the Senate. Sometimes these deals are done in the name of protecting the interests of the individual Senator's State. Party discipline is strong in Australia, as in Canada. In the case of the Labor Party, it is written into party rules. In the case of the Liberal Party (the conservatives) it is almost always followed in practice. Labor politicians who "cross the floor" to vote with the Opposition are liable to expulsion from the party. Liberal politicians are freer, but they risk "de-selection" for their seat when the next general

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<sup>22</sup> In one respect, the Canadian record on adjudication of federalism disputes tends to undercut one of Jesse Choper's arguments; among the reasons Choper argued for non-justiciability of federalism questions is that the umpiring of federalism disputes involves the Court in political controversies and thus uses up scarce judicial capital that ought be reserved for the Court's more necessary and important function of preserving individual liberties. Canadian constitutional history points in the opposite direction, though: despite a century of unpopular judicial decisions in federalism cases -- as we will discuss next week, including Privy Council invalidation of the Canadian New Deal during the Depression -- Canadians overwhelmingly supported the 1982 enactment of the Charter of Rights and Freedoms, which gave the Supreme Court broad additional power to preserve individual liberty.

election comes around. (Both Parties, however, permit “conscience votes” on matters where deep personal convictions or intractable moral issues are at stake. On these very rare occasions, MPs or Senators are free to vote as they wish. Conscience votes have always been permitted for laws regulating abortion or access to abortifacient drugs.) It is rare – although not unheard of - that contentious issues, where a politician may feel compelled to vote against his or her party, arise over federalism. Lobbying is an important activity in Canberra, but the appearance of organized sub-national government delegations is not a routine or familiar part of Australian federal life.

Since Australia does not have a presidential system, there is no parallel to the State organization of presidential elections. The Prime Minister and all members of Cabinet are elected in their own right, as individual members of constituencies. Federalism rarely comes into the picture in the choice of Prime Minister, other than in the occasional complaint that the majority of Prime Ministers have come from the east coast (the more populated States). In the allocation of portfolios and the formation of Cabinet, however, it is well understood that a Prime Minister must keep in mind some representation of all the States, if possible, at the risk of alienating State branches of his or her Party, or complaint in the media (and, where the opportunity arises, in parliament) about “neglect” of the small States. While these institutions and processes, formal and informal, do keep a check on the centralizing tendencies of the federal parliament, overall, Choper’s theory does not translate well into the Australian context. In the past, the High Court of Australia played the more important role in “policing” federalism. It would be a stretch today, however, to maintain that it still does so. Complaints are heard, from time to time, about the predominance of the large States in appointments to the High Court, but this is rarely articulated in federalism “policing” terms. Rather it is represented as a matter of federal fairness and “turn-taking”. The recent appointment of a Chief Justice (French CJ) from Western Australia will do much to assuage these concerns. (South Australia, however, remains unrepresented on the High Court since the Court’s establishment in 1903, and this matter is routinely raised in legal circles when a new appointment is pending.)

**(4) Federalism and partisan politics.** There is another *realpolitik* dimension to the partisan politics of federalism in Canada and the United States. Although it was a legendary American, Justice Louis D. Brandeis, who famously observed that it “is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,” *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), the record of provincial innovation in Canada is even stronger. As Andrew Petter (Dean of the University of Victoria Faculty of Law and former Attorney General of British Columbia under the New Democratic Party government) has observed in his article, *Federalism and the Myth of the Spending Power* (1989) 68 *Can. Bar Rev.* 448:

Hospital insurance, medicare, labour codes, human right codes, even bills of rights, were pioneered by innovative provincial regimes before gaining political acceptance across the country. The same pattern continues today with initiatives such as public auto insurance, gay rights and pay equity. The implementation of public auto insurance in Saskatchewan fueled demand for a similar scheme in Manitoba; the example set by the two prairie provinces paved the way for voter acceptance of government plans in British Columbia and Quebec; and the track record of these four provinces has bolstered campaigns for public auto insurance in Ontario and elsewhere. Similarly, the move to amend human rights codes to prohibit discrimination on the basis of sexual orientation began in Quebec and has since spread to the Yukon, Ontario and Manitoba. The

example set by these provinces will undoubtedly encourage other provinces, and eventually the federal government, to follow suit. The same process is likely to occur with respect to pay equity. Ontario's enactment of pay equity legislation applying to the provincial private sector is already placing pressure on other provincial governments to undertake similar initiatives.

This is because, unlike US politics, Canadian federal politics are "necessarily preoccupied with mediating among competing regional, cultural and linguistic interests." Thus, Petter suggests "it is no coincidence that, while the two mainstream political parties have dominated national politics since Confederation, ideological parties have fared much better at the provincial level." Indeed, the social democratic NDP has formed governments in BC, Saskatchewan, Manitoba, and Ontario, while the Parti Quebecois has governed Quebec.

**(5) The "Lochner legacy" of judicial umpiring.** The different political processes in each country provide only part of the story as to the relative desirability for the Supreme Court to act as a general "federalism umpire." Our expectations about how well our highest court will perform this assignment play a major role as well. In dissenting in *Morrison* while joining the pro-federal majority in *Raich*, Justice Souter made clear what active judicial umpiring to limit federal jurisdiction to categories of commerce (such as existed in the U.S. before 1937 and still exist today in Canada per *City National Leasing*) "comes with the pedigree of the near-tragedy" that was caused by the U.S. Supreme Court's prior jurisprudence. More heatedly, he suggested that, just as prior courts used "formalistic commercial distinctions" as useful instruments to achieve a world of laissez-faire economics; Souter accused the pro-states justices of a new "animating theory" of states' rights.

Do you believe Justice Souter's accusations are fair? Have Canadian justices been better umpires? Why might this be so?

**(6) Originalism awry.** Recent American jurisprudence to the contrary notwithstanding, these cases reveal a somewhat more constrained federal power in Canada than in the United States, especially before the broadening of the trade and commerce power in *City National Leasing*. From either a textualist or an originalist perspective, this is somewhat ironic. Subject to the power of Congress to regulate interstate and foreign commerce, bankruptcy, and a few other specific matters, the Tenth Amendment to the U.S. Constitution reserves all power to the states or the people. In contrast, Parliament has jurisdiction over all "Trade and Commerce," as well as marriage, banking, criminal law, and regulation over any firm declared to be "for the General Advantage of Canada," while provinces are constitutionally limited in their ability to impose certain taxes. Indeed, Professor Hogg believes that the framers of Canada planned a stronger federal government than their American cousins. See §5.3. The critical difference is that the broad language conferring power on Congress to regulate interstate commerce has been given an extremely broad interpretation by the U.S. Supreme Court, while British and Canadian judges have reserved this broad protection for the provincial power over property and civil rights.

Note that none of the major decisions interpreting ss. 91 and 92 of the British North America Act seem to have seriously sought to capture and apply the bargain between the Quebecois and pro-Confederation Ontarians that those sections represent. As with any compromise, one difficulty is that the partisans' public statements reflected quite differing views. As reflected in A.I. Silver's *The French-Canadian Idea of Confederation 1864-1900* (U. of Toronto Press 1982), Sir John A. Macdonald saw the compromise as a "happy medium" between complete union and a truly federal government, giving the General

Government broad powers save certain guarantees for francophone “language, nationality, and religion.” The pro-Confederation *Bleus* of Quebec saw the document as granting to each legislature “perfect independence within the scope of its own jurisdiction, neither one being able to invade the jurisdiction of the other.” A useful standard does emerge, however, from the historic record. A leading *Bleu* pamphlet proclaimed that proposals for a single legislature governed by population would have put “our civil law and religious institutions at the mercy of the fanatics,” while the BNA Act provided “a system of government which puts under the exclusive control of [Quebec] those question which we did not want the fanatical partisans of [Ontario Liberal leader George Brown] to deal with.” Historian Silver suggests that federal controversies would divide voters on ideological ground, not as French Canadians or English Canadians. Herein might be a workable original standard: would federal power be the sort that would divide Canadians on linguistic lines or the traditional lines of political economy? The narrow definition of Trade & Commerce should be considered in this light. To be sure, a national commercial code or standard of tort liability – which would clearly meet the American definition of affecting interstate commerce – might be seen in Quebec as direct threat to their Civil Code approach to voluntary obligations and delicts. However, it would be untenable to conclude that a price gouging statute passed in the wake of post World War I inflation (struck down in *Board of Commerce*, excerpted above) was the sort of issue that Quebecois would despair of delegating to “fanatical” Ontarians, or that the issue of government interference in the free market is an issue which divides Canadians on linguistic or national lines.

In Australia, with some rare exceptions, the High Court has permitted a gradual, but progressive accretion of power from the States to the Commonwealth. The notable exception is *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, where the Court held that the Commonwealth may not discriminate against the States (or a State) and may not exercise its powers so as to undermine the continued existence of the States or their essential capacity to govern. The so-called “Melbourne Corporation” doctrine was said to arise from the Constitution’s recognition of the continued existence of the States (ss 106 and 107) and from its overall structure as a Constitution for a federation. However, the protection of the federal system has not been a pervasive, or even significant theme in Australian constitutional jurisprudence. (The Melbourne Corporation doctrine has been applied only rarely: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 and *Austin v Commonwealth* (2003) 215 CLR 185). Some consider Australian federalism to be seriously threatened by the combined forces of Commonwealth fiscal powers, Commonwealth recourse to the external affairs power, and High Court interpretation (which permits these exercises of power and eschews originalism). The “Workchoices” case – *New South Wales v Commonwealth* (2006) 229 CLR 1, was for some, the final nail in the coffin of federalism. This case concerned legislation that aimed to bring the bulk of industrial relations regulation under Commonwealth control, via an Act that rested on the Constitution’s Corporations power (s 51 (xx) ), bypassing other constitutional limitations (in particular s 51 (xxxv) which limits Commonwealth industrial relations regulation to inter-state disputes). The High Court upheld this law, as a valid application of the Corporations power. In a dissenting judgment, Justice Callinan deplored both the methodology of the Court majority, and the effect of the judgment:

### ***New South Wales v Commonwealth (2006) 229 CLR 1***

CALLINAN J (in dissent): The Constitution should be construed in the light of its history. It should be construed purposively. The founders' intentions and understandings, to the extent that they can be seen to be generally consensual, are relevant. The evidence to be found in the Debates is valuable. The referenda, the results of them, and what was said by informed, legally qualified and knowledgeable legislators ...are relevant in the way ...The Constitution should not be construed to enable the Court to supplant the people's voice under s 128 of it. The Constitution should not in general be read as if it were intended to confer powers in duplicate. "Originalism" so-called, is no less a proper interpretative tool than any other, and will often be an appropriate one. It is useful here ... Sight should never be lost of the verity that the Constitution is a constitution for a federation, and that it provides for a federal balance ... The text, indeed the whole structure, of the Constitution clearly mandates the co-existence of the Commonwealth and the States... There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society... The potential reach of the corporations power, if it is as extensive as the majority would have it, is enormous. The extent to which corporations and their activities pervade the life of the community can be gleaned from the numbers quoted in the explanatory memorandum and to which the joint judgment refers. The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned. This Act is an Act of unconstitutional spoliation.

**(7) Black letter differences: intra-state/provincial activities with external effects.** Despite a narrowing of the differences after *Lopez and Morrison*, a huge doctrinal gulf remains between the American and Canadian approaches over the federal authority to regulate local matters because of their substantial effect on national commerce. While *Wickard v. Filburn*, *supra*, permitted congressional regulation of home-grown wheat, because of the cumulative effect of such wheat on overall demand, parliamentary regulation of grain elevators as part of comprehensive regulation of wheat, the vast majority of which is exported from farm provinces, was struck down in *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.<sup>23</sup> This difference is most clearly exemplified in the area of labor relations. Congress' power to regulate unions and collective bargaining as well as individual wage and hour limits were sustained in *Jones & Laughlin and Darby*, *supra*. In contrast, *Toronto Electric Comm'rs v. Snider*, [1925] A.C. 396, struck down Parliament's effort to regulate labor relations, and *Canadian Pacific Railway v. A-G (B.C.) (Empress Hotel)*, [1950] A.C. 122, held that only provinces could establish regulations relating to the hours of work. While the U.S. cases emphasized the effect of local commerce on national commerce, *Snider* rejected such an expansion of federal power because it would unduly intrude on the provincial power over property and civil rights. Although *Snider* was a Privy Council decision and not all of its reasoning is valid today, it is still the case that the only basis for Parliamentary regulation of labor relations is when the regulated labor is an essential part of an activity otherwise subject to federal regulatory power. See, e.g., *Re Industrial Relations and Disputes Investigation Act (Can.) (Stevedore's Reference)*, [1955] S.C.R. 529 (federal labour law applies to stevedores because of federal power over "navigation and shipping")

<sup>23</sup> Parliament was able to accomplish its purposes, however, because of another provision of the *BNA Act*, s.92(10)(c), which allows Parliament to subject to federal law those local works it declares to be "for the general advantage of Canada."

**(8) Principal authority over criminal law.** In *Lopez*, the Court observed that in the U.S., “States possess primary authority for defining and enforcing the criminal law.” Unlike s. 91(27) of the *British North America Act*, the enumerated legislative powers of the United States Congress set forth in Art. I, §8 of the Constitution do not include a general authority to punish crimes.<sup>24</sup> It has long been recognized that “congress cannot punish felonies generally.” *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 428 (1821). Thus, the Court noted that any federal criminalization of conduct already outlawed by most states cause a “change in the sensitive relation between federal and state criminal jurisdiction.”

As a historical matter, the Framers doubted that courts had jurisdiction over criminal laws passed by another “sovereign,” so that widespread federal criminal law would have required a massive federal court structure that was undesirable in the 18<sup>th</sup> century. Given the breadth of the Commerce Clause even after *Lopez/Morrison*, however, the most significant practical limit on the widespread federalization of most crimes in the United States lies in persuading Congress that such an approach reflects unsound policy. For an articulation of contemporary policy concerns favoring the general primacy of the states in the area of criminal law, see Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 Kan. L. Rev. 503 (1995). Dean Mengler argues that (1) states can better focus on social problems that have a special impact on a discrete region of the country; (2) in a diverse nation, state and local government can better provide opportunities to express different social and cultural values; (3) states can serve as laboratories to “try novel social and economic experiments without risk to the rest of the country;”<sup>25</sup> (4) federalization of crime in has an adverse impact on the caseload of the otherwise limited U.S. federal courts; and (5) the traditional American fear of centralized power that led to the very notion of limited national government supports a secondary role for Congress in criminal law. *Id.* at 517. Dean Mengler concludes that Congress should only legislate in the criminal area in special circumstances where state enforcement is inadequate: (i) multistate or international crime like organized crime or international drug operations; (ii) the criminal acts are so sophisticated that the concentrated resources of the FBI and other federal law enforcement agencies are needed; (iii) serious high-level corruption of state or local government; or (iv) conduct involving highly sensitive social issues in the local community that can be more objectively prosecuted in the federal system (like civil rights violations). *Id.* at 526.

The conventional Canadian view is quite different. One of the perceived defects in the American system for Canadians is that the same conduct could be treated differently across the country, and one of the benefits of federalization is that each Canadian knows what his rights are in traveling elsewhere -- criminal law becomes a symbol of nationhood and the expression of of collective morality as part of one criminal code “could meld us into a nation.”

Note that while Parliament retains exclusive authority to proscribe anti-social conduct as such, provinces retain in s.92(14) the important power over the “administration of justice,” which means that

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<sup>24</sup> The specific grant of authority to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” exemplifies this limit. Similarly, Congress was granted criminal and all other exclusive legislative authority over the federal district as well as federally-purchased forts and other “needful Buildings.”

<sup>25</sup> The quote is from a famous dissenting opinion by Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

provincial Attorneys General can decline to enforce unpopular criminal law. The Parti Quebecois government stopped prosecuting Dr. Morgentaler for performing abortions (*Morgentaler II*, discussed in Chapter Two, below, arose only when he opened a clinic in Toronto). Recently, it has been suggested that the new federal gun registration law upheld in the *Firearms Reference* is wildly unpopular in the Prairies and may not be enforced by provincial attorneys general.

Another aspect of this distinction is whether it results in a criminal law that is substantively reflective of “enlightened” thinking of academics and progressives. (In a number of respects, Canadian law focuses more on rehabilitation and alternatives to imprisonment than does American law, especially in regard to juvenile delinquency.) While substantive differences may reflect different political values of Canadians and Americans, there may be a structural element as well. Because Parliament has exclusive jurisdiction over criminal law, and because of party discipline criminal legislation will be passed only with the approval of the Prime Minister and Justice Minister, there is less likely to be the sort of populist response to crime that one sees in the United States. Cf. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn about the Rights of the Accused?*, 44 *Syracuse L. Rev.* 1079 (1993).

**(10) Demographic explanations.** To what extent can/should federalism differences be explained because Canada's largest national minority (francophones) comprise 80% of the population of one of the two major provinces? (Another way to think of this is to engage in the following thought experiment – how would you think about American federalism if, after the American Civil War, three or four southern states became majority-black?)

Historically, Americans sought a "collective rather than personal right to have [some] area of their affairs governed only the states," because of the negative experience with the distant and unresponsive colonial government in London. President Jefferson declared at his inaugural that states were the "surest bulwarks against anti-republican tendencies." Indeed, one of the Law Lords responsible for narrowing the parliamentary power over commerce, Lord Acton, praised American federalism because states served as "the protectorate of minorities and the consecration of self-government."

Dean Choper, whose political process views were accepted by the 5-4 *Garcia* majority and rejected by the 5-4 *Lopez/Morrison* majorities, disagrees:

...our history has demonstrated that the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores and the great the opportunity for aggregation of economic power to overshadow the political scene.... In every area of constitutionally designated individual liberties... the record of state and local governments has been far inferior to that of the nation. [As a noted political scientist observed, for federalism to protect liberty] depends on a neat concentration of national minorities. It is likely, however, that they will be present in many places and in the minority everywhere...

*Judicial Review and the National Political Process* at pp. 252-53.

Does Canada represent the “neat concentration of national minorities” necessary for federalism to protect liberties? According to Canadian legal philosopher Charles Taylor, the argument in favor of

strong provincial powers is based not only on the concerns discussed above but also on a different view of liberty. While Americans (and many Canadians) see liberty as suspicious of collective goals and focuses on preserving the ability of each person to self-determine a view of the good life, in Quebec, however, the survival and flourishing of French culture -- the promotion of *la nation canadienne-française* -- is a civic virtue. Human dignity of French Canadians is enhanced by the maintenance of such culture. Thus, provincial autonomy does indeed protect the liberty of Quebec to preserve the French Canadian culture, while strong federal power implies the ability of Ottawa to impose the views and cultural aspirations of English Canadians on Quebec. (We return to this topic in Chapter Four, below.)

## VII The role of original intent

Neither the U.S. nor Canadian Supreme Courts interpret their Charters from a strictly originalist approach; courts should only invalidate statutes as inconsistent with the Constitution if the laws were of the sort that would have been understood, at the time the constitutional provision was enacted, to fall within the provision's prohibitions. You will see this more clearly in Chapter Two in the abortion cases. As the dissenting justices observed in *Roe v. Wade*, at the time of the enactment of the Fourteenth Amendment to the U.S. Constitution, many states had criminalized abortion and there was no suggestion in the ratification debate that anyone understood that Amendment to proscribe abortion law. Even stronger evidence is provided in the more recently adopted Canadian *Charter*, where the Minister of Justice explicitly suggested to Parliament that abortion laws would not be proscribed by s.7.

These materials do not extensively focus on this important issue of constitutional interpretation, because, while the rhetoric differs, the prevailing approach to originalism is similar. At first glance, this might not appear to be the case. American jurisprudence has been summarized as follows:

In modern times, judges and lawyers, in interpreting [the U.S.] Constitution, rely on at least five different types of argument. The reason (1) from the text of the Constitution; (2) from the framers' intent; (3) from constitutional theory (some of which can be quite abstract); (4) from precedent; and (5) from moral and policy values.

5 Rotunda & Nowak, §23.2, at page 217 (citing Richard A. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987)). *Morgentaler*, in contrast, says that the prime guidepost of Canadian constitutional interpretation is to give a broad and "purposive" interpretation to the text.

Although the Supreme Court of Canada expressly rejects "original intent," the Court has stated that a constitutional right is "to be understood ... in light of the interests it was meant to protect." *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. Meant by whom? Although Justice Dickson, as he then was, cleverly used the passive voice in this phrase by omitting the subject, it seems clear enough that this requires at least an initial reference to the understanding of the text by the framers and ratifiers of the Constitution. Dickson explained in the following paragraph:

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the *historical origins of the concepts*

*enshrined*, and where applicable, to the meaning and purpose of other specific rights and freedoms  
....

*Id.* This understanding of a “purposive” approach suggests a much narrower gap between Canadian approaches and Rotunda’s & Nowak’s description of American interpretation. The American emphasis on intent usually really means general purpose, and the Canadian emphasis on purpose requires an inquiry into intent.

Another major difficulty with the originalist approach is that, even if justices were keen to implement it, discerning the original expectations of a constitutional provision’s drafters or ratifiers is often difficult or impossible. As the U.S. Supreme Court wrote in the legendary *Brown v. Board of Education* decision:

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

347 U.S. 483, 489.

The major difference between Canadian and American judicial treatment of original intent seems to be the greater willingness of the Supreme Court of Canada to explicitly reject the notion that they are bound even if the specific intent of the framers on the specific issue before the case were known. There are several possible explanations for this greater rhetorical candor. One is temporal. Most American constitutional controversies involve the interpretation of the original text (ratified in 1789), the Bill of Rights (ratified in 1791) and the Civil War Amendments (ratified in 1865-70), so the modern occasions where the court is confronted with an issue specifically considered by the framers is going to be more rare than will be the case in interpreting the Canadian Charter, which came into force in 1982. Another is the consensus in Canada, less widely adopted in the United States, that the Constitution should be a “living tree capable of growth within its natural limits.” *Edwards v. A.G. Canada*, [1930] A.C. 124, 136. (This pathbreaking decision by the Privy Council rejected years of formal and restrictive treatment of the *British North America Act* by the law lords, a treatment viewed by many Canadians as contrary to the general intent of the framers of Canadian federation. The actual holding in the case was that the requirement of s. 24 that the Governor General appoint “qualified persons” to the Senate could include women, although such a prospect was undeniably not part of Sir John A. MacDonald’s original understanding of the founding Act.) Another possible explanation for a greater Canadian willingness to forthrightly reject original expectations, related to the early temporal point, concerns the standing of the “framers” to whom originalism would give authoritative weight. In the American context, these are venerable national icons almost two centuries dead. In the Canadian context, these are active politicians, who remain quite controversial. Comparing Madison and Hamilton to Chretien and Strayer (the chief

civil servant drafter of the Charter) is simply not fair.

(For the Australian perspective on originalism, see the discussion of *Cole v Whitfield* above.)

In my (Professor Irving's) book, *Gender and the Constitution* (2008) I consider, among other things, the effect of constitutional interpretation of gender equality. My discussion includes a basic overview of a range of methods of interpretation. The extract that follows is taken from this overview (students who wish to engage further with a "gender audit" of constitutions are warmly invited to read the whole book!)

**Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008)**

**From Chapter 2: "Constitutional Language"**

**Interpretation**

Although it cannot be said that any single methodology of constitutional interpretation necessarily produces a "feminist reading" (or that others necessarily produce a "patriarchal reading"), there are traceable differences in gender impact between methodologies, and thus, interpretive choices to be made.

For many (perhaps most) constitutions, it is left to the individual judge to choose a method of interpretation in the course of judicial review. Some constitutions, however, include an express guide to their own interpretation. Section 39 (1) of the South African Constitution gives detailed interpretive instructions.

... The Canadian Charter of Rights and Freedoms incorporates a similar balancing test for determining whether a law violates the charter. Charter provisions are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>1</sup> As with the South African provisions, this requires a broadly "purposive" approach to interpretation.

Whether a constitution's framers will choose to entrench a particular interpretive methodology in such a manner will depend not only on whether agreement can be reached about the appropriate methodology, but also on a question, the answer to which itself depends on one's approach to interpretation: is it better to leave the methodology of interpretation open, or is it better to fix it in time? Should interpretation itself be allowed to evolve or new approaches emerge? Is a single method of interpretation appropriate to all constitutional questions that come before the courts? Do different constitutional provisions require different approaches? Should interpretation be adapted to the

particular dispute or the nature of the case at hand? Are the interests of justice served by a uniform or a flexible approach?

In practice, constitutional interpretation is rarely performed in a clear, methodical fashion, and even dedicated proponents of one method or another do not adhere systematically to their professed approach. To do so would, in practice, be difficult. Often, if not always, judges will seek interpretations that produce normatively attractive results, further the stability and coherence of the law, or are faithful to the principle of *stare decisis*, among others. They may thus find themselves applying different methodologies to different cases. Nevertheless, some judges do at least avow a commitment to, or preference for, one method over another. Interpretation is not chaotic and unclassifiable; it is possible to identify and name several distinct “schools” of interpretation.

“Original intent” aims to recover the specific intentions of the constitution’s framers. Its aim is to determine, historically, what they had in mind in making the particular choices they made. The meaning of the constitution, according to such “intentionalists,” does not change. It is, and remains, the meaning its framers intended it to have at the time they wrote it. Meaning is fixed at a historical point in time, and authority lies in authorial intention. Intention is personalized, and intention and meaning are taken to be the same thing.

What we might call “statutory analogism” treats a constitution as analogous to an ordinary statute and applies the regular rules or “canons” of statutory interpretation to uncovering the meaning of constitutional provisions (these rules may lie in the common law, or they may be set out in interpretation acts). This approach resembles originalism to the extent that it seeks to understand the “mischief” the legislators (or framers) intended to overcome, and in doing so, it sometimes draws on extraneous sources, including accounts of the history of the drafting or framing of the instrument being interpreted. However, statutory interpretation does not seek subjective or personal intention in uncovering legislative history; rather it seeks “legislative intent.” That is to say, its purpose is to find what the legislation (or constitution) was designed to do, rather than what the legislators (or framers) wanted or thought it would do.

This approach is close to “textualism.” Textualism seeks meaning in the words of the text and eschews a search for meaning outside or behind the words. Textualists assume that the legislators’ intent lies in the words they chose (and that any other intent is irrelevant). They treat the text as dispositive of meaning, and they confine their historical search to the meaning of the text at the time it was written. So, extraneous sources of meaning may be drawn on, but these (in principle) should be confined to legal opinions, legal dictionaries, or similar law books, written or published at the relevant legislative time.

A “purposive” approach to constitutional interpretation has, again, something in common with both forms of intentionalism (both originalist and textual) in that it seeks meaning in the purpose that the legislation (or constitution) was designed to serve, but it does so at a level of abstraction or generality that allows the purpose to be broad, liberal, and sufficiently flexible to embrace new or modern ways of fulfilling an original purpose. As the former chief justice of the Israeli Supreme Court, Aharon Barak, writes, the purposive approach brings together “the goals, interests, and values – at various levels of abstraction – that the author of the text sought to actualize” with “the goals, interests, and values – at various levels of abstraction – that a text...is designed to actualize. It is not related to the actual intent of the author. Rather, the author’s hypothetical intent determines objective purpose.”<sup>ii</sup> In constitutional interpretation, Barak adds, “considerations relating to the essence of the constitution and its role in social life prevail. This role – of guiding public behavior over the course of generations – warrants preferring objective purpose in constitutional interpretation.”<sup>iii</sup>

It has something in common, thus, with what is known as “moral” intentionalism, a theory of interpretation proposed by Ronald Dworkin, which treats the meaning of a constitution as being the normatively best meaning, bringing together an (assumed) original moral intent with its appropriate expression in the present. “The moral reading,” Dworkin writes, “proposes that we all – judges, lawyers, citizens – interpret and apply [the] abstract clauses [of a constitution] on the understanding that they invoke moral principles about political decency and justice.”<sup>iv</sup>

“Progressivism” (known variously as “living constitutionalism,” or the “living force” or “living tree” approach) is similar, but more pragmatic. It is driven more by considerations of the result or outcome than by fidelity to the constitution’s meaning (however adduced). Its basic principle is that a constitution should be adapted and updated to current values, modern ways, and modern standards (that is to say, *desirable* or *progressive* modern values, ways, and standards).

... [T]he Canadian Persons Case (*Edwards v. Canada (Attorney-General)* (1928) S.C.R. 276) - the Supreme Court’s decision that women were not “persons” for the purpose of appointment to the Canadian Senate - went on appeal to the Judicial Committee of the Privy Council [in London]. The Privy Council agreed that women had historically been excluded from public office (how could they have found otherwise?), but drew from this a different conclusion. The judges were not persuaded that the history of exclusion was dispositive. The “exclusion of women from all public offices,” they stated, “is a relic of days more barbarous than ours.” Customs “are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.” Extraneous legal history was not applicable to the interpretation of the BNA Act, which, as a constitution (and not an ordinary statute) was to be given “a large and liberal interpretation.”

The act, the judges said, had “planted in Canada a *living tree* capable of growth and expansion within its natural limits.”<sup>v</sup> The word “person” could now include both sexes. “To those who ask why the word should include females, the obvious answer is why should it not.”<sup>vi</sup>

Although the originalism of the Supreme Court had led to the conclusion that women were not “persons,” the application of a progressivist methodology produced the opposite conclusion. Women, henceforth, were entitled to sit on the Canadian Senate.<sup>vii</sup>

### Interpretation and gender

It is extremely unlikely that *any* framer of the U.S. Constitution in 1787 had the goal of equality between men and women in mind, or believed that women were included in the class of persons to whom the political offices described in the Constitution were to be open. Certainly, the so-called “founding fathers” – an uncomfortable expression for feminists ... but one that makes sense for strict *originalists* – debated whether *white men* and *black men* were to have an equal place in the constitutional community. The status of slaves (and slavery as an institution) was a major issue at the Philadelphia Convention of 1787, and ultimately, these issues would split the United States. However, if one were to interpret the Constitution in light of the original intentions of its framers, women would scarcely feature at all as members of the constitutional community.

The Constitution was amended after the Civil War to incorporate an equal rights provision. An originalist interpretation of this amendment is a little more complex with respect to gender. Almost certainly, the original “intention” behind the Fourteenth Amendment (ratified in 1868) was equality between *men*, but (as shown in the Introduction) women activists at the time challenged this as the exclusive interpretation. They drew parallels between their own servitude and the institution of slavery;

they used the rhetoric of universal equality and inalienable rights to extend the ambit of rights to both women and men. They were, of course, unsuccessful at the time.

Would originalism always produce such an outcome? One of the issues for the originalist position is identifying exactly who the *founders* were. If the term is broad enough to embrace the whole “founding generation” – comprising all the people who lent their support, tacit or overt, to the enterprise of constitutional design or amendment – then women need not be excluded. However, if the term is treated as coterminous with *framers*, and the latter is confined to members of constitutional conventions or Congress, or even extended to the members of ratifying conventions, then the result is quite different. This type of originalism will have little positive to say to women.

To this day, with the exception of the Nineteenth Amendment, which prohibits gender-based suffrage disqualification, the U.S. Constitution is silent on gender equality. Again, if an original intent methodology was consistently applied (and confined to the persons who directly *wrote* or voted on the Constitution or its amendments), the Constitution would probably rule out any laws mandating gender equality. It might also, by implication, prohibit the striking down of laws that arbitrarily discriminate as to gender.

In contrast, *no* democratic constitution written after 1980 (of which I am aware) is silent on gender equality or intentionally exclusive of women’s membership in the constitutional community. (This is not to say that no modern, democratic constitution is *indirectly* adverse in its impact on women.) The point here is that, for a country with an old constitution, historical originalism is not good news for women.

Textualism – although less focused on the historical actors – may be similarly problematic (unless, that is, an interpretive distinction is made between “essential” and “inessential” textual meaning<sup>viii</sup>). It is doubtful, for example, that the legal meaning of the expression “equal protection of the laws” (or their equivalent) anywhere in the mid-nineteenth century would have prohibited legal discrimination against women.

Statutory analogism is similar if one follows the rule of statutory interpretation that the words in a statute bear the meaning they had at the time of the statute’s drafting; although it will not have this result if another rule of statutory interpretation, the “plain meaning” rule, is applied first. The plain meaning rule gives the words of the statute (or constitution) the meaning that they have “on their face,” without looking behind or beyond that meaning *unless* the words are ambiguous or unclear. In contrast, both the purposive approach and interpretive progressivism are deliberately open to new ways of understanding or reading constitutional provisions, so that “equal protection of the laws” could not possibly be read at the start of the twenty-first century to extend only to men.

One should be skeptical, however, of the assumptions that progressivism will always produce *progressive* results, and that originalism (whether textualist or historical) will always be regressive. Historically, progressivism has lent much support to those seeking a constitutional meaning consistent with the expansion of rights. Indeed, Adam Winkler argues that the women who campaigned in the mid-nineteenth century against an originalist reading of the U.S. Constitution, and promoted an interpretation compatible with women’s evolving roles in society – were themselves the founders of “living constitutionalism.”<sup>ix</sup>

However, new social needs and values are not necessarily progressive. What is to stop a constitutional court, reasoning from current values, from winding back rights or conceptualizing rights in a way that is regressive from the perspective of a previous generation? What if the *original* values were

progressive, but the current are not? It is obvious that original intent applied to a constitution written in the 1780s will produce a result quite different for gender equity from the same method applied to a constitution written 100 years later. The Canadian Charter of Rights and Freedoms was adopted in 1982. Might one not want to insist on an *originalist* reading of the equality provisions in the Canadian Constitution?

A purposive approach, bringing together the historical purpose with “the interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize in a democracy,”<sup>x</sup> may provide the best compromise between the historical goals or purposes that one wants to retain and current interests that one wants to promote. It is, importantly, sensitive to *context*. It brings purpose and context together, allowing the object of the former to find new expression in the latter. Contextualization of the experience, circumstances, and status of women is a core component of gender equity in constitutional design. Former judge of the Canadian Supreme Court, Bertha Wilson argues further that purposive interpretation follows from the very purpose of constitutional rights:

The anti-majoritarian nature of rights provides valuable guidance to the courts in interpreting the constitution....[T]he true test of rights is how well they serve the less privileged and least popular segments of the society. Thus, constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity.<sup>xi</sup>

She is careful to point out, however, that more is at stake with respect to interpretation than constitutional rights. Purposive interpretation places the constitution and the experience of the individuals who are subject to it in social context: “[W]omen’s interests in the constitution extend beyond equality rights. The whole constitution should be available to women since its various guarantees are meant to be applied not to different groups but to different harms.”<sup>xii</sup>

Here, we need to take a further step to disentangle “purposive” interpretation from an approach that derives meaning from the purpose of the relevant law. Wilson illustrates her preference for purposive methodology with a comparison between U.S. and Canadian understandings of constitutional breaches. Unlike in the United States, “the Supreme Court of Canada has held that it is not necessary to prove an intention to discriminate in order to establish a violation of [Charter] equality rights....It is sufficient that a law have a discriminatory impact on a protected group.”<sup>xiii</sup>

A group-based approach to interpretation, Mark Kende explains, looks to the effect of the law, not its purpose.<sup>xiv</sup> Kende’s analysis concerns the South African case of *President v. Hugo*,<sup>xv</sup> where presidential pardon in 1994 of women prisoners with young children was challenged by a male prisoner for breach of the South African Constitution’s prohibition on gender discrimination. The Constitutional Court majority accepted that the presidential act was facially discriminatory between men and women, but held that it recognized a social reality (that women are, in most cases, the primary caregivers of young children) and gave relief to a third group, the children who suffered by being deprived of their mothers. An alternative jurisprudence, such as is dominant in the United States, focusing on the discriminatory purpose and gender-based classification in the act, Kende argues, would have reached the opposite conclusion.

The court in *Hugo*, in Kende’s words, applied “a group-oriented equality norm, an anti-dominance principle, and a pragmatic interpretive philosophy.”<sup>xvi</sup> In doing so, he argues, it arrived at the correct decision. I share his conclusion. How then can I reconcile it with a defense of purposive interpretation? How can one be purposive and outcome oriented at the same time? As is suggested in

Bertha Wilson's analysis, the focus of purposive interpretation is on the purpose of the constitution; at the same time it requires an examination of the *impact* of the law. A purposive methodology draws out constitutional purpose at a high level of principle and finds in it a normative standard, awaiting expression in law. The point of the constitution is to guide or frame law making along the channels of the purpose embodied in the constitution's provisions, including by prohibiting certain forms of law. Law must conform to the constitutional purpose, but conformity is tested by the law's impact or effect.

This is the essence of purposive interpretation: the meaning it draws from the constitution lies in both senses of "meaning," both intention and consequence. The intention is explored in the consequence, the purpose in context. This is well recognized in the concept of substantive equality, which allows for unequal treatment by the law (e.g., in affirmative action programs for women, or in entitlements such as maternity leave that are not available to men), in order to give effect to the constitutional purpose of gender equality.

My point here ... is to suggest that constitutional interpretation is significant for gender equity and that careful consideration needs to be given to whether a particular method of interpretation should be constitutionally entrenched, or whether gender equity is best served by leaving the choice of interpretation open and flexible.

### **Afterthought: Constitutional Tactics and the Implications of Active Judicial Review**

In terms of "constitutional tactics," compare Justice Bertha Wilson's view in *Morgentaler* that the more measured approach of her colleagues was a waste of time because almost any form of legislative reform would not pass muster with a well-publicized lecture by Justice Ruth Bader Ginsburg [67 N.Y.U. L. Rev. 1185 (1992)] that *Roe* should simply have invalidated the overly restrictive Texas statute because "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable."

The abortion controversy, important as it is on its own merits, takes on even greater importance, at least in the United States, because even during a time of conservative domination of the judiciary, it is one of the most important reasons why voters who are politically progressive continue to want judges to have broad discretion to protect constitutional rights. In that regard, consider the observations of Canadian judicial critic Michael Mandel:

The record shows that the most effective pro-choice politics have not been legal politics but mass politics, specifically the election of pro-choice governments. Abortion was effectively decriminalized by this means in Quebec eleven years before *Morgentaler* (1988). And after *Morgentaler*, anti-abortion governments have been able to throw up effective obstacles by restricting medical insurance and by encouraging or permitting restrictive hospital policies. On the election of pro-choice governments, as in Ontario in 1990 and British Columbia in 1992, has been able to reverse these policies.

*The Charter of Rights and the Legalization of Politics in Canada*, at 432.

Mandel's critique takes on additional salience if one accepts the view that the values of a free and democratic society shared by the United States and Canada face a far greater threat from private forces such as corporate power than from an over-reaching government. If that is the case, broad

discretionary judicial power over unenumerated rights becomes a dangerous weapon and one likely to echo the *Lochner* era's judicial opposition to progressive social legislation. See generally Joel Bakan, *Just Words* (Univ. Toronto Press 1997).

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<sup>i</sup> Canadian Charter, Section 1.

<sup>ii</sup> Aharon Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005), at xiii.

<sup>iii</sup> *Ibid.*, at xv.

<sup>iv</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), at 2.

<sup>v</sup> Emphasis added.

<sup>vi</sup> *Edwards* (1928), *supra*.

<sup>vii</sup> The first Canadian woman was appointed to the Senate in 1930. Murphy herself never became a senator.

<sup>viii</sup> For example, in *Cheatle v. The Queen* (1993) 177 CLR 541, the High Court of Australia was asked to determine whether the Constitution's provision regarding "trial by jury" mandated unanimous verdicts. The court held that unanimity was an "essential" part of the meaning of jury trial at the time the Constitution was enacted. They considered other indicia and concluded that some characteristic of a jury in 1900 were not "essential." These included the exclusion of women from serving as jurors. The court stated: "Neither the exclusion of females nor the existence of some property qualification was an essential feature of the institution of trial by jury in 1900. The relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community....[I]n contemporary Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement." At 560.

<sup>ix</sup> Winkler argues that "living constitutionalism" was developed by American suffragists at this time and not in the "Progressive era," or specifically in the jurisprudence of Oliver Wendell Holmes, as commonly claimed by constitutional historians. The women, Winkler writes, engaged in "sustained effort to promote adoption of an evolutionary constitutional interpretive methodology," thus shaping the constitutional interpretation "that became dominant in the twentieth century." Adam Winkler, "A Revolution Too Soon: Woman Suffragists and the 'Living Constitution'" (2001) 76 *New York University Law Review* 1456, at 1457–1458.

<sup>x</sup> Barak, *Purposive Interpretation in Law, supra*, at 377.

<sup>xi</sup> Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (1988) 71 *Public Law* 334, at 181.

<sup>xii</sup> Bertha Wilson, "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 *Queen's Law Journal* 5, at 12.

<sup>xiii</sup> *Ibid.*, at 10–11.

<sup>xiv</sup> Kende draws this from Owen Fiss's analysis of the U.S. Constitution's Equal Protection Clause. Kende, "Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation" (2000) 117 *South African Law Journal* 745, at 757.

<sup>xv</sup> *The President of the Republic of South Africa and the Minister of Correctional Services v. John Phillip Peter Hugo*, CCT 11/96.

<sup>xvi</sup> Kende, *supra*, at 746.