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In Defence of Doctrine:
The Judicial Review of Canadian Federalism
in Comparative Perspective

by

Gerald John Baier

Submitted in partial fulfilment of the
requirements for the degree of
Doctor of Philosophy

at

Dalhousie University
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DALHOUSIE UNIVERSITY

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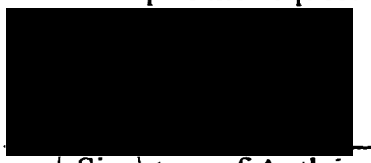

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DEDICATION

For Kirsten

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ABSTRACT

The judicial review of Canadian federalism is under-investigated by political scientists. The dissertation employs a comparison of recent federalism decisions from the high courts of Canada, the United States and Australia to demonstrate that this traditional field of inquiry deserves closer inspection. The inattention given to this subject is largely a result of disenchantment with the courts as a site of dispute resolution. Critics have claimed that the techniques of legal reasoning are nothing more than a cover for political decision making by an unaccountable and undemocratic judiciary. The reasons for a decision and the doctrines employed to arrive at a decision, while once thought to be the best way to understand the state of federalism, are now considered poor guides at best and deceitful at worst. The dissertation argues to the contrary, that judicial doctrines are the key to a better understanding of judicial reasoning, especially about federalism. Indeed, doctrine can be studied as an independent variable in the politics of federalism. That it currently is not is an indication of how doctrine has been impoverished by theories of judicial review which assume it is a tool for achieving certainty and neutrality in constitutional interpretation. Doctrine can be understood more modestly, not as determinative and true, but as a tool of legal reasoning that influences, but does not compel, judicial outcomes. To bolster this assertion, detailed surveys of recent judicial doctrine in the U.S.A., Australia and Canada are presented. The evidence demonstrates two things: first, that specific, traceable doctrines are commonly used to settle division-of-power disputes and second, that the use of doctrine in judicial reasoning makes a positive contribution to the operation of a federal system. Doctrine, it is concluded, is worthy of both defence and detailed study.

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CHAPTER 1:

INTRODUCTION

1.1 IGNORING JUDICIAL REVIEW

It is said that familiarity breeds contempt. If that is true, one of the most familiar topics to students of Canadian federalism, judging by the scorn piled upon it, must be the judicial interpretation of the federal division-of-powers. Despite its apparent relevance for an understanding of federalism, the study of judicial review is seen as a tired, dull and maybe even a misleading exercise. This dissertation seeks to revive the study of judicial review as an element of Canadian federalism. It employs evidence from the judicial review of federalism in Canada as well as Australia and the United States to demonstrate the relevance of law to federalism.

While lawyers and legal academics stay conversant with developments in the constitutional law of Canadian federalism, these same developments seem to have escaped the attention of political scientists. Developments in the interpretation of rights have not. While the *Charter of Rights and Freedoms* is little more than fifteen years old, it has spawned a boom of constitutional scholarship by political scientists. They vigorously attend to and analyse in detail the Supreme Court's decisions and approaches to various rights. The Charter unquestionably merits this attention. So too does the division-of-powers. Only the Charter, however, is getting its due. Judicial review of the

division-of-powers remains a topic of neglect despite its genuine importance to the study of Canadian government.

A recent textbook, *New Trends in Canadian Federalism* [1] demonstrates how much judicial review of the division-of-powers is overlooked. This collection of essays, edited by François Rocher and Miriam Smith, has several chapters on Canada's constitution. Yet, the book has no comprehensive chapter on judicial review of the division-of-powers. The explanation for this shortfall is unclear. The lack of attention paid to federal judicial review generally is not indicative of a lack of developments. Two or three major cases and many more less dramatic cases on federalism are decided by the Supreme Court every year. The cumulative impact of those decisions can be seen in the work of political scientists who study particular policy sectors, including some of those represented in the Rocher and Smith collection. Such studies frequently make note of relevant developments in the interpretation of the division-of-powers and the impacts on the sector which result. The environment in particular is a policy area profoundly influenced by the judiciary's interpretation of the division-of-powers.[2] Clearly, the division-of-powers is still relevant, but is not typically approached as a subject in its own right.

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[1] (Peterborough: Broadview, 1995).

[2] Rocher and Smith note that "the difference between formal jurisdiction (as laid out in sections 91 and 92 of the *Constitution Act, 1867*) and the working reality of Canadian federalism" is highlighted by a closer look at specific policy fields. The process of untangling is more dependent upon judicial review in some fields than in others. See for example the chapters by Rhada Jhappan "The Federal-Provincial Power-grid and Aboriginal Self-Government" and Kathryn Harrison "Federalism, Environmental Protection and Blame Avoidance, " in Ibid. Also see the latter's book-length study. Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996), especially Chapter 3, "The Constitutional Framework: Constraints and Opportunities."

If the lack of attention cannot be credited to a lack of activity, what other reasons might explain it? The prime suspects appear to be an excess of scepticism about the impact of judicial review and an even greater excess of 'realism' about how the courts come to their decisions.

The Judicial Committee of the Privy Council (JCPC), Canada's court of final resort until 1949, had a profound effect on the shape of Canadian federalism in the early years of the federation.[3] Its impact led observers to a not unreasonable belief that judicial review was critical to understanding Canadian federalism. The JCPC's era is long past in more ways than one. The Supreme Court of Canada replaced the JCPC as Canada's court of final resort 50 years ago this December. More importantly, judicial review seems to be of less immediate impact in establishing the tone of federalism. Innovations in the federal system have changed the way that political scientists understand federalism. An unprecedented level of intergovernmental co-operation began in the late 1950s and has blurred the lines of distinction between governments and their responsibilities ever since. Those lines were ones that the courts worked very hard to patrol. As governments have

[3] Alan Cairns has challenged this received wisdom. "It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained and caused the development of Canada in a federalist direction that the country would not otherwise have taken." Alan Cairns, "The Judicial Committee and Its Critics," *Canadian Journal of Political Science* IV, no. 3 (1971), 319. It was certainly felt to be true by the observers of the time. On the Bennett 'new deal' decisions, F.R. Scott wrote that the impact of the Judicial Committee would, "...have grave and far reaching consequences. It is probably not too much to say that they have created for Canadians a constitutional situation scarcely less critical than that which led to Confederation itself." F.R. Scott, "The Consequences of the Privy Council Decisions," *Canadian Bar Review*

become increasingly comfortable with blurry lines, the desire to clarify responsibilities in court has waned. Negotiation, not litigation, is the preferred means to resolve federalism conflicts. Both levels of government can get more of what they want negotiating with each other rather than submitting to the zero-sum game of litigation. So much of what can be studied about federalism goes on outside the purview of the judiciary. Thus, the decisions of the court seem a poor guide to the state of intergovernmental relations at any given time.

Accompanying this decrease of influence (or perhaps inducing it) has been a decrease of faith in the decision-making methods used by the courts. The style of judicial decisions on federalism has generally been formal, phrased in legal maxims and categories rather than attuned to the overt policy context of jurisdictional disputes. With governments doing more co-operating and compromising, the formalism of the court seems outdated at best and frustrating at worst. This 'trap of formalism' further prevented political scientists from accurately demonstrating the effects and significance of judicial power.[4] Peter Russell credits James Mallory's *Social Credit and the Federal Power*[5] for creating a new understanding of judicial decisions as an important dependent variable interacting with other political forces to shape the Canadian federation. By making

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XV (1937), 485. At the very least, the Committee's decisions reinforced and encouraged the development of Canadian federalism in a decentralized direction.

[4] Much of this history has been recounted in greater detail by Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science," *Canadian Journal of Law and Society* 1 (1986). Russell argues that "few... authors have attempted to construct a general theory of judicial review or of judicial decision making by appellate judges." Ibid., 21.

[5] J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954).

judicial decisions a dependent variable, Mallory indicated that they were no longer the result of "self-evident or self-enforcing logical deductions," but the product of judicial choices informed by ideology or simple policy preferences. Observers came to disassociate the reasoning in decisions from their political impact. The 'bottom line,' rather than the thinking of the court, was the only reliable information one could take from judicial review for political analysis. Legal realism seemed the only intelligent and critical perspective one could bring to judicial review.

Legal realism begins with the assumption that judges are making conscious, political decisions in the way that they interpret the constitution or any other law. Constitutional adjudication cannot really be believed to be "a series of logical inferences from abstract legal categories."[6] Thus, the only way to study the courts as an agent of politics, as an actual independent variable, is to try and measure the political qualities of the judicial branch. Political outcomes, it has been assumed, are better explained by political factors than by the post-hoc justifications found in judicial decisions.[7] Researchers ask questions like: Which government appointed a judge? What kinds of policy preferences have judges articulated in their pre-judicial careers? What process does a judicial panel use to come up with its decisions? What influence do clerks have on their judges?[8] External actors are also looked at in political terms. The adjudication

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[6] Russell, "Overcoming Legal Formalism," 11.

[7] Perhaps the best example of this approach comes from Professor Russell himself. Peter H. Russell, "The *Anti-Inflation* case: the anatomy of a constitutional decision," *Canadian Public Administration* 20, no. 4 (1977): 632-665.

[8] Peter McCormick has done extensive work on the political variables of judicial review, both of the Charter and non-Charter kind. Peter McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992," *Canadian Journal*

strategies of the provinces and federal government are probed. The arguments that governments are willing to make and the kinds of results they pursue in court can vary and may not always make sense on the surface, but they represent the 'politics' of judicial review. 'Overcoming legal formalism,' as Russell described it, has led to more systematic study of institutional variables and less concern for the explanations courts advance in defence of their decisions.

1.2 Approach of the Thesis

Perhaps it is not surprising that Canadian political science has lost interest in federal judicial review. A single-minded fixation on the interpretation of constitutional law is a practice whose time has passed. There are too many possible explanations for the state of Canadian federalism to rely on a single institutional variable. It is, however, still a variable that deserves some attention. If there is an obvious need to study judicial review, what do we do about the problem of studying it? How do we take judicial review seriously yet remain sufficiently cautious so as to avoid the trap of formalism? First, one must acknowledge that the approaches inspired by legal realists do not tell the whole story. Realists and critical legal theorists make a genuine effort to take the law seriously as a political phenomenon, but they plainly disregard the most obvious evidence available

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of Political Science 26 (1993), Peter McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgement on the Supreme Court of Canada, 1949-1993," *Supreme Court Law Review* 5 (1994), Peter McCormick, "Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship." *University of New Brunswick Law Journal* 45 (1996), Peter McCormick and Tammy Praskach, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba," *Manitoba Law Journal* 24, no. 2 (1994) and, Peter McCormick,

- the arguments of the court. Any revival in the study of federal judicial review must start by paying more solemn heed to judicial reasoning.

Comparative experience clearly demonstrates this to be so. Australia and the United States have been chosen as sources of comparison for this study. The reasons for choosing them are numerous. The obvious advantages to a comparativist are the common law tradition and the written federal constitutions which are present in all three countries. There are also reasonable similarities in the structure and operation of all three high courts. Most important, as the thesis demonstrates, there is a relative commonality of approach to the task of federalism adjudication. This similarity allows one to draw reasonable conclusions about the place of law in federations generally.

The United States has clear and immediate relevance to students of the judicial review of federalism. The original problems of federal constitutional interpretation were raised and addressed by Americans. Many of the approaches that have been adopted in Canada and Australia owe their origin to American practice. Doubts about the certainty of the law also have American origins. The scepticism so common among observers of twentieth-century jurisprudence derives from American thinking about the limits of the law. Even more importantly, the present-day Supreme Court has made American federal jurisprudence highly relevant by engaging in a fundamental debate over the meaning of federalism and the proper role of the court in a federal system. The stakes raised for the

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"Birds of a Feather: Voting Patterns on the Lamer Court 1991-7," *Osgoode Hall Law Journal* 36 (1998).

political system by judicial review are high enough to merit attention, not just attention to the bottom line of the Supreme Court's rulings, but to the manner in which they get there.

Australian jurisprudence is less dramatically engaged in debates about the fundamentals of federalism. Historically, the approach of the Australian High Court to federalism has been rigidly formal. That formality has come somewhat under fire, but its resilience despite the questions raised by legal realism is interesting in itself. The staying power of legalistic constitutional interpretation makes judicial reasoning as relevant as ever in Australia. By looking at judicial review in other federations, there is considerable evidence to suggest that the reasoning of courts can be taken more seriously when studying federalism. The problems encountered in constitutional interpretation obviously differ from country to country, but the general approach to adjudicating federalism disputes that all three countries share suggests an important lesson for students of federalism and the law.

1.3 Outline of the Argument

This is a thesis about both law and politics. While many deny there is any difference between the worlds of law and politics, most political thinking reserves a certain place for the law beyond the kinds of politics we expect from legislative and executive institutions. Such a conception of the law may seem a liability when making a critical study of judicial review. It is perhaps naïve to try and deny the obvious politics at work in the judiciary. The great contribution of legal realism and critical legal theory, after all, has been to teach observers of constitutional law that judicial choices are policy

choices. Apparently there is no standard or set of standards within the law that can remove discretion from the hands of judicial decision-makers. Can one see any more in judicial review than simple politics dressed up in the language of law?

For federalism this is a particularly critical question. The federalism cases reviewed here hint that the choices made by judges might not be wholly political. There is an element of judicial decision-making which works differently. The effort to construct tests and rules or doctrines, while done in the name of certainty, may not actually achieve it. But the effort does go some of the distance, as doctrine conditions the approach of legal actors to the problems before them. While I most certainly defend a particular (and debatable) conception of the law, I do so in the interest of 'getting to' how the courts affect federalism. The thesis is less concerned with answering questions about the philosophical nature of law than understanding the place of judicial review in federalism.

The outline of the thesis is as follows. The chapter immediately following will present a more detailed case for studying doctrine in judicial review. The case draws mainly from Canadian literature on judicial review. It also calls on new theoretical developments in the historical study of the American Supreme Court. This theoretical foundation establishes the approach that will be taken in the chapters which follow. Before turning directly to contemporary evidence, a quick survey is made in Chapter Three of the constitutional landscape and the previous effects of judicial review in all three of the federations. This chapter is necessary reading for a clear understanding of the historical state of the judicial review of federalism.

Thereafter commences the core of the dissertation, namely, three chapters looking at the development of federalism doctrines within the three respective Anglo-American federations over roughly the last thirty years of the twentieth century. The United States is surveyed first, as it perhaps most starkly demonstrates the way that doctrine and political preferences can be confused and how ultimately the law shapes federalism decisions. The American court also demonstrates most strongly the potential influence of a high court on long-term trends in federalism. Australia follows. There too, one finds evidence that a doctrinal approach to the study of federal judicial review is one that accurately reflects the decision making process at hand and gives a clear indication of the kind of influence that judicial review may have on the evolution of a federation. Finally, the work of the Canadian Supreme Court is studied for evidence of doctrine. A concluding chapter follows the case studies. Therein, the applicability of the doctrinal approach will be re-evaluated on the basis of the evidence presented in Chapters Three through Six. The concluding chapter will also suggest some of the implications that the understanding presented here has for the study of both Canadian federalism and federalism generally.

CHAPTER 2:

JUDICIAL DOCTRINE AS AN INDEPENDENT VARIABLE IN FEDERALISM

2.1 LAW, DOCTRINE AND FEDERALISM

Federalism is legalism. At the core of a functioning federation is an uncommon respect for the rule of law. The formidable British constitutional scholar A.V. Dicey criticised federalism mercilessly for just that feature. He saw in federalism too much of a reliance upon law to settle social problems. Particularly troubling for Dicey was the degree of sovereignty that appeared to rest with the courts. "Federalism" he wrote, "substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law."[1] Compared to more pragmatic sources of legitimacy and authority, such as parliamentary sovereignty, Dicey found that the constitutional law of a federation could be rigid and uncompromising- even conservative.[2] Yet, what Dicey saw as faults - rigidity and inflexible certitude- were exactly what the architects of most federal systems were looking to build into institutions. They wanted reliable and predictable rules that would allow competing values and communities to co-exist.

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, E.C.S. Wade, ed., 10th ed. (London: MacMillan, 1959), 179.

[2] Ironically perhaps, it is the British constitution and the hegemony of the Dicey-led explanation of parliamentary sovereignty which is now accused of excessive conservatism. The "narrow, legalistic interpretation of what constitutes 'federal'" inherited from Dicey, is, according to Michael Burgess partly to blame for the blindness

The constitutional designers of the federations surveyed here had a high degree of faith in the law as an instrument of government. They believed that legalism and a respect for rules were what would prevent federations and societies in general from succumbing to the whims of raw power. The law was intended to serve as a conceptual fence, conserving arrangements and communities which logic and evolution might otherwise treat less kindly. Regional particularities would be preserved and differences allowed to co-exist through the legal forms provided by federal constitutions, even in the face of forces like cultural homogenization or global capitalism. With the benefit of hindsight it is clear that legalism is also capable of distorting the unregulated natural order to the point of promoting the perverse. But, odd or eccentric holdovers (Prince Edward Island, a province?) are nothing more than proof that the law counts in federations.

Dicey might well have exaggerated federalism's rigidity. It is clear that constitutions need to be able to evolve, or else the institutions they create risk becoming irrelevant. Martha Fletcher calls this the 'problem of adjustment.' The disconnect is caused by the fact that "even the most carefully drawn [constitutional] language is subject to multiple interpretations, and ... the context in which the arrangements operate changes over time."[3] The solutions to the problem of adjustment are many. Most obviously there

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to other constitutional possibilities suffered by Britons. Michael Burgess, *The British Tradition of Federalism* (London: Leicester University Press, 1995), 17.

[3] Martha Fletcher, "Judicial Review and the Division of Powers in Canada," in J. Peter Meekison, ed., *Canadian Federalism: Myth or Reality* (Toronto: Methuen, 1977), 100. Another author intrigued by the problem of adjustment in federations is William Livingston. For Livingston the ever-variable societal basis of federalism would always ensure that institutions (or instrumentalities in his vocabulary) remained out of step.

are provisions in all federal constitutions for formal amendment of constitutional arrangements.[4] Less formal agreements can also be struck to accommodate change as the need arises. These kinds of agreements, under the monikers of 'co-operative' or 'executive' federalism, have proliferated in the last half of this century, so much so that they are, to many, the defining feature of federalism. Intergovernmental co-operation tends to overshadow the solution to the problem of adjustment discussed here and the one that most bothered Dicey - judicial review and interpretation of a constitution.

The task most commonly associated with a high court in a federation is the supervision and interpretation of federal arrangements. Courts complete this task in two ways, either by directly altering the division-of-powers through the simple resolution of jurisdictional disputes or by altering, in that process, the vocabulary of federalism. The task of dispute resolution is familiar enough. When presented with disputes over jurisdiction, the court must find in favour of a particular interpretation of the constitution. In division-of-powers cases, high courts must routinely decide whether legislation is constitutional by determining if the subject is legitimately one for the federal government or the unit governments. With minor variations, this is the principal task of judicial review of jurisdictional conflicts in most federations. In making such judgements courts either lend legal legitimacy to or reject and thus effectively de-legitimise the practical

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William Livingston, *Federalism and Constitutional Change* (Oxford: Clarendon, 1956), 1-13.

[4] Dicey was particularly troubled by the difficulty with which federal constitutions could be altered. In the American case he ascribed this problem to the slumbering sovereign (i.e. the hard-to-rouse people) which he contrasted with the 'ever-wakeful' English Parliament. Dicey opined, "a monarch who slumbers for years is like a monarch who

arrangements presented to them by a particular case. The courts do not initiate changes in a federation so much as legitimate the changes that come about when governments push the envelope of their respective powers. When courts endorse these changes and even when they reject them, the evolution becomes more formal and legal. This is the classic constitutional role assigned to the courts, one that accords with a rather formal conception of federal change. Many observers have asserted that in practice federalism is a much more fluid set of arrangements that depends more on political compromise than on legal evolution.

The less obvious method by which courts introduce constitutional change is by altering the vocabulary of federalism. The process of adjudication makes it abundantly clear that constitutional language is never precise enough to cover all eventualities. That is why adjudication cannot be contracted out to a suitably programmed judicial computer. But federalism is supposed to be legalism! It is supposed to be as certain and reliable as an algorithm. The constitution, which is presumed to be the main source of this certainty and legitimacy, demonstrates an inability over time to keep pace with the naturally evolving order or to anticipate the changes that occur in a society and engage the state. Federalism and the law are intended to introduce certainty, but constitutional language is often so imprecise that contending forces cannot agree on equally acceptable definitions of key terms and provisions. This is the paradox of federalism that judicial review attempts to overcome. A large part of the judicial task is struggling with the meaning and intention of words. Judges are aided in this task by the time-honoured methods of their

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does not exist. A federal constitution is capable of change, but for all that a federal

profession. They construct rules and limitations on meaning and elaborate otherwise imprecise concepts through the creation of doctrine. Judicial doctrine gives parameters to constitutional language.

A robust and vigorous tradition of judicial doctrine is essential to the maintenance of federal legalism and federalism itself. Judicial review of constitutional arrangements is a bare necessity that enables federations to evolve. In order for judicial review to serve its purpose though, doctrine requires pride of place. Doctrine is the engine which drives judicial review yet sustains the practice of legalism. Unfortunately for the general observer and perhaps fortunately for legal academics and political scientists, doctrine is complicated, unclear and variable. That is not to say that doctrine is completely unintelligible or uncertain. It is easy to observe, and in that sense a perfect source of raw material for the social scientist. Doctrine, like the positive law it supplements, is supposed to be consistent and clear. However, there are no guarantees that it will be consistent or consistently applied. As a matter of fact, the capacity of doctrine to adequately operationalize legalism is an issue of perennial debate in the legal academy. Doctrine itself becomes the disputed variable between advocates of a legalist, formal approach to constitutional review and those less inclined to accept that there is any such thing as certainty in constitutional law.

This chapter seeks to establish doctrine's role as an independent variable in the evolution and maintenance of constitutional federalism. It seeks to define, for the

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constitution is apt to be unchangeable." Dicey, *Law of the Constitution*, 149.

purposes of this thesis, what judicial doctrine is. In the literature, the definition of doctrine varies according to the user's evaluation of law as a social force. In order to construct a working conception of doctrine, the chapter will posit an initial, minimalist definition of the term. This definition will be followed by an examination of what some prominent Canadian constitutionalists may be said to add to that minimalist definition. All will be shown to be ultimately unsatisfying variations. A more compelling account of how doctrine operates in federal jurisprudence is found in a recent revisionist account of the judicial review of the American New Deal. This account adds a limited degree of agency to the minimalist definition of doctrine. In this view, doctrine has something of a life of its own. It is seen as a compelling agent to those most susceptible to its influence, the judiciary. With such a conception in mind, the role of doctrine as an independent variable in the evolution and maintenance of federalism becomes clearer.

2.2 JUST WHAT IS DOCTRINE?

Canadian legal scholar David Beatty describes the task of constitutional interpretation as follows.

> The courts, when faced with a text that was written in broad and sweeping terms, have, over time (and, as with any human institution, not without some difficulties along the way), been able to develop a set of *mediating principles* that allow them to differentiate fairly and impartially between the laws that are constitutional and those that are not.[5] (emphasis added)

This description of the process is as good a point as any upon which to start a discussion of judicial doctrine. What Beatty calls 'mediating principles' are, in effect, doctrine. A

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[5] David Beatty, *Constitutional Law in Theory and in Practice* (Toronto: University of Toronto Press, 1995), 21.

bare-bones definition of doctrine should add nothing more. The implication that these mediating principles are by their nature fair or impartial must be considered more critically. That Beatty includes such adjectives in his description is not uncommon. In fact it is an element that is all too common in definitions of the interpretive process.

What form do these principles take? For a Canadian audience familiar with unwritten constitutional rules, or conventions, there might seem a parallel. There is not. Doctrine is entirely distinguishable from constitutional convention. The latter is not enforced by the courts, but instead is 'considered binding by and upon those who operate the constitution,'[6] in other words, mostly by politicians and office holders. In that sense it is an aid to practice, not determination. Doctrine is enforceable by the courts. It is in fact law. Doctrine finds its concrete expression in judicial decisions and commentary upon them. Judges will refer to previous cases on similar matters, the techniques used therein, or to constitutional scholarship when making their decisions. In practice, doctrine is largely this distillation of ideas and approaches into what amounts to a series of techniques for dealing with new fact situations. Doctrine often takes the form of tests or standards that can be applied to the contested law or action before the court. Sometimes a doctrine is expressed simply as a definition, either of a prohibited, or permitted, state of affairs. The concept of precedent or *stare decisis*, which is a fundamental aspect of the common law, is simply a doctrine, however important, which courts follow. High courts occasionally defy precedent. They do so because in addition to the doctrine of *stare*

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[6] The definition is borrowed from British constitutional scholars Geoffrey Marshall and Graeme Moodie. Quoted in Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), 3.

decisis to which courts regularly submit, doctrines also exist which counsel the courts to refuse to be bound by their own precedents when they believe them to be in error. This latter maxim sounds rather subjective and at times it is, yet it is the primary means by which the law keeps pace with the times. When courts refuse to be instructed by precedent they must do so with substantial justification and an alternative line of reasoning that draws on precedent as well.[7]

As Beatty's description shows, doctrine tends to do double duty in many definitions. For some, it serves not only as a tool of the law, but also as a source of certainty and legitimacy in law. This is a much more normative position. On these lines, not only do judicial principles help decide cases, they help decide them correctly and objectively. In fact, they should dictate the correct answer to a legal problem. Doctrine, to Beatty's way of thinking, enables 'fair and impartial' differentiation between constitutional and unconstitutional laws. In other words, doctrine not only structures the options for resolution of legal disputes, it also holds within itself the objective and value-free (read non-political) protection of constitutional values – a.k.a. the 'right' answer. A minimalist definition of doctrine must exclude such a normative claim. 'Fairly and impartially' should be replaced by 'consistently'. Consistency is a non-normative trait, a rule or doctrine can be consistently fair or unfair, consistently good or bad. To suggest that by their nature rules are fair is to make a normative claim on behalf of the rules or in this case, the law. At its most basic, doctrine provides a degree of likelihood of results.

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[7] Peter Hogg's discussion on the issue of precedent is instructive. He argues that 'in constitutional cases the [Supreme] Court should be more willing to overrule prior

This does not automatically translate into results that are fair or impartial - just reasonably foreseeable. Adding objectivity or impartiality to its virtues suggests that doctrine reflects an even greater degree of certainty, that there are right and wrong answers to questions of law, federal or otherwise. A minimalist definition must exclude such claims. At a minimum, then, **doctrine is a set of principles, maxims, tests and approaches to the interpretation of the law that is used to regularise its application and make it more routine and predictable**. Objectivity or fairness is not a trait inherent to doctrine, it is something claimed on its behalf by theorists.

Canadian scholarly writing on doctrine and its place in judicial reasoning goes some way to structuring a discussion of alternatives to the minimalist definition. Perhaps the most elemental debate in jurisprudence is between those who believe wholeheartedly in the capacity of the law to provide certainty and those who are much more sceptical about such possibilities. This conflict is well represented by the writings of David Beatty on the one hand, and Patrick Monahan and Paul Weiler on the other.[8] Beatty gives law an objective character by definition. Monahan, and especially Weiler, are much more

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decisions than in other kinds of cases." Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1996), 216-217.

[8] Similar dichotomies can be found in the Australian literature about High Court interpretation. The 'literalist' school advocates a limited, formal approach to the understanding of the constitution's provisions. There is a much more sceptical school of thought which distrusts the dichotomy made between political and legal decision making. For an example of the former see Geoffrey Sawer, *Australian Federalism in the Courts* (Carlton, Victoria: Melbourne University Press, 1967), or Leslie Zines, *The High Court and the Constitution* (Melbourne: Butterworths, 1991). Examples of the latter include, Brian Galligan, *The Politics of the High Court* (St. Lucia: University of Queensland Press, 1987) and Greg Craven, "The Crisis of Constitutional Literalism in Australia," in H.P. Lee and George Winterton, eds., *Australian Constitutional Perspectives* (Sydney: The Law Book Company Limited, 1992).

cautious about the potential of law to be apolitical. Monahan, for example, does not deny law its rightful place in federalism, but he does suggest that it should not be confidently relied upon in the affairs of a nation. Both of these positions need to be looked at in closer detail.

2.3 Doctrine as Certainty: David Beatty

David Beatty is not satisfied with a minimalist definition of doctrine. Neither are most observers. Critics and champions of doctrine both tend to presume certainty as a necessary characteristic. For Beatty, doctrine's primary virtue rests in its capacity to help courts settle on the correct and principled solutions to constitutional problems. In this view, it is possible to write the rules and develop fair and apolitical ways of applying them, in which event, federal conflicts will be more easily resolved. If the law does not work properly at present, it is because of poor application, best understood as a deviation from the just standards that the law is capable of defending.

Beatty has set out the core of his position in his text, *Constitutional Law in Theory and Practice*. He seeks to direct the treatise specifically to "all of my colleagues who, for one reason or another, and in different ways and degrees, have abandoned the notion that there is an independent, objective and determinate idea that makes the concept of law intelligible."[9] Further he states, "this book is much more about the possibility and the perfectibility of the law than it is about unremitting triumphs and unalloyed success." This is so for the simple fact that "how the courts have actually decided cases is not

uniformly flattering and supportive of the virtue of law."[10] 'The virtue of law' is a telling phrase. It demonstrates Beatty's belief that there is nothing wrong with the constitution or the notion of law (either as written or as an institution) and that failings in the Canadian constitutional order are instead a result of poor practice by judges.

What are they doing wrong? As regards the division-of-powers, Beatty claims the courts have made a basic mistake in not living up to the set of principles derived over time to maintain federalism. In other words, they have not followed their own doctrinal instruction. According to Beatty, doctrines emerge naturally in the quest for realising law's intrinsic fairness and will serve the development of constitutional law well, but only if they are consistently applied. In current and recent Canadian jurisprudence Beatty contends that the Supreme Court is failing to apply its own doctrines properly.[11]

What are those principles and where are they derived from? In division-of-powers cases, Beatty argues that the external aids of precedent and definition can only provide some of the direction courts need when deciding which level of government is responsible for particular subject matters. Assigning powers on the basis of common definitions and the respective assigned jurisdictions of either level government is difficult. Beatty finds that a simple dictionary-style approach is too general to fulfil the need for concrete guidance demanded by the judicial task. For Beatty, the internal logic of the constitution is a much more appealing guide. In looking to such a source he is not

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[9] Beatty, *Constitutional Law in Theory and in Practice*, xi.
[10] Ibid., 18.

seeking the mindset of the founders to determine what constitutional phrases meant at the time of Confederation so those definitions can be applied to current issues. Rather, he tries to reduce the constitution to its most basic elements and then construct answers to new questions from those certitudes. He takes as irreducible a commitment to federalism and to democracy.[12] These values serve as Cartesian certainties upon which more specific principles can be built or developed. A commitment to federalism implies a commitment to the federal principle, which in turn is operationalized by two practical values to guide the courts. These practical values are the operative, doctrinal elements – culled from the Supreme Court's jurisprudence - which he believes will offer certainty and guidance to judicial decision makers. In the case of the division-of-powers they are 'mutual modification' and 'concurrency,' phrases which require some explanation.

For Beatty, mutual modification is a variant on the requirement that Canadian courts must choose between one of two lists of governmental powers. Canada is unique in its practice of listing the powers of both the federal and the provincial governments.[13]

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[11] David M. Beatty, "Polluting the Law to Protect the Environment," *Constitutional Forum* 9, no. 2 (1998).

[12] Beatty's 'constitutional values' do not go unnoticed by judicial authorities, including the Supreme Court of Canada. Its recent decision in *Reference Re: The Secession of Quebec* 161 D.L.R. (4th) 385 (1998) recognizes these two values as well as a commitment to the rule of law as fundamental tenets of the Canadian state.

[13] In the Canadian case, the courts must decide between the two lists of powers in sections 91 and 92 of the *Constitution Act, 1867* assigning powers to the federal and provincial governments respectively. The only exception would be powers recognised in the constitution as concurrent, of which three provisions speak. They enumerate agriculture and immigration, the export of natural resources and old age pensions as concurrent powers shared by both the federal and provincial governments. In the Australian and American constitutions there is only one list of governmental powers; that assigned to the federal level. The residue is left to the states. Various commentators approach this division-of-powers as having a much more concurrent nature. The residual

When choosing a category in which to place a subject matter, the courts must weigh the placing of a subject in one category against the effect doing so will have on other categories. Mutual modification is the recognition that including a matter in the domain of one level of government effectively limits the sphere available to the other. An example may better illustrate this point. If the court is faced with a broad subject matter such as fishing, it must make trade-offs between the federal power over seacoasts and fisheries, and the provincial power over property and civil rights which could conceivably cover the marketing and processing of the fish. Modifying one heading with inclusion modifies the other by exclusion. But, how is this a principle and not just a simple effect? Beatty argues that it structures the task of categorisation. The court has the benefit of an alternative in every case. If something appears to be a matter for the federal power of trade and commerce, the court can also ask if it is not a matter dealing with property and civil rights in the province. With two competing lists of powers there is always an alternative available when structuring the decision. In this way, the lists not only set out the powers of the two levels of government, they act as defences against the encroachment of the other level. Thus Beatty argues, by way of the mutual modification principle, the Supreme Court has restricted the federal treaty-making power to respect the jurisdictions of the provinces, and has been able to set limits on the seemingly all-

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nature of state power characterises federal power differently. Except for a few powers explicitly listed as exclusive, most powers held by the federal government are concurrent with the states. The federal government has supremacy (or paramountcy in the Australian lexicon) when a conflict arises, but unless one does, both the states and the federal government are presumed to operate within the majority of the enumerated powers. The judicial task is twofold then. The court must decide if indeed a matter is one for the federal legislature and, if it is, whether there is a substantive conflict of action, in which case the supremacy of the federal government must be invoked. Hogg, *Constitutional Law of Canada*, 363-364.

encompassing powers of property and civil rights at the provincial level or peace, order and good government at the federal level. Defining provincial and federal powers in relation to each other and in relation to the capacities of each level, both literal and constitutional, creates a balance between the two, preventing the federal nature of the division-of-powers from being weakened over time.

Beatty' s second animating principle is concurrency. Concurrency commands the courts to interpret federalism with a mind to the fact that political life cannot be hived off into 'watertight compartments.' Overlap, he argues, will occur any time two governments are operating in the same territory. When the courts allow concurrency in some form, but apply restraints where necessary, they enable both levels of government to maximise their sovereignty. Beatty calls this a logical rather than literal reading of the constitution. Doctrines which recognise the need for overlap and seek to minimise the deleterious impact of it are at odds with the clean compartments set out in the constitution. However, Beatty recognises this as a place where the law can provide a more subtle understanding of social change and maintain its place in federal arrangements.

Beatty has much to say about recent developments in Canadian federalism jurisprudence, all of which is better considered in the context of Chapter Six. For the time being it is worth reiterating what he considers to be the place of doctrine in a properly constituted federalism. For him, doctrine is the legitimate expression of the law's place in federalism. It also assures that the basic principles of the constitution are followed. Where Beatty perceives the legal side of federalism to falter is in the judiciary's

application of doctrine. Recognizing this weakness rescues Beatty from naiveté. Judges have been inconsistent in applying the principles Beatty recommends, a fact which can be simply proven. Indeed, Beatty himself gives accounts of several cases in which the courts failed adequately to address the principles he identifies or to use them at all when making important judgements about federalism. Some would interpret this failure as a clear indication of the impossibility of an objective judicial review. However, Beatty regards this failure as an indication of something wholly different. That judges sometimes, or even regularly fail to uphold doctrinal standards and principles is, oddly enough for Beatty, proof of the general objectiveness of the standards. The fact that one can identify deviations from good practice proves the possibility of a better method. Those cases which depart from the use of proper standards are the exceptions that prove the rule.

There are two points on which one can take issue with Beatty's presentation of the process of constitutional adjudication. First, is his method. Beatty's description of the judicial process suffers from an unexamined presumption that objectivity and certainty are inherent in law. His description of the process of adjudication is inaccurate in presuming that judges, when properly applying the law and applying doctrine, are always deciding objectively. He injects a normative trait into the very definition of doctrine by adding fairness and impartiality to the minimalist definition of 'mediating principles.' Not only is doctrine a set of mediating principles for Beatty, it is a set of objective and fair standards that demonstrates the difference between constitutional and unconstitutional laws. According to this line of thinking, the very act of creating mediating principles extends the natural certainty of the law. The presumption that the

law is by its very nature objective is a critical leap that Beatty offers little incentive for the reader to make. It is a presumption on his part. It is not a presumption that can be easily shared.

A second point of contention is that Beatty's normative argument suffers from his presumption of law's perfectibility. Ultimately, the constitutional values that he identifies as universal, come from his own reading of what federalism means. One might as easily suggest that the constitutional commitment to federalism implies a preference for federal government activities over the exercise of provincial power. Empirical evidence from different federations shows that different sorts of values can be emphasized in federal systems depending on the preferences of both governments and electorates. As only one example, the degree of regional or unit equality can vary from federation to federation. Equalization programs in Canada and Australia were designed to ensure that citizens of all provinces or states receive comparable levels of public services despite varying economic capacities. The American federal system does much less to ensure this sort of equality, at least on a regionally redistributive basis. National responsibility for many welfare programs and the absence of government-funded health care help to ensure that levels are relatively equal. The continued devolution of welfare spending to the states has caused some concern about the relative equality of states to provide essential social services.[14] Yet Beatty seems to suggest that a commitment to federalism implies

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[14] Recent American literature on federalism suggests the states have widely varying capacities to provide social services and that if national standards are not enforced, states may face the prospect of becoming welfare magnets. Alternatively all states will erode their services in a 'race to the bottom' in order to avoid becoming such a magnet for transient welfare recipients. See Paul E. Peterson, *The Price of Federalism* (Washington:

universal principles which courts can uphold. Indeed, he makes some effort to do comparisons to demonstrate that some of the basic principles he singles out in the Canadian case can be found in other jurisdictions. The problem with this kind of argument is that in an effort to give objective status to the law Beatty must suggest that the law and hence the concepts grounding federalism, are apolitical and universal. They are not.

2.4 Doctrine as Politics: Paul Weiler and Patrick Monahan

Beatty represents a more recent incarnation of what is essentially the oldest position on the place of doctrine and law in federalism. Apart from his ideological position (which shapes those values he considers standards) Beatty does not differ markedly in his approach to judicial review from the original judicial guardians of the Canadian constitution, the Lords of the Privy Council. He may believe that their reasoning was flawed or that their application of doctrine was biased and inconsistent, but his justification of the role of judicial review is the same as any they articulated. For Beatty, judicial review is beyond politics because law is a perfectible instrument. The judges of the JCPC and of the Canadian courts all appear to have operated under that assumption. The polar argument is equally adamant that the courts are unable to provide the federal system with this level of neutral arbitration. As early as the 1930s Canadian scholars began to question the ability of courts to find any doctrines that would save them

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Brookings Institution, 1995), and John A. Ferejohn, *The New Federalism: Can the States be Trusted?* (Stanford: Hoover Institute Press, 1997). The contested nature of equality in Canadian federalism is examined in, Jennifer Smith, *The Meaning of Provincial Equality*

from misinterpreting federalism. Even so, critics of the Supreme Court and of the JCPC largely took issue not so much with the role of the tribunal, but the results of its role. Thus a generation of critics, F.R. Scott, Bora Laskin, and W.R. Lederman prominent among them, dissected the reasoning of the court and concluded that it promoted an unrealistic and inappropriate (usually decentralist) conception of Canadian federalism. This placed a great deal of the blame for the problems of Canadian federalism on the heads of misinformed judicial decision makers.[15] Dissatisfied with the direction which the scholarly dialogue was taking, these critics began to see past the perceived doctrinal mistakes to suggest that there was a basic flaw with the power of judicial review.[16] Eventually, the very concept of judicial power was directly challenged. In 1974, Paul Weiler wrote an impassioned and ground-breaking critique of the court that fundamentally questioned the role of the judiciary and still stands as a critical theory of judicial review.[17]

After a thorough examination of the law of Canadian federalism in the post-1949 period (since the Supreme Court of Canada has been the final court of appeal) Weiler

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in Canadian Federalism, Working Papers (Kingston: Institute for Intergovernmental Relations, Queen's University, 1998).

[15] Alan Cairns has written the definitive account of this era in Canadian scholarship and jurisprudence. Cairns, "The Judicial Committee and Its Critics."

[16] A nadir of sorts may have been reached with the publication, in 1967, of G. P. Browne's *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press). Browne's was a somewhat prescriptive account of the missteps taken by the JCPC. Bora Laskin suggested in a scathing review that the kind of formalist analysis of the assumptions and logic of the *BNA Act* that Browne conducted would have been better left a private exercise. Bora Laskin, 'Book review' *Canadian Public Administration* 10 (1967), 514.

[17] Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/ Methuen, 1974).

claimed that he had a hard time finding the sorts of principled reasoning and justifications required of the court by its own apparent standards of law. In his view, the judicial task is to provide simple adjudication of disputes, and the adoption of general policies for the law. In the latter task, the best aid to the court is the formation and maintenance of legal principles. Principles allow the courts to make policy choices by giving them a frame of reference that connects legal rules to the facts before them. Legal principles can be sifted out of the past jurisprudence of a court and the internal logic of its decisions. In sum, Weiler argued, "legal argument in terms of principle is not only a necessary avenue towards a better quality of legal *justice*, it is the primary source of the stability and predictability of a legal *order*."[18] [emphasis in original] While the law is not perfectible and objective, this margin of policy making, by requiring a degree of principled argumentation from judges, is enough to ensure that the judicial branch does not slide into subjectivity.

That said, Weiler argued that the judges of the Supreme Court held 'an outmoded and unduly narrow conception of the role of law in courts."[19] He saw little more than politics at work in the deliberations of the court. And a dishonest politics at that. For the court's deliberations were accompanied by an almost devout commitment to the mythology that politics was nowhere involved. The result was a jurisprudence markedly weaker than if political decision making was frankly admitted. The court and its judges, he contended, clung to an idealist vision of judicial review in order to cover up their own political decision making. In the United States, where the political tenor of the court's

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[18] Ibid., 53.

work was conceded to a greater extent, the court lived up to its self-imposed standards better. By setting an impossible task as a guardian of pure law, the Canadian court not only failed to achieve its goal, it also perverted its potential contribution to the system. The court encouraged a way of thinking that was no longer of net benefit. It did more harm than good.

For Weiler, this was particularly true in the field of federalism. The evolution of a constitutional system is inevitably out of pace with the society it serves. Weiler attributed this disconnect to the failure of the court to make the changes necessary in the constitutional order. This conservatism was a direct result of the judiciary's 'hidebound legalism.' Weiler's preference was for the politicking to be out in the open and the umpire of federalism to be more of an arbiter of negotiated disputes rather than an oracle purporting to provide one, singular truth. He proposed a model of federal judicial review much more akin to labour arbitration than anything currently in practice. The judicial authority in Weiler's thinking should act as more of a conciliator, forcing both sides to articulate their demands and reach a compromise rather than handing down zero-sum commands.

Patrick Monahan disagrees more fundamentally with a position like David Beatty's. Weiler basically articulated an ideal vision of the law akin to Beatty's. When he found that the courts failed to live up to his standard, he recommended a different approach to the task altogether, rather than to rely on the hope that the mere law might

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[19] Ibid., 4.

get greater respect from its practitioners. The more practical and efficient alternative for Weiler was to abandon all pretence to legalism in the adjudication of federal disputes. Weiler's was not a blanket criticism of the law as a social construct, but simply a critique of the judiciary's inability to live up to the demands of constitutional law. Monahan's view of the law is much less optimistic. He argues that doctrine is at a twilight and that we must "complete the inconclusive rebellion against the formalist impulse." According to Monahan, it is wrong to think of doctrine as a vehicle for certainty and objectivity. He calls the adherence to this way of thinking "'constitutionalism' – the notion that a legally enforceable document should define the society's federal institutions and establish standards for their evaluation."[20] Monahan agrees with the minimalist definition of doctrine. However, he also fails to see any particular value in doctrine that could not come from ordinary political debate.

The doctrine of which Monahan speaks derisively is the same one that Beatty seeks to revive. Monahan finds it something of an oddity that the doctrinal impulse is far from gone in Canadian federalism jurisprudence. Formalism has been under siege in the Anglo-American legal world since the turn of the century. So, he wonders, why does the Canadian court cling to doctrine? A desire for certainty and the appearance of neutral judicial decision-making seem to be the main reasons why formalism remains despite the advances in understanding touted by legal theorists. Beatty regards attempts to codify

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[20] An ideology which Monahan argues was almost solely subscribed to prior to 1940 in Canada. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), 143.

federalism principles as the worthy search for certainty and objectivity that should occupy the court.

Monahan also talks about the principles of Canadian federalism to which the courts have subscribed. However, Monahan recognizes that equally compelling counter principles exist, which he suggests can be defended with the same degree of certainty. Monahan does not seek to raise the counter principles to doctrinal status, but to wholly remove the mystique from principle. For every element of certainty Beatty discovers in the constitution's commitment to democracy and federalism, Monahan could theoretically identify and defend an equally compelling and entirely contrary element. Neither one, in his view, is less arbitrary than the other. It is impossible, he argues, to draw any meaningful distinction between doctrinal and political discourse. The construct which Beatty defends cannot, in Monahan's opinion, be upheld.

Despite the best efforts of the Supreme Court to construct rules which remove political discretion from its decision making, results appear to rely ultimately upon what Monahan calls 'background understandings' of federalism and its purposes. These background understandings are what make legal doctrine political. "Ultimately," Monahan claims, "the constitutional adjudicator is being called upon to make some accommodation between the competing social visions that underlie Canadian federalism. Political choices on these issues are the 'stuff' of constitutional adjudication."[21] While doctrine seems to provide a non-political account of federalism based on principle, it

actually provides more than one 'principled' explanation for a variety of tenable political viewpoints on federalism. In that sense the law offers nothing more certain than what could easily be labelled a simple political choice. For Monahan, it doesn't matter how thin the corridor for decision is. As long as judges have a choice between doctrines to justify their political preference, they are still making a political calculation. He suggests that there is an "essential continuity between legal and political reasoning."[22] There are no grounds upon which distinctions can be fruitfully drawn between these presumably different forms of reasoning.

Monahan's solution to this surfeit of contingency is to revel in it rather than lament it. He proposes that "federalism disputes to both federal and provincial legislation, should be resolved through political processes. The claim is simply that federalism issues are inescapably political and there is no plausible reason for removing them from the political arena."[23] However, the courts show no signs of reneging their role in federalism. Despite the best efforts of Canada's federal government and provinces to modify the federal system outside the strictures of constitutional law, the law reasserts itself whenever it has the opportunity.[24] By altering the federation without changing the constitution, the current federal and provincial governments are attempting to place federalism entirely within the realm of politics. Despite these trends, Monahan argues

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[21] Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism," *University of Toronto Law Journal* 34 (1984), 89.
[22] Ibid., 99.
[23] Ibid., 96.
[24] See *Re Canada Assistance Plan* (1991) 2 SCR 525 and Katherine Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union," *Canadian Business Law Journal* 25 (1995).

that "at the most general level, the challenge facing Canadian federalism is to revive flexibility and innovation in political life. The task is to make politics something more than a constricted consideration of marginal adjustments to an established system of prerogatives."[25] It is not clear that leaving federalism entirely to the political arena is conducive to enhanced debate and an appropriate degree of accountability. By abandoning legalism, the guarantees of federalism that benefit the weakest or poorest positioned may also be abandoned and those actors may be left to the whims of a rawer sort of power, one less patient with legal niceties.

To demonstrate where a theory like Monahan's leaves those seeking to explain judicial review, consider another highly critical account of Canada's high court. Political scientist André Bzdera argues that there is no feasible political theory of judicial review in federations other than one which recognizes the role of the court as a centralizing force. With nothing to guide them but their political preferences, ultimately judges will be kindest to those who put them in office. Bzdera calls upon less than systematic evidence from a number of federations to suggest that the main effect of the judicial review of federalism is to legitimize and strengthen the central state in preference to its units. This he cites as a "failure of modern judicial review in the federal state."[26] The claim pivotal to Bzdera's conclusion is that since high court judges are appointed by the central government, the incentives and culture of high court judging reinforce the legitimation of central government expansion. He allows that some high court judges do

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[25] Monahan, "At Doctrine's Twilight," 98.
[26] André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science* XXVI, no. 1 (1993), 28.

favour the units in a federation and that there are decisions that go against the wishes of central governments. However, he claims the net effect of federal judicial review is the eventual centralization of power.

Most constitutional scholars in Canada would suggest that the court is balanced in its approach to federalism. Bzdera calls this the 'pendulum' theory of judicial review - that for every swing to the benefit of the central government the court takes, it appears to take an equivalent swing to the favour of the provinces. To Bzdera's thinking, this 'pendulum theory' is inaccurate for it takes too little account of the structural conditions of the court's place in Canadian federalism, particularly "the political importance of the judicial selection process on the policy output of the high court."[27] Additionally, the theory suffers from a shortage of international comparisons. On the basis of that evidence, Bzdera suggests that our understanding of federal judicial review needs to be re-evaluated. He goes so far as to claim that the political theory of federalism itself must be altered to take into account the inescapable reality that federal high courts favour their centralist counterparts. He writes that "there appear to be no exceptions to the centralist theory of the judicial function."[28] This centralist bias upsets the traditional theory of sovereignty implicit in a federal arrangement.

The primary failing of Bzdera's method is the lack of any attempt to take seriously the output of the court. If the so-called pendulum watchers are blind to the obvious evidence that federal high courts are puppets of the central government, Bzdera

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[27] Ibid., 6.

is equally blind to the contrary evidence contained in the reasoning of high court decisions. Perhaps a considered reading of cases is not something he wishes to do. But, what he writes off as the 'positivist vision of the judicial function'[29] proves to be much more influential in determining trends in interpretation than are the methods of appointment and the sinister co-opting of judicial elites into the central government consensus.

2.5 Enter Autonomy- The Example of New Deal Doctrine

Is there any understanding of doctrine that might be useful to constitutional scholars? Beatty's faith in the law may strike a reader as too evangelical and Monahan's reliance on politics seems to lead to shallow claims which threaten the basic distinction between judicial and political institutions. Thus one is left to ask if there is a compromise position that gives doctrine and judicial review a place in federalism that is not naïve about the law, but does not remove some of the certainty and protection of legalism. In what way can a minimalist conception of doctrine aid such a theory of judicial review? Recent scholarship on the history of the American Supreme Court suggests another way in which doctrine might be conceived. Barry Cushman's account of doctrinal developments in the New Deal period suggests that it is possible to be neutral about doctrine and study it as a variable like any other in the decision-making process undertaken by judges. Doctrine is worth studying not because it holds all the right answers, but because it is a formative force on the answers, a force that gains its

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[28] Ibid., 29.
[29] Ibid., 7.

legitimacy from tradition and formal methods. Doctrine serves as a set of meditating principles which, while not indifferent, are not the only answer.

Strictly political accounts of judicial review, like that proffered by Monahan, or by the conventional histories of the American New Deal, have a low opinion of doctrine. It is merely a front for other forces. In the case of the New Deal, the Supreme Court is supposed to have reversed its initial opposition to the constitutionality of the progressive reforms of the Roosevelt administration only after its institutional integrity was threatened by that same administration's plan to appoint extra judges and 'pack' the court with more sympathetic jurists. It was the self-preservation instincts of the court, rather than any convincing legal precedent, which brought it around to support of the New Deal. The episode can be explained by politics, not by law. Cushman calls this account 'superstructural.' Doctrine, in such an account, like false columns in neo-classical architecture, is irrelevant to the real stability of the decision-making structure. Columns, like judicial rhetoric, are impressive, but much more mundane materials are holding the building up. By this account, "When a judge reviews the constitutionality of a given piece of legislation, he first decides whether it embraces a political, social or economic policy with which he concurs. Having made this essentially political determination, he then instructs his law clerk to go out and find the precedents that will support the result he desires."[30] The judge is a political actor like any other, except that

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[30] Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 33. Lorne Sossin, drawing on his personal experience as a clerk to the Supreme Court of Canada suggests that the interaction between clerk and judge is never so simple and that judicial decision making, even with the aid of clerks, still operates very much within the realm of 'legal reasoning.'

she is momentarily inconvenienced by the method of her profession to unearth some 'technical mumbo-jumbo' to justify her decision.

Technical mumbo-jumbo is doctrine. Cushman obviously disagrees with the superstructural account, so what does he offer instead? Drawing from the work of other legal scholars he contends that legal forms and practices (i.e. doctrine) may have a degree of relative autonomy. They may indeed have agency. Quoting legal theorist Robert Gordon, he contends, "[legal forms and practices] can't be explained completely by reference to external political/ social/ economic factors. To some extent they are independent variables in social experience and therefore require study elaborating their peculiar internal structures."[31] Cushman's purpose in defining doctrine this way is to provide a different account of how the American Supreme Court played out its role in the New Deal era. To do this, he takes doctrine seriously as a variable in the legal and political order of the New Deal. By doing so he is able to explain much of the change that has otherwise been ascribed to the overt influence of Roosevelt's court-packing plan. Cushman studies in detail the methods that the court used, and how they compare with pre-New Deal doctrines. By doing so, he is able to establish the importance of those doctrines, and emphasize the role of the New Deal advocates in Roosevelt's second term who narrowed issues for the court and turned around the unfavourable outcomes experienced in the early days of the administration. To approach the period any other way he argues "is to deny the constitutional jurisprudence of the period any status as a

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That is, with an eye to precedent and accepted understanding as much as to policy preference. Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada," *U.B.C. Law Review* 30, no. 2 (1996).

mode of intellectual discourse having its own internal dynamic. It is to dismiss the efforts of the lawyers defending the constitutionality of New Deal initiatives as irrelevant and redundant...and to suggest that sophisticated legal thinkers casually discard a jurisprudential worldview formed over the course of a long lifetime simply because it becomes momentarily politically inconvenient."[32]

The content of Cushman's New Deal argument is more relevant to the specific discussion of the New Deal period in Chapter Three. More important to the argument here is his conception of doctrine. He gives real intellectual substance to judicial doctrine and accepts it on its own terms. Why? Because it acts as a serious restraint on the way that judges conceive their role and carry out their task. Judges are schooled in the law. They practise it for many years. They respect doctrine as an aid to decision-making, not because it is objective or because it provides a nice cover for their personal preferences, but because it is a part of the trained method of legal reasoning. Cushman's description of legal history is telling:

> Legal history is not simply political history, or social history, or economic history; legal history is also intellectual history. Judges are participants not merely in a political system, but in an intellectual tradition in which they have been trained and immersed, a tradition that has provided them with the conceptual equipment through which they understand legal disputes. To reduce constitutional jurisprudence to a political football, to relegate law to the status of dependent variable, is to deny that judges deciding cases experience legal ideas as constraints on their own political preferences.[33]

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[31] Cushman, *Rethinking the New Deal Court*, 41.
[32] Ibid., 5.
[33] Ibid., 41.

Certainly judges have predispositions, but that does not mean that we ought to conflate doctrine with political discourse. Predispositions are one variable, doctrine another. Other variables might include the fact situation, the climate of opinion at the time the case is heard, or the strength of presentation by those at the bar in a particular case. All of these add up to influences on the way that cases are decided. And unlike some of the other less tangible inputs, doctrine stands apart from the circumstances of a case before the courts. The study of judicial doctrine can be viewed as an intellectual pursuit in its own right. The study of doctrine is not unlike the study of any other intellectual history. There are core ideas, leading personalities, innovators and disciples. At the outset of this chapter it was suggested that courts alter federations by changing the vocabulary of federalism. Altering doctrine over time changes the basic way in which we engage with the concept of federalism. It changes federalism's vocabulary and consequently the structure of federations.

Doctrine must not be understood as a tool of objectivity and certainty, nor as a wholly political, post-hoc justification for policy preferences. Doctrine is neither certain, nor political. But, it is legal. Contrary to what Monahan claims, there is a difference between the legal and the political. Legal decision making is constrained by very different forces than its political counterpart, and those restraints have a very real effect on the outcome of those conflicts. Legal reasoning and decision making are bound by the strictures of the courtroom and the formality (however contrived) of the conflict. As a means of resolving disputes about federalism it is called upon for specific reasons and offers specific benefits to a federal system. In approaching doctrine one must learn to be

indifferent about its application. That is the true test of having a better understanding of the concept. One must not expect things from doctrine and then be disappointed when it does not appear to work in the way one hoped it would. Criticising the court for departing from the 'proper' interpretation commanded by doctrine risks a slide to a Beatty-like quest for (an elusive) certainty.

There are constraints in doctrine of a degree unlike any other. The legal character of doctrine is crucial. The discipline of thinking required to make a legal argument and to render a legal decision is a critical degree removed from plain political decision making. This is true even if a judge or number of judges are cavalier about the formalism of the law. Formalism is a natural default position for a court to take, and over time is a more credible determinant of outcomes than any isolated policy choices are likely to be. Doctrine is the reminder that federalism is a legal order as well as a political one. Legality can be distinguished from certainty without becoming political.

Canada's pre-eminent constitutional law scholar, Peter Hogg, seems in relative accord with the Cushman approach. In an elegant footnote to his discussion of the role of the courts in federalism, he describes the difference between political and judicial decision making.

> I do not acknowledge that judges make political decisions similar to those made by politicians. To me, the element of political choice in a [judicial] decision is *reduced to a very narrow compass by the substantive constraints of the language of the constitutional text and decided cases*, and by the procedural constraints of the litigation process. A much wider choice of outcomes and reasoning is open to politicians.[34] (emphasis added)

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[34] Hogg, *Constitutional Law of Canada*, 121 fn. 101.

While judges make decisions of political consequence, in his mind that does not translate into political decisions.

2.6 Conclusion

Paul Weiler came to the conclusion that judicial review and legalism are of no net benefit to federalism. Maintaining the artificial constructs of an apolitical judicial review for the task of settling division-of-powers disputes does not do a federal system any favours. Indeed, the maintenance of judicial review as an arbiter of federalism risks distorting the politics of federalism in all sorts of inefficient and unproductive ways. Weiler referred specifically to the so-called 'chicken and egg war' between Ontario and Quebec to demonstrate his point.[35]

The provinces of Ontario and Quebec each have large agricultural sectors. They also represent the two largest provincial markets for those products. It so happened that in the late 1960s Ontario producers were oversupplied with eggs and Quebec producers were oversupplied with chickens. Each province naturally looked to the other's market as the place to unload these excess supplies. This was not looked upon kindly by the producers of the respective products. Marketing boards were eventually created in both provinces to maintain the price of these products at a consistent level regardless of their province of origin. Manitoba, which has a much smaller market but a sizeable agricultural industry, depended on selling its consistent oversupply to the large market

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[35] Weiler, *In the Last Resort*, 156-164.

next door in Ontario. Manitoba was eventually penalised by the protectionism designed to discourage Quebec producers from raiding the Ontario market.

Manitoba was the classic innocent bystander. In a seemingly perverse move, the provincial government introduced legislation similar to that on the books in Ontario and Quebec. The Manitoba government almost immediately thereafter referred the legislation to its own Court of Appeal for a ruling on its constitutionality, in the hope that all the marketing schemes would be found unconstitutional. The Manitoba Court of Appeal indeed found the legislation unconstitutional. As a result, the Manitoba government was able to pursue an appeal of the 'unfavourable' decision to the Supreme Court, which upheld the finding of the lower court, thereby, making all such legislation unconstitutional.

Weiler found it "rather hard to see what the courts have to contribute to the resolution of this essentially political and economic conflict."[36] That the Manitoba government chose to pursue its objections through the circuitous route of passing legislation of the exact type that it sought to eliminate and then submitting it to the adjudication process does seem less efficient than engaging in negotiation with its provincial counterparts, or convincing the federal government to take the lead in resolving the conflict. Weiler recognized that the Manitoba government had little choice but to take its circuitous route when the federal minister of justice appeared unwilling to intervene in the conflict. The law provides an outlet for the weak in exactly this sort of

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[36] Ibid., 156.

situation. Federalism may be founded on a notion of legal equality, but there is no rule of substantive equality. Weak and strong actors emerge among the provinces. The strong provinces are likely to impose their will on the weaker provinces or be indifferent to the effects of their own self-interested actions. The chicken and egg war demonstrated exactly those kinds of behaviour. Weiler believed that the Supreme Court got involved despite its own best instincts because of the legal mystique of federalism. The 'Manitobas' of the federal system must thank their lucky stars for the legal mystique since it was the only thing to save them from the protectionism of the big markets and producers.

From the perspective presented here, this example demonstrates perfectly the utility of federal legalism. Weiler believed the court made a political decision to resolve a political conflict that was probably better resolved outside the legal system. Indeed, the saga continued after the Supreme Court's decision in the *Manitoba Egg Reference*[37] with the meeting of officials from the various provinces to hammer out a more amiable solution to the issue – one more sensitive to the needs of all the provinces affected than was the 'winner takes all' result of the Supreme Court. However, the law's intervention, whatever its weaknesses or drawbacks, helped to prevent the flexing of Ontario and Quebec's muscle from unduly harming Manitoba producers in the long run. There is considerable value in such an illustration. It demonstrates exactly why federalism was designed as a legal order as well as a political one. The doctrines available to the court

[37] *A.G. Manitoba v. Manitoba Egg and Poultry Association* 19 DLR (3d) 169 (1971).

provided it with grounds for a decision, however imperfect in the eyes of some observers, and that decision effectively aided the weakest player in the drama.

The intention of this chapter has been to divorce doctrine from some of the normative and pejorative descriptions made of it. Doctrine is neither a surrogate for certainty in constitutional judgement, nor is it a thin veil for political decision making. It is a variable that stands alone from these descriptions. It is an independent variable; one that shapes outcomes. But more importantly, it is a variable critical to a properly functioning federalism. Federalism thrives upon a healthy relationship between the strictures of law and the innovation of politics. The continuity of the law is a staple of federalism, not because the law is in itself a good, but because the rule of law protects elements of the federal system which would otherwise quickly be lost to regularising pressures. Economic logic and universalising social forces can make quick work of federal diversity. The law is one of the prime protectors of that diversity. Doctrine is what helps the law to stay consistent without losing its formality, without descending into politics itself. It is only upon those grounds that judicial review can be considered legitimate.

At the same time, doctrine is not even close to being a prescription for all that ails the federal system or the task of judicial review. It is not a solution or a problem, it is simply a fact of federalism. To the scholar's benefit it is one of the more easily approached variables in a federation. The current state of doctrine is plain for everyone to see, yet it goes virtually unconsidered by most political scientists. It is a variable worthy

of independent study for the main reason that courts continue to resort to the practice of doctrine regardless of the favour in which it is held by any particular theory or theorist.

CHAPTER 3:

HISTORICALLY RELEVANT DOCTRINES

3.1 A RESPECTED APPROACH

All three federations chosen for study here have a distinguished tradition of federalism and of judicial review upon which volumes have been written. This tradition has provided the raw material for the most eminent constitutional scholars of these nations. Herman Pritchett, Edward Corwin and Forrest McDonald in the U.S.; Bora Laskin, F.R. Scott, Peter Russell and Alan Cairns in Canada; Geoffrey Sawer, Leslie Zines and Owen Dixon in Australia. All have chronicled the dynamic between the courts and the federal constitutions of these states. If one looks at the current literature on these enduring themes, it seems as though the field's glory days have passed. Not only is there less attention paid to these matters, there also seems to be less of a need for the formal legal and political analysis of federalism used by the authors.

The previous chapter sought to explain why ignoring the content of contemporary judicial review provides an impoverished account of federalism. A shift has taken place in the constitutional interpretation of federalism of all three nations in the past twenty years. Landmark decisions have revived federalism as a matter of debate in high courts. In fact, developments in all three federations show that judicial doctrines of federalism are a very real and critical determinant of federal character, as indeed they have always been.

Doctrines of the courts were often viewed in the past as the main determinant of federal evolution and they were subsequently studied in some detail. Today's courts are both aware of this previous evolution and well attuned to it. Thus, understanding the approaches of their predecessors is important to studying the present courts. The stable of doctrines previously used by the courts provides the practical and theoretical foundation upon which present doctrines are constructed.

This chapter begins with a review of the way in which power was divided between governments in the three federations at their outset. This is followed by a brief comparative sketch of the courts' historical approach to division-of-powers questions. The overview is intended to provide background for detailed discussions of contemporary judicial decisions, as well as show the place of doctrine and its logic as a variable in federal evolution as well as how it has fallen into disfavour in both political and legal circles.

3.2 The Constitutional Frameworks

The United States is the first modern federation. K.C. Wheare, the most celebrated observer of federal government, when articulating his famed 'federal principle' wrote that the "federal principle has come to mean what it does because the United States has come to be what it is."[1] There was something of a fundamental innovation in the founding of the United States - a novel approach to which others throughout history have responded when pondering new constitutional arrangements. The founders redefined conceptions of liberty

and government for generations to come. Americans also changed the definition of federalism. The ancient and accepted definition of federal government was much more confederal (in effect decentralised) than what was to emerge from the Philadelphia meetings of the constitutional convention. Martin Diamond believes that Americans, though not the first federalists, certainly altered the concept in a significant way by surrendering power and real sovereignty, through the people, to a national and competing loyalty.[2]

The American founding is well documented and requires little elaboration here. The thirteen original states whose delegates met in Philadelphia undertook a unique exercise in unity, but created a federalism that by most standards today would be considered de-centralized. Key to their creation was the concept of enumerated powers. The American national government is a government of enumerated powers. The constitution lists the powers assigned to the Congress in detail. The powers of the states are not similarly enumerated. This is the trademark of American federalism's logic. Under the first, post-revolutionary constitution, the Articles of Confederation, the states maintained a large degree of sovereignty. The States only reluctantly gave up some of their functions to the national government with the second and present constitution.[3] Anything not covered in the

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[1] K.C. Wheare, *Federal Government*, 3rd ed. (New York: Oxford, 1953), 12.
[2] Diamond's analysis is based upon his reading of the *Federalist Papers*. See, Martin Diamond, "The Federalist's View of Federalism," in George C.S. Benson, ed., *Essays in Federalism* (Claremont: Claremont Men's College, 1961).
[3] Specifically, Congress was given the power in Article 1(8) to create taxes, borrow, regulate commerce among the States, create rules of naturalization and bankruptcy, coin money, control counterfeiting, set up a post office, control patents and copyrights, create courts, punish piracy, declare war, create an army and navy, call forth militias, govern the capital district and make all laws considered necessary and proper to the exercise of the foregoing powers. The states were specifically prevented from engaging in these pursuits by Article 1(10).

list of Article 1, section 8 was retained by the states. The Articles of Confederation had assumed the sovereignty of the states and the new constitution made sure that orientation continued. Under the Tenth Amendment, all powers not delegated to the national government are retained by the states or the people of the states. This so called "residual" power ensured that matters not foreseen by the founders that did not meet the descriptions found in Article 1 (8) would remain the responsibility of the states. Theoretically time was on the states' side.

In a government of enumerated powers, the matters assigned to a level of government are symbolic of its status. By that count, the American federal government fared better than its predecessor under the Articles of Confederation, but still did not appear to be dominant in relation to the states. The sixteen grants of power assigned to Congress by section 8 have had to evolve into the significant powers they now are. For example, the military powers given to the federal government have obviously grown exponentially with the rise of the United States as a major military force. The definition of the military power has not changed, but circumstances have just made it a much more significant set of responsibilities than it was when the constitution was first written. In contrast, the most important domestic power assigned to the federal government currently is interstate commerce. It was and is potentially very expansive, but has required judicial review rather than circumstances to reach its present wide scope.

The Canadian founding followed the American, though not for close to a century. The Canadian founders were very much aware of their southern neighbour (due largely to a

fear of continental manifest destiny) and were wary of the traits of American federalism which, in their view, helped to encourage the Civil War. At the same time, the Fathers of Confederation were convinced of the need for a federal arrangement in British North America.[4] The unification of Upper and Lower Canada had been a disaster and some form of decentralization was clearly needed. Too much power in the hands of unit governments, however, was clearly seen as a problem. Therefore, an approach entirely different from the American was taken when dividing governmental responsibilities in the Canadian constitution. The Canadians drew two lists of subjects, one for the national government and one for the provinces, rather than enumerate the powers of one level and depend upon residual sovereignty to define the rest. Section 91 of the *British North America* (later *Constitution*) *Act* of 1867 assigns a general power to make law for the "peace, order and good government of Canada" (or p.o.g.g.) to Parliament as well as a list of thirty specific powers on which it may legislate. Then, instead of leaving the rest to the provinces, fifteen specific heads of power were enumerated and assigned to the provincial legislatures under sec 92 - including a general category of property and civil rights as well as matters of a "merely local and private nature in the provinces." The residual power, by contrast with the American scheme, was left to the federal government.[5]

Historically, scholars have suggested that the Canadian constitution was meant to be centralized. As evidence, they pointed to the p.o.g.g. clause, the federal appointment of Lieutenant-Governors (the representative of the Crown and the holder of the Crown's

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[4] See Jennifer Smith, "Canadian Confederation and the Influence of American Federalism," *Canadian Journal of Political Science* XXI, no. 3 (1988): 444-463.
[5] By section 91 (29) of the *Constitution Act, 1867.*

discretionary powers), the powers of reservation and disallowance (whereby the Governor General could either hold or refuse assent to provincial bills), and the lowly status of the responsibilities accorded the provinces. In addition, they found no shortage of arguments in the debates preceding Confederation that the new Canada should resemble a legislative union more than the American federal system. Canada's first prime minister, Sir John A. Macdonald, was known to prefer a unitary over a federal state, at least in theory.[6] That said, critics of this historical interpretation have tried to demonstrate exactly the opposite intention. The selection of phrases such as 'property and civil rights' which had a fairly expansive meaning,[7] and the compromises attendant to the federal settlement are thrown back at the centralists as proof.[8] Nevertheless, the constitution clearly has a capacity for central-government dominance. In fact, Canada was able to become deeply involved in two world wars, with the central government taking unprecedented control over nearly all aspects of Canadian life, without truly compromising the constitution. At the same time, the document has proven sufficiently ambiguous to allow a more decentralised federation to result when the appropriate grounds are found.[9]

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[6] Bora Laskin, "Peace, Order and Good Government Re-examined," *Canadian Bar Review* 25 (1947)and F.R. Scott, "Centralization and Decentralization in Canadian Federalism," *Canadian Bar Review* XXIX (1951).

[7] W.R. Lederman suggested that property and civil rights had an established meaning in British North America before Confederation. "The Fathers of Confederation knew all about this - they lived with it every day - and naturally they took the broad scope of the phrase for granted." W. R. Lederman, "Unity and Diversity in Canadian Federalism," *Canadian Bar Review* LIII (1975), 601.

[8] The post-Confederation provincial rights movement is ably chronicled in Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1991).

[9] See Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism*, Royal Commission on the Economic Union and Development Prospects for Canada, vol. 71 (Toronto: University of Toronto Press, 1990), especially Chapter 3, "The Confederation Settlement."

The Australian founders, like the Canadians before them, were keen observers of other federations when setting about to transform their own loose association of colonies into a more unified whole. As latecomers to federalism (they are just about to celebrate a centennial), they had the benefit of the experience of two predecessors when settling upon their own distribution of governmental power. The Australians found much to recommend the U.S. constitution. While they remained great fans of parliamentary responsible government, the Australian founders differed from the Canadians on federalism. The Canadian constitution was the most prominent marriage of federalism and parliamentary government available for emulation, but was determinedly overlooked. The Canadian constitution offended antipodean sensibilities in at least two ways. First, the overt federal sway over provincial affairs represented in the appointment and presumable control of Lieutenant-Governors, as well as the provisions for reservation and disallowance, would not do. Second, the subject matters assigned to the provinces were seen as too inconsequential, giving the units a lesser status in the division-of-powers.[10] The American constitution was at least superficially more 'federal' and thus more appealing to the no-nonsense founders.

The Australians paid particular attention to Lord James Bryce, whose *American Commonwealth* was standard reading for admirers of American federalism at the time. Under the sway of Bryce, and given their own seminal brand of states' rights, the Australian delegates opted for a Commonwealth government of enumerated powers with the residue remaining in the states. A Canadian observer of the Australian constitution, accustomed to

finding two lists of powers, will search in vain for a list of state powers comparable to the enumeration in section 92 of the Constitution Act, 1867. There is no list. The states - as the semi-sovereign colonies that they were - carried out regular functions before federation and they simply continued those jobs post-federation. The nominal purpose of federating was simply to promote standards in areas of common concern. The rest was left to the states. Therefore, the new Commonwealth government was accorded some responsibilities in section 51 of the *Commonwealth of Australia Constitution Act*, and expected to act within the confines of those enumerated powers essentially as a servant of the states. Section 107, much like the American Tenth Amendment, secures the residuary powers to the states. Specifically it preserves for a state those powers that it had as a colony, "unless it is by this Constitution exclusively invested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State."[11]

3.3 A Brief Review of American Federalism in the Courts

The history of division-of-powers jurisprudence in the U.S. is almost synonymous with the fate of the Congress' commerce power. The constitution provides in Article 1, section 8 that "Congress shall have the power... To regulate Commerce with foreign nations, and among the several states."[12] Among the enumerated powers of Congress and hence the national government, this is the closest thing to a plenary power. That it has become so is due almost solely to the interpretation of the court. It has been very much the case in this

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[10] Leslie Zines, "Federal Theory and Australian Federalism: A Legal Perspective," in Brian Galligan, ed., *Australian Federalism* (Melbourne: Longman Cheshire, 1989), 16.
[11] *Commonwealth of Australia Constitution Act*, sec 107.
[12] *Constitution of the United States*, Art 1. Sect. 8.

century that the degree to which the federal government is permitted to regulate commerce determines the degree to which the federal government regulates America. Apart from the imagination of Congress, there has been little limit on commerce clause activity. When the court has found reason to be restrictive about Congress' power over commerce, the nation has experienced a heightened degree of *laissez-faire* economics or regulation by the states. When the court has been more responsive to claims for federal jurisdiction, the federal government has been more active. Present day interpretation of the commerce clause continues to be the crux of federal government interventionism and is examined more closely in Chapter Four.

In his comprehensive account of the theory of American constitutionalism, Bruce Ackerman has divided the period since the founding of the republic into three segments; a federalist, middle and modern republic.[13] These categories also roughly correspond to mega-trends in the evolution of federalism and the commerce power both in and out of the court and will thus be used to segment this brief tour. That there is a correspondence between the two is far from coincidental. While Ackerman is at all times aware of federalism as an element of theory in American politics, his concern is much more wide ranging. Nonetheless, federalism does have a way of insinuating itself into the most critical conflicts of the day, often providing the institutional framework or backdrop against which more profound moral and social conflicts are fought.

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[13] Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap, 1991), especially Chapter 3 "One Constitution, Three Regimes." Ackerman rejects a 'court-centred' view of constitutional development. He wishes to expand beyond the legal opinions to make a more holistic effort at understanding evolution. The categories he describes, however, do fit a court-centred analysis.

3.3.1 THE FEDERALIST ERA

The post-Philadelphia generation of American governors remained heavily populated with the fathers of the nation. Successful in their founding enterprise, many went on to man the institutions they had created, armed with the distinct nationalist vision of the new republic they had helped to bring to life. Not surprisingly, the first generation of American national politicians sought to aggrandise and empower their new creation, to the obvious detriment of the powers of the states.

The immediate post-Philadelphia Supreme Court did not distinguish itself particularly well in this campaign for the new nation. Instead it lived up to Alexander Hamilton's characterisation of it as the 'least dangerous' branch.[14] Historically speaking, the tenure of the first three Chief Justices was rather undistinguished and uneventful, a point proven by the difficulty administrations had in even recruiting and holding onto personnel for the court. The first Chief Justice, John Jay, resigned to pursue the governorship of New York. Jay was followed by John Rutledge whose interim appointment did not receive the approval of Congress. The third Chief Justice, Oliver Ellsworth, the man responsible for the *Judiciary Act* which created the court, held the job for four years, but ill health shortened his stay in office. While the judicial careers of these men were unremarkable and kept the court

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[14] In *Federalist* 78, Hamilton argued, "whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary from the nature of its functions will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them....it may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its

in the shadows, their successor led a revolt which changed the court's standing in American politics.

John Marshall was sworn in as Chief Justice in 1801 and from that point on left an indelible mark on the relationship between the Supreme Court and the other branches of government. In the bluntest sense, the Supreme Court became a 'player' under Marshall, claiming for itself the power to interpret authoritatively the constitution. The most famous decision to come from his pen was *Marbury v Madison*, in which he claimed for the court that authoritative interpretive power. While legal theorists and political scientists still debate the soundness of his reasoning and the appropriateness of his claim, it was at that point that the court established *de facto* legitimacy in this endeavour- legitimacy enough to weather the alternate claims of presidents to come.[15]

On matters of federalism and commerce, one decision stands out in the Marshall era. In *Gibbons v Ogden* the court first considered the commerce power, and extended it along nationalist lines. The majority opinion by Chief Justice Marshall also provided the grounds for future reasoning on commerce. The court was asked to decide whether the extension of a monopoly over steamboat service by the State of New York could exclude those wishing to operate service between states (in this case between New York and New Jersey). Gibbons was authorised by Congress to run interstate service, while Ogden was licensed by the holders of the monopoly granted by New York State. The true question at hand was which

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judgements." Jacob E. Cooke, ed. *The Federalist Papers* (Middletown, CT: Wesleyan University Press, 1961), 522-23.

law prevailed. The answer was equally simple. For the court, "the acts of New York must yield to the law of Congress." However, Marshall also took the opportunity, partly in response to the arguments of counsel, to discourse on the scope of commerce. Marshall did not grant that a power over commerce was "complete and entire" as Daniel Webster had argued before him. Rather, the Chief Justice characterised the grant as divisible - much as commerce among foreign nations could stand alone, so could commerce among the states. He owned that even commerce among states to some extent existed as an internal matter, yet commerce within states could be regulated by Congress. But Marshall made a now famous disclaimer. "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...and which does not extend to or affect other States." (emphasis added) Thus "the completely internal commerce of a State... may be considered as reserved for the State itself."[16] This dictum was incorporated in later doctrine as a distinction between inter and intra state commerce.

Following the long tenure of John Marshall which ended with his death in 1835, Roger Taney was appointed Chief Justice. Taney was not known to share the nationalist sentiments of his predecessor and in some measure pushed the country to instability by aiding the states' rights cause in the south. Taney oversaw the most infamous period in the court's history, represented well by its most notorious decision - *Dred Scott v Sanford.* Dred Scott, a former slave, was denied his freedom which had been gained by transport to one of the slave-free states, as he had returned to Missouri which still practised slavery. The

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[15] See Larry Alexander and Fredrick Shauer, "On Extra-judicial Constitutional Interpretation," *Harvard Law Review* 11(1997).
[16] *Gibbons v Ogden*, 9 Wheaton 1 (1824).

decision, in effect, nullified the Missouri Compromise which confined the practice of slavery to the old states of the South and kept newly formed states in the West slave-free. This decision had no small part in heightening tensions in the run-up to the Civil War. By invalidating the Missouri Compromise the court demonstrated the difficulty of settling the slavery issue. While the decision itself was not really about federalism, state secession certainly is. The southern states seceded from the union four years later, the *Dred Scott* decision being a prime indication that compromise on the issue of slavery was unworkable.

3.3.2 The Middle Republic

The American civil war was many things. It was a struggle over the appropriate moral vision of a nation, and it was a quarrel between old and new, north and south, industry and agriculture, conservatism and progress. It was also a fight over federalism. Just as the earliest years of the republic and the formative debates that preceded it were about articulating a political theory for the nation, the civil war and the reconstruction period were very much about redefining the political philosophy of the republic. Much as the court had the opportunity to act as a provocateur before the war, it also had a hand in shaping the nation in its reconstruction.

The South's defeat and the illegitimacy of the claim to states' rights may have seemed to put to rest any doubt about the status of the national power. The Supreme Court, however, did not necessarily agree. The middle republic is marked by a distinct hostility to the extension of federal power. The Republican Congress, which assumed the task of reconstruction, immediately pursued the passage of the Fourteenth Amendment. The

amendment includes an affirmation of citizenship for all those born or naturalised in the United States. It also includes the provision that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[17] While the federalist era had a nationalist inclination, the post war Republican regime had an even more heightened sense of the need for a strong federal government. The court's response to the Fourteenth Amendment and the attempt to expand national power on those grounds is typical of the style of jurisprudence following the war.

The *Slaughter-House* cases are generally cited as the prototype of the court's work in this period.[18] Ackerman tries to paint a more sympathetic picture of the court by emphasising the severity of the challenges that it faced. He believes the court was forced to synthesize pre and post civil war constitutionalism and that such a task necessitated some ugly compromises and difficult decisions. To make a workable whole out of the concepts inherent in *Dred Scott* and the Fourteenth Amendment required the court to walk a fine-line. The *Slaughter-House* cases did exactly that. The court refused to extend the provisions of the Fourteenth Amendment to invalidate discriminatory state legislation. The cases at hand challenged the Louisiana legislature's grant of a monopoly over butchering in New Orleans to one central slaughterhouse. Butchers excluded from the monopoly or unwilling to work in the central facility protested on the grounds that their equality of citizenship, guaranteed by

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[17] The amendment gave primacy to national citizenship over state citizenship for the first time. Ackerman, *We the People*, 81. *The Constitution of the United States* Amendment XIV, sec 1.

the Fourteenth Amendment, was compromised by this policy. The court, replying in the negative, interpreted the Fourteenth Amendment to be strictly about race and not a guarantee to other kinds of equality. While it could be seen to be moving forward the post-war consensus on that front, the court was indulging state-ordered discrimination on other grounds by excluding appeals to other forms of inequality. "We doubt very much whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[19]

The jurisprudence of the middle republic develops two concepts essential to later commerce doctrine. First, the high court found in *Hammer v Dagenhart* that to manufacture is not necessarily to engage in commerce. The case itself concerned the constitutionality of a Congressional law banning the transportation of goods in interstate commerce which were the product of child labour. The defendant was charged under the legislation for shipping goods produced by child labour in his North Carolina cotton mill. The defendant challenged the ability of Congress to make laws regulating intrastate activities under the auspices of an interstate power. The process of manufacturing was argued to be an activity exempt from Congressional oversight. While the products of the mill may have been destined for use in interstate commerce, it was argued that their manufacture was an activity that took place wholly within the boundaries of a state. The court acknowledged that commerce 'succeeds to manufacture', but accepted the argument that the process of manufacture could be isolated from the trade and transportation of goods which is more properly understood to be interstate commerce. The scope of the commerce power was subsequently limited so as not

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[18] *Slaughter-House Cases* 16 Wallace 36 (1873).

to apply to activities which were demonstrated to occur wholly within a state. By divorcing manufactures from interstate commerce, even though the products were destined for interstate trade, the court limited Congress' ability to police the national economy and particularly impaired its ability to impose labour standards.

Second, in this period the court begins to refer to the process of commerce as a 'stream.' As early as 1871 with *Daniel Ball* and into 1905 with *Swift*,[20] the court characterised commerce as a stream or flow, which involves various stages. Products enter the stream of commerce at different points, which helps to determine the scope of congressional power. Before a product enters the stream, it is excluded from regulation. Once it is in the stream, it can be regulated. Which activities and stages were in the stream became critical to future determinations of Congress' power.

3.3.3 New Deal

The New Deal period belongs neither to the middle nor to the modern republic. Like the immediate pre-civil war period, the New Deal represents such a state of constitutional flux that it cannot exemplify anything other than a shift. The Supreme Court closed the middle republic with a series of decisions that frustrated attempts by the national government to relieve the vagaries of the depression. At no point in American history has a conflict between the Supreme Court and the two other branches of American government been so plain, and the consequences so high, as during the first two terms of Franklin Roosevelt's presidency. FDR and the New Deal Congress believed they had a clear mandate

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[19] Ibid., 81.

to effect considerable change in the American way of life. They were met with an obstructionist court which held up the progress of the expansionist program of the era.

The opening shots in the battle over the New Deal came in the lower federal courts, which issued injunctions at an astonishing rate, effectively stalling the application of federal regulations without actually resolving the question of their constitutionality. The administration was reluctant to bring test cases to the courts for fear of losing and was usually excluded from many of these challenges by clever legal tactics anyway.[21] When cases did go to the Supreme Court, they did not fair much better. In the 'hot oil' case, the court dealt the first major blow to the legislative program of the New Deal, invalidating portions of the *National Recovery Act* (NRA)- a centrepiece of the administration's agenda.[22] This initial defeat was followed by a brief reprieve in the 'gold clause' cases, which upheld the administration's plan for monetary policy, allowing federal debts to be paid in deflated dollars as the administration wished rather than remain redeemable in gold.[23] This forestalled an increase in the value of government debts at a time when it could least afford it. Shortly thereafter, in true roller coaster fashion, the court then invalidated the *Railway Pension Act*, altering for the worse the financial well-being of a million rail workers

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[20] *The Daniel Ball* 10 Wallace 557 (1871), *Swift and Co. v U.S.* 196 US 375 (1905)
[21] Industrial opponents of the New Deal launched 'friendly' lawsuits against firms for obeying New Deal legislation. These suits were usually filed by the firm's own shareholders. This prevented the government from having an opportunity to defend its laws as the case was a private one between the firm and its 'disgruntled' shareholders. In such cases, with both parties really seeking the same outcome, vigorous defences of the legislation were noticeably absent. Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Politics of Upheaval*, vol. III (Boston: Houghton Mifflin, 1960), 448.
[22] *Panama Refining Co v Ryan* 293 U.S. 388 (1935).
[23] *Norman v Baltimore and Ohio Railroad* 294 U.S. 240.

and their families.[24] That case in particular seemed to foreshadow a negative ruling on the broader social security projects of the government then wending their way to the court.

The darkest day of the New Deal in the Supreme Court would come three weeks after the railway pension case on May 27, 1935, otherwise known as Black Monday. While previous decisions had held out some hope for a reversal of New Deal fortunes, with close and seemingly ideological divisions on the court, the trio of decisions released on this fateful day were all unanimous. The most important of the three decisions, *Schecter Poultry*, invalidated the whole of the *National Industrial Recovery Act (NIRA)*.[25] The Act provided for minimum wages and maximum hours of work. The Schecter corporation, which was charged with violating the act, slaughtered poultry from farms in New York State and Pennsylvania in its Brooklyn slaughterhouse for local retail sale. The slaughtered chickens were not sold through interstate commerce, but arrived at their demise through it. The question for the court was whether or not the stream of commerce ended at the Schecter slaughterhouse's door. The court agreed that it in fact did and that there was no interstate element relevant to the slaughter of the chickens and that Congress had thus invaded the reserved power of the states to control working hours and wages.

In the early days of the court's conflict with the New Deal, partisans of the administration ridiculed the older, conservative members of the court who were hostile to

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[24] *Railroad Retirement Board et al. v Alton Railroad Co. et al.* 295 U.S. 330 (1935). For a sympathetic account of the railroaders' predicament see Chapter 2 "Mr. Justice Roberts and the Railroaders," in William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

the administration's efforts as "the four horsemen,"[26] a menacing holdover from a previous era. But on Black Monday, the whole court, including the judges whom the partisans thought were more sympathetic to their project, rejected New Deal legislation. Justice Brandeis, one of the three reputedly liberal justices, not only agreed with his colleagues, he made a point of demonstrating his displeasure to a confidant of the president in the robe room following the announcement of the decision. Arthur Schlesinger recounts Brandeis giving this message to be passed on to Roosevelt:

> This is the end of this business of centralization and I want you to go back and tell the president that we're not going to let this government centralise everything. Its come to an end. As for your young men, you call them together and tell them to get out of Washington- tell them to go home, back to the States.[27]

The anger the court experienced in return was also rather substantial. Speaking to reporters in the Oval Office, President Roosevelt, with a copy of the *Schecter* decision sitting on his desk, decried the court for returning the country and constitution back to the 'horse and buggy era.'

While Justice Brandeis may have been frank in the robing room about the consequences of the decision, the formal reasoning of the court was much more muted. The court relied less upon a dislike of centralization than on a commitment to a limited textual view of the provisions of the constitution. The court was unwilling to widen the stream of

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[25] *Schecter Poultry Corp. v U.S.* 295 U.S. 495 (1935).
[26] Justices Willis Van Devanter, George Sutherland, Pierce Butler and James McReynolds made up the foursome. The 'liberal' justices were Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone. Charles Evans Hughes, who was the Chief Justice, and Justice Owen Roberts represented the crucial swing faction on the court.
[27] Schlesinger, *The Politics of Upheaval*, 280.

commerce and steadfastly refused to bring the context of the depression into its reasoning. "It is not the province of the Court" they argued, "to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the federal constitution does not provide for it." Felix Frankfurter, writing in the *Harvard Law Review* with legal realist pioneer Henry Hart, viewed this as abhorrent behaviour since the court's relationship with Congress had historically been much more flexible. The warning they believed to be implicit in the tone of the decision was particularly disturbing. "Against such advisory pronouncements," they wrote, "the constitutional theory and practice of a century and a half unite in protest."[28]

The court's unanimity in opposition to the New Deal was short lived however. By the fall of 1935 the conservative faction and the contending liberal group had begun to polarize. Caught between these two sides were Chief Justice Charles Hughes and Associate Justice Owen Roberts. The direction of their sympathies was clearly going to be crucial to outcomes. Immediately after *Schecter*, the two swing votes continued to reject New Deal legislation. 1936 saw more rejections of federal power under the commerce clause. The court continued to define the power narrowly and excluded activities which Congress was undertaking. *Carter Coal* did for the beginning of the stream of commerce what *Schecter* had done for its terminus. The court rejected the constitutionality of labour standards applied to the coal mining industry on the grounds that the production of coal was outside the scope of interstate commerce. The manufacture and sale of coal were to be looked upon as two separate and distinct activities and during production coal mining was not in the stream of

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[28] Ibid., 283.

commerce. Drawing directly from *Schecter* the court claimed that "in the *Schecter* case the flow [of commerce] had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same."[29]

Other powers were also narrowly interpreted. *U.S. v. Butler* did to the *Agricultural Adjustment Act* (AAA), another cornerstone of the reform package, what *Schecter* had done to the NIRA. In the *Butler* decision, the court refused to accept the justification for intervention in agriculture under Congress' spending power. The whole New Deal agricultural policy was thrown out with the decision. This had a significant negative effect on the reputation of the court. Roosevelt, who had harboured hostility towards the court as far back as 1929, was now firmly convinced of the need for change.[30] The split in the court confirmed his suspicions that a personnel change would result in the more favourable verdicts he sought. Emboldened by a landslide victory in the 1936 elections, Roosevelt prepared a legislative package for altering the court and sought supporters in Congress to ensure it would pass. The plan focused on changing the composition of the court by increasing its size to accommodate six more judges whom FDR himself would appoint. Shortly after Roosevelt presented the court-packing plan to Congress, the famous "switch in time saved nine."[31] The court finally relented and cobbled together a new majority in support of the New Deal in 1937.

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[29] *Carter v. Carter Coal* 298 U.S. 238 (1936), 309.
[30] William Leuchtenburg, "The Origins of FDR's Court Packing Plan," in Phillip Kurland, ed., *Supreme Court Review, 1966* (Chicago: University of Chicago Press, 1966), 348.
[31] The actual 'switch' by Justice Roberts was in *West Coast Hotel v Parrish* which upheld the state of Washington's minimum wage law. The case was decided in chambers several weeks before the court packing plan made its way to Congress. National regulation would not be upheld until later in the year with the more consequential *NLRB v Jones &*

3.3.4 MODERN ERA

The National Labour Relations Board (NLRB) was an agency set up by the New Deal Congress to enforce labour standards in interstate industries. The NLRB was better prepared than many of its hastily constructed counterparts for a constitutional challenge to its authority. The Board counted among its staff some of the more astute federal government lawyers of the time. Under their leadership and the pressure of the court-packing plan which was making its way to Congress, the New Deal won its first major battle in the Supreme Court.[32] *NLRB v Jones and Lauglin Steel* was a clear about face from the court. It expanded commerce along the lines first envisioned in *Gibbons v Ogden*.[33] Whereas *Schecter* and *Carter Coal* had shortened the stream of interstate commerce, the *NLRB* case took a more holistic view of how interstate commerce was being carried out and thus where national regulation was necessary or allowable. In the *NLRB* case, the court gave the first favourable consideration to the idea that labour practices had an 'effect' on interstate commerce regardless of their local or intrastate nature outside the stream of commerce. Even indirect effects on interstate commerce, argued the 5-4 majority, could be regulated by Congress. This significantly expanded the scope for Congressional oversight. Chief Justice Hughes, for one, had noticeably come around to the view that outcomes and political background needed

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Laughlin Steel. The timeline is important for those who suggest something other than political pressure changed the court's attitude. See Cushman, *Rethinking the New Deal Court*, especially Part II "A New Trial for Justice Roberts."

[32] Some dispute exists about whether it was the effectiveness of the NLRB's case that determined the positive outcome. If one ascribes greater weight to the influence of the court-packing plan, the skill of the NLRB lawyers in relation to other New Deal lawyers is less relevant. See, Barry Cushman, "A Stream of Legal Conciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*," *Fordham Law Review* 61 (1992) and Cushman, *Rethinking the New Deal Court*.

to be considered. Compared to the tone in *Schecter*, he rejected the idea that "we are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."[34] Rather, the court considered the effects of not regulating wages and working hours in the steel industry generally and found that by allowing differing practices among the several states, interstate commerce was affected.

This inaugurated the so called 'constitutional revolution' of 1937. From this point on the commerce power provided justification for countless regulatory forays by the federal government. The self-styled conservative historian Forrest McDonald writes that, "the court in sum, had stepped out of the way and it would stay out of the way for more than a generation. The only remaining restraints upon Congress and the President were democracy and bureaucracy - neither of which is to be found in the constitution."[35] If the revolution was a travesty of constitutionalism for conservatives, the general consensus among court watchers was quite the opposite. Most of the legal academy was supportive of the New Deal from the start. More importantly, they supported a change in court methodology that allowed the expansion of commerce along the lines of necessity rather than originalist interpretation. By expanding the doctrine of commerce to include activities that affected interstate commerce indirectly, the door was opened for Congress to expand the regulatory state.

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[33] *Gibbons v Ogden* 9 Wheaton 1 (1824)
[34] *NLRB v Jones and Laughlin Steel* 301 U.S. 1(1937), 41.

An alteration in personnel and approach was completed and the revolution was finally confirmed four years later in *U.S. v Darby*, which overruled the extreme *laissez-faire*ism of *Hammer v Dagenhart*. From that point on judicial deference to the various schemes of Congress continued, as did the consequent, rapid expansion of the national governmental apparatus. It was only to be checked marginally by the court in 1976 with *National League of Cities v Usery*. The expanded commerce clause became the main justification for national governmental activity and remained unchallenged by the court for nearly 50 years. The logic of this expansive doctrine was pushed to its limit in *Garcia v San Antonio Metropolitan Transit Authority*. This study takes *Garcia* as a turning point in the development of recent federalism doctrine and that case will open Chapter Four.

3.4 A Brief Review of Australian Federalism in the Courts

In none of the federations studied here has one single case marked such a dramatic reversal of judicial doctrine as the *Engineers*[36] case did in Australia. That 1920 case marked a complete turnaround by the Australian High Court on the interpretation of federalism. In both Canada and the United States, change has been much more incremental. While the constitutional revolution of *NLRB v Jones* in the U.S. may be cited as a definitive turning point in the modern era of American constitutional law, it only signalled an alteration already evolving in the court's thinking. The Australian experience with federal judicial review has been much more uni-directional. Constitutional interpretation experienced one dramatic push and has only recently acquired the subtlety that creates a degree of balance.

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[35] Forrest McDonald, *A Constitutional History of the United States* (Malabar, Florida: Kreiger Publishing, 1982), 199.

The history of federalism doctrine is best considered with the *Engineers* case serving as a point of demarcation between the founders' era and more recent doctrines.

3.4.1 THE FOUNDERS' COURT

The immediate post-federation period was filled with constitutional developments. The High Court was set up without much delay following the creation of the Commonwealth. While the federation conferences agreed on the need for such a court in a properly constituted federation, it took two years to settle on its legal form and to pass the enabling legislation through the first parliament. Prominent constitution-makers were recruited to the initial three justice panel and they immediately set about emulating their colleagues in other federations. They met with some popular resistance for such pretensions. Only the eminent status of those initially appointed to the court kept it in good stead. Public opinion in the states was cautious about judicial review as the court, not surprisingly, was perceived to be a nationalising force. Unlike the early American court, there was no shortage of work for the justices, who were also burdened with duties on other judicial and quasi-judicial panels and heard their cases in the various state capitals rather than in one central location. Only a small fraction of the court's work was appealed (with its permission) to the JCPC.[37] Brian Galligan, in a comprehensive history of the court, states that these early years

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[36] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd.* 28 C.L.R. 129 (1920)

[37] Appeals to the Privy Council were not ones of unrestricted right. Such appeals were known as *inter se* (as of grace) and depended upon the grant of a certificate from the High Court itself. Australia, particularly in comparison with Canada's long deference to the Privy Council, may be congratulated for its independence from the Empire on this count. The original draft of the constitution sent to London for the approval of the Imperial Parliament provided for no appeals at all from the High Court. Joseph Chamberlain, Secretary of State for the colonies, refused to allow final authority to rest with the new court. The Australians were equally adamant. The mechanism for *inter se* appeals was a compromise, but one that

produced an 'even-handed' jurisprudence that relied "more heavily on the sagacity and authority of the justices than on logical consistency or a literal construing of the constitution's text."[38]

However, some interpretive movements were made in this early period. Pre-eminent among them was the establishment of the doctrine of implied immunity. Essentially, the doctrine dictated that neither level of government, co-ordinately sovereign as they were, could be subjected to the will of the other. This line of interpretation had little to do with determining the substantive meaning of items in a list of powers such as those in section 51. The co-ordinate vision of federalism (which K.C. Wheare advocated as the ideal expression of the 'federal principle'[39]) was swallowed whole by the first generation of Australian constitutionalists. What they admired in the American model was the sovereignty of the units and federal government. Accordingly, the court became a vigilant patrolman on the border between federal and state power; keeping both sides in their respective realms and encouraging a tough separation of functions and applicability of law.

Implied immunity went so far as to relieve Commonwealth government employees from having to pay state income taxes. *D'Emden v Pedder*,[40] decided only a year after the court began hearing cases, found the state government practice of imposing a stamp duty on the salaries of federal employees unconstitutional. With American precedents at their side,

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left the colonial court with control over the finality of its decisions in matters dealing with the limits of Commonwealth or state powers. Appeals to the JCPC were finally abolished in 1968. See Galligan, *Politics of the High Court*, 75-76.

[38] Ibid., 80.

[39] K.C. Wheare, *Federal Government*, 3rd ed. (New York: Oxford, 1953), 11-12.

McCulloch v Maryland[41] foremost among them, the court ruled that the nature of the federal system required governments to be immune from such interference in their activities, unless expressly authorized by the constitution. They believed the stamp duty to be unjustified in this regard and disallowed it, giving the Commonwealth an early endorsement of its supremacy.

Following that principle, the Court decided two years later that state controlled railroads were equally immune from the interference of Commonwealth laws. In the *Railway Servants* case, the court exempted state railway employees from Commonwealth labour arbitration laws. State regulation of the railways is one of the most questionable accomplishments of Australian federalism. Unlike Canada which federated in part on the promise of a national rail system, the Australian rail infrastructure predated federation and thus lacked any degree of standardization. The legacy was a system that required passengers to change trains on interstate journeys, as the engineering specifications of the tracks were incompatible. In addition to varying infrastructures, the employees of these state enterprises were subject to different labour laws. The Commonwealth government tried to create a standard labour regime through a common court of arbitration. In this effort it was no more successful than the wide bodied trains of Victoria were at traversing the narrow gauge rail lines of South Australia.[42] Basically the court extended the idea of immunity it developed to

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[40] 1 C.L.R. 91 (1904).
[41] 4 Wheaton 316 (1819).
[42] There are now numerous interstate lines which were completed at great expense to both State and Commonwealth governments. However, even today gaps remain in the system. A complete account of the federal challenges to rail standardization can be found in, Garth Stevenson, *Rail Transport and Australian Federalism* (Canberra: Centre for Research on

protect the Commonwealth in *D'Emden v Pedder* so that it operated in the opposite direction as well - to shield the states from Commonwealth control. Again the court made pointed reference to American precedent, reinforcing its support for the concept of co-ordinate federalism. The majority quoted from the American case of *Collector v. Day* that "in respect of the reserved powers, the State is as sovereign and independent as the general government."[43] The inclusion of *Collector v Day* in the *ratio* of the case signalled zero tolerance for any interference.[44]

The *Railway Servants* case also strengthened the other significant doctrine of the founders' court, that of reserved powers. Leslie Zines describes the doctrine as a product of the interpretive problem caused by comparisons to the Canadian constitution. The Canadian constitution is unique among the three countries examined here for its enumeration of the powers of both the federal and unit governments (the 'lists' in section 91 and 92). The reserve power is theoretically left to the federal government. Interpreters of the Canadian constitution have to determine which exclusive power a particular governmental activity falls under. So is the requirement of a business license (to borrow Zines' example) a matter of 'trade and commerce' and thus federal responsibility, or is it a matter of property and civil rights and thus provincial responsibility?[45] The residual power is less relevant a category when two lists provide so many possible justifications. By contrast, the only positive grants

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Federal Financial Relations, 1987). Chapter 2, "The Gauge Problem" describes some of the physical challenges presented by differing engineering specifications.

[43] Quoted in Robert Menzies, *Central Power in the Australian Commonwealth* (London: Cassell, 1967), 35.

[44] The doctrine of implied immunity was invoked in six cases up until 1919. All involved taxation or industrial arbitration issues. Geoffrey Sawer, *Australian Federalism in the Courts* (Carlton, Victoria: Melbourne University Press, 1967), 127.

in the Australian Constitution are those given to the Commonwealth government. The High Court needs to articulate the reserved powers in order to determine if a matter is left to the states. In *Railway Servants*, the court found that to give real teeth to the reserved powers of the States, the reserve had to be the major grant of power and the enumerated fields needed to be read narrowly. The doctrine of reserved powers gave the benefit of the doubt to the states by explicitly limiting the extent to which Commonwealth powers could expand.

The court's apparent motivation for being sensitive to state concerns for nearly two decades after federation was its sense of self preservation. Being pragmatic, rather than dogmatic, was the safest way for the High Court to ensure that the states did not lose their faith in the new central government institution. The Court was not completely averse to ruling in the Commonwealth's favour, however. Several cases over the course of the First World War gave considerable scope to the Commonwealth's powers. The court did not abandon the twin doctrines of implied immunity and reserved power to make such grants. Rather, the court found that the defence power of the Commonwealth, enumerated in section 51, was ample justification for some of the centralization necessary to make a contribution to the war effort. The leading case in this period, *Farey v. Burvett* (1916),[46] allowed the fixing of bread prices in the State of Victoria as an exercise of the defence power. Foreshadowing the technique that would change the court, Isaacs J. wrote that "if the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the

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[45] Zines, *The High Court and the Constitution*, 5.
[46] *Farey v Burvett* 21 CLR 433 (1916)

judgement and wisdom and discretion of the Parliament."[47] What might have been interpreted as patriotism and general support for the war effort was in fact the thin end of the wedge for the Commonwealth to greatly expand its power.

3.4.2 *ENGINEERS*

Engineers turned the first twenty years of constitutional interpretation directly on its head. The court explicitly overruled the state-favouring doctrines of implied immunity and reserved powers, and set a course for the possibility of a real centralism. *Engineers* has a modest pedigree, considering it is one of the most influential cases in Australian constitutional history. The court was asked to decide whether the labour arbitration provisions assigned to the Commonwealth by section 51 (xxxv) of the constitution were applicable to state enterprises. It seemed to be a foregone conclusion, as the High Court had already found in the *Railway Servants* case that state railroads were exempt. In this case, Western Australia's engineering and sawmilling works had come into an industrial dispute with the national union representing its workers. The union believed the hearing to be a lost cause and accordingly engaged the services of one of the Victoria bar's more junior and inexperienced members. Little did they know a legend was in the making. Robert Menzies, later a long serving Prime Minister, was retained as the barrister. Menzies, a mere twenty-five years old, (an age which today finds most practitioners drafting memos, not appearing before the country's highest court!) was given the brief at the last minute and came to the court equipped with what he later admitted was a young man's brashness. The story runs that in Menzies' argument before the Court there came a point in his line of reasoning where

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[47] Quoted in Galligan, *The Politics of the High Court*, 95.

he began to strain logic. Unimpressed with his attempt at an alternative characterization of the state enterprises as trading rather than governmental activities, one of the justices remarked that Menzies' theory was a lot of nonsense. Menzies brazenly agreed, disclaiming responsibility for being so convoluted. Rather, he blamed earlier decisions for forcing him into the difficult argument. He claimed he could only make a logical case if he was granted standing to challenge those decisions.

Granted just that opportunity, Menzies successfully convinced the court to alter its approach to the constitution and to federalism. He modestly notes that it was not only his courtroom skill that turned the tide. Despite the court having just previously endorsed some of the old doctrines,[48] he was young enough not only to be bold with his betters, but to still have fresh memories of his instruction in law school. His tutelage prepared him well enough to know that those who formed the majority in those previous decisions were no longer with the court. The justices still present, he hoped, "might be willing to seize upon the opportunity to re-open the whole matter, overruling the *Railway Servant's Case* in the process."[49] That they did.

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[48] *Amalgamated Workers Union v. The Adelaide Milling Company* (1919. 26 C.L.R. 460) reaffirmed the implied immunity doctrine. The application of immunity required that the activity regulated be shown to be governmental. The generosity of the Court allowed many essentially non-governmental activities to be approved for immunity as long as they were controlled by a State. Menzies wittily remarked some years later that in the above case, "a wheat lumper [employed in the milling of wheat by a State enterprise]... was unconsciously, but splendidly, performing one of the primary functions of government." Menzies, *Central Power*, 36.

[49] Ibid., 38.

The *Engineers* case was especially innovative not because it overturned the old doctrines of immunity or reserved powers, but because it endorsed a different way of looking at Commonwealth power. The rule that emerged is stated thusly: the specific grant must be defined before the residue can. This gave the Commonwealth a definitive upper hand in the process of interpretation. As long as the court was prepared to read the explicit provisions of Commonwealth power in section 51 with even a minimum of generosity, there was a good likelihood that an activity could be placed within those grounds of competence before even considering if it belonged to the residue. While the Australian court avoided the trade offs between mutually exclusive categories that preoccupied Canadian interpreters, such a convenience probably worked to the detriment of the states in securing their reserve jurisdictions.

Galligan calls the majority decision a "powerful polemic, but a logical muddle."[50] Similarly, Zines notes that "it is written with more fervour than clarity."[51] The logical mess it seems, was a necessity for securing the agreement of a majority of the court. Isaacs, J who wrote the decision held nothing back in his criticism of recently deceased colleague Samuel Griffith, who was a major force on the court in its pre-*Engineer*'s years. Isaacs and Griffith had serious disagreements about the course of interpretation, and now Isaacs was able to advance forcefully his views on interpretation. "There can be no doubt," claims one observer, "that Isaacs dipped his pen in vitriol before drafting the judgement."[52] Yet, the

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[50] Galligan, *The Politics of the High Court*, 99.
[51] Zines, *The High Court and The Constitution*, 10.
[52] John Nethercote, "The Engineers' Case; Seventy Five Years On," in *Proceedings: Sixth Conference of the Samuel Griffith Society*, ed. John Stone (Melbourne: Samuel Griffith Society, 1995), 4.

legacy of the decision defies such a characterisation. It is more simply known for its endorsement of a particular brand of literalist reasoning, which logical or not, reasoned or not, would come to dominate constitutional interpretation. The decision rejected the use of American precedent, readily accepted in the High Court's early decisions, in favour of an idealized form of British legal reasoning. Consequences were deemed irrelevant. Coming to a decision neutrally was what counted.

The preferred technique of the *Engineers* court was to read the section 51 powers literally. So if, as in this case, the Commonwealth was granted the power to settle industrial disputes extending beyond the state boundaries, that grant had to be interpreted as all encompassing. Exceptions are not implied by the literal grant. In fact the power is basically understood to be unlimited. The reserved powers and implied immunity doctrines were limits read into the Commonwealth's powers by the court, based upon the constitution's commitment to federalism. Here "a proclaimed neutral technique produced an expansion of national powers at the expense of the states."[53] This literalist technique removed the need for more particular doctrines like reserved powers or implied immunity, in effect becoming something of a super doctrine itself. Literalism meant that if the activity in dispute seemed to fit under the auspices of one of the grants assigned to the Commonwealth, then the Commonwealth was entitled to it. The advantage in disputes rested with the Commonwealth as a result, for only it had a list of enumerated powers to consider. Only when the court was unconvinced by a stretched category would the Commonwealth lose.

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[53] Galligan, *Politics of the High Court*, 101.

3.4.2 AFTER *ENGINEERS*

Like the American court after the New Deal revolution, the Australian High Court has barely looked back since the *Engineers* case. The concept of reserved powers previously endorsed by the court was undoubtedly "exploded and unambiguously rejected"[54] by the court and would not be revived. The default method of constitutional interpretation has been to expand routinely the reach of Commonwealth power through the generous interpretation of the section 51 headings. That said, Australian federalism has not been the one way train that is the American commerce clause. There have been important qualifications of both the *Engineers* doctrine and of its reasoning. There is a tempered quality to the decisions of the High Court. The balance is particularly evident when one considers the centralist ambitions of the Commonwealth government at various points in this century.

Brian Galligan claims that the Australian High Court, despite the semblance of legal impartiality, is a consummate political actor. It has encouraged a remarkable degree of stability in Australian politics by keeping tight control over the pressure release valve of constitutional conflict - change through judicial interpretation. The basic struggle of Australian political life, in his thinking, has been between the democratic-socialist Labor party and a strong corporate-liberal culture opposed to most if not all of the Labor party's policies. This conflict plays itself out in the politics of federalism. Labor has consistently sought to use the national government to exercise authority over the economy and life of Australian citizens while its opponents have worked equally hard to remove government from regulatory roles and to decentralize power and decision-making to the states. Labor's

program historically included the explicit goal of dismantling federalism, despite the party occasionally holding power in the States.[55] More practically, Labor has sought the piecemeal constitutional change necessary for greater centralization. Given that they have almost always failed, Labor governments have also sought to push the limits of their constitutionally assigned powers. They were granted leeway by a generous High Court, forestalling the more radical changes that some Labor partisans would have preferred.

In the post-*Engineers* period the tone of interpretation has been captured in the manner with which the court approached Commonwealth powers. Literalism was the legacy of *Engineers* as theory. In practice this meant the characterization of the section 51 powers assigned to the Commonwealth was the prime determinant of the actual power of the Commonwealth. For example, if power over taxation was broadly construed, then the Commonwealth would gain considerable financial power over the states. Similarly, if trade and commerce was widely interpreted (much like commerce was in the U.S.) then the states would have less of an opportunity to impose (or not impose) regulations on commercial activity. The post *Engineers* period, up until the startling expansionist decision in the *Tasmanian Dam* case in 1983,[56] witnessed a slow accretion of power in the hands of the Commonwealth courtesy of a generous judicial characterization of its assigned subject matters.

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[54] *Strickland v Rocla Concrete Pipes Ltd.* (the *Concrete Pipes* case) 124 C.L.R. 468 (1971), 487.
[55] Galligan, *Politics of the High Court*, 106 and 220.
[56] *Commonwealth v Tasmania* (1983) 46 ALR 625. See the complete discussion in Chapter Five below.

This expansion was careful and slow in contrast to the ambitious program of the Labor party. Former Prime Minister Gough Whitlam summed up the theme of fifty years of 'constitutionalism as struggle' in the title of a famous paper "Labour versus the Constitution."[57] Galligan argues that the most intense conflicts of this sort occurred pre-1950. Commonwealth expansionism was not limited to Labor. After his prodigal career as a barrister, Robert Menzies oversaw a long period of Liberal Party government as Prime Minister. He too was a central expansionist, simply not as fervent a one as his colleagues in opposition. Galligan calls Menzies a proponent of 'centralising federalism' in contrast to the 'socialising centralism' of the Labor party.[58] Apart from arguing the *Engineer*'s case, Menzies influenced constitutional interpretation through his appointment of Owen Dixon as Chief Justice in 1952, and the appointment of many like-minded colleagues on the court. Menzies trained in the law as Dixon's junior, and Dixon remained for Menzies the ideal judge, articulating the constitutional principles which Menzies tried to put into practice from the other side of the bar.[59] Justice Dixon's tenure on the court demonstrated the character of Menzies' balanced approach.

The most significant expansion of Commonwealth power in the immediate wake of the *Engineers* decision came in the form of war-time income tax. The Commonwealth government, through a system of uniform taxation, centralized the collection of income taxes and took on the task of redistributing revenues to the States. Both the states and the

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[57] "The Constitution versus Labor" in Gough Whitlam, *On Australia's Constitution* (Camberwell, Victoria: Widescope, 1977).
[58] Brian Galligan, "Constitutionalism and the High Court," in *The Menzies Era*, ed. Scott Prasser, J.R. Nethercote, and John Warhurst (Sydney: Hale and Iremonger, 1995), 154.
[59] Ibid., 156.

Commonwealth were entitled by the constitution to impose taxation, but the rates imposed by the Commonwealth made further taxation by the States politically untenable. The redistributive elements of the Commonwealth program were only in effect for those States which committed to the uniform scheme. The scheme was seen as a necessary measure for war-time fiscal management. Prior to implementing the system, the federal government could not get enough tax room, particularly in poorer states which had higher rates, to secure the money it needed for the war effort. If the Commonwealth took sole responsibility for the collection of taxes and redistributed amounts equivalent to what the states collected on their own, it would avoid the problems anticipated in poorer states like Queensland. While other centralist initiatives had been approved during the war, including schemes as crucial as central banking and as mundane as drinking hours (securing early afternoon pints as a staple of Australian life), the *Uniform Tax* decision was the first to extend such powers for reasons other than the ongoing war. The court, with Dixon absent in America as a war-time diplomatic representative, found that the Commonwealth's power in section 51(ii) to impose taxation justified the scheme. It allowed the Commonwealth to tempt or entice the states into a scheme of uniform taxation. This was further legitimated by the section 96 provision which allowed the Commonwealth government to make grants to the States under whatever terms and conditions it felt were justified. Section 96 could not compel co-operation, but it could encourage it. The provisions of the *Uniform Taxation Act* were deemed to be non-compelling, as states could essentially opt-out. In a noted turn of phrase, Latham CJ wrote for the court that "the States were being tempted to cease levying income tax, but temptation was not compulsion."[60] Doing away with the uniform rates after the war would have

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[60] R.L. Mathews and W.R.C. Jay, *Federal Finance: Intergovernmental financial relations in*

devastated some state's finances, or led to unreasonably high tax rates. The Commonwealth had many of the States in an impossible situation, thereby securing to itself a monopoly on the taxation of income. This in turn gave it a considerable ability to influence state governments through the power of the purse.

The court made much of its inability, under strict tenets of legalism, to consider or to prevent undue outcomes for the politics of federalism. If the effect of a decision was to emasculate the power of the states, that was a matter to be resolved by the political branch of government.[61] Leslie Zines quotes Latham, CJ on the possibility that the court's decision in the *Uniform Tax* case may have meant the end of political independence for the states, now dependent on the Commonwealth's money;

> The determination of the propriety of any such policy must rest with the Commonwealth parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the courts.[62]

The court backed away from centralization in 1945 with the *Pharmaceutical Benefits*[63] case, in which it invalidated a Labor government strategy to provide for the semblance of a national health plan. On a similar note, it modified the then discredited

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Australia since Federation (Melbourne: Nelson, 1972), 175.

[61] Menzies claims to have offered to alter the form of fiscal federalism during his term as Prime Minister. However, he found that State leaders could never agree to a revision. Only those States which stood to gain from regained control were ever eager. Those states that received redistribution were loathe to open up the system for tinkering. In short, Menzies saw no proposal from a state that he could accept without being unfair to some states or without placing an unreasonable compensatory burden on the Commonwealth government. See Menzies, *Central Power*, 90-91.

[62] *South Australia v Commonwealth* (First Uniform Tax case) 65 C.L.R. 373 (1942), 429.

implied immunities doctrine in the *State Banking* case of 1947.[64] The Labor government, when it created the central Commonwealth Bank, sought to ensure all government business, both from the Commonwealth and States, would be transacted through it, giving the Commonwealth government some significant leverage in the financial industry. The legislation, which was challenged by the city of Melbourne, compelled states and municipalities to do their banking with the central bank rather than banks of their own choosing. Melbourne was an important banking centre and the several private banks on hand to offer their services argued that the advantage given to the central bank was undue. The court found that a Commonwealth bank was within the scope of the section 51 power for banking. It did not find that the states and local councils, as state agencies, could be compelled to do their business with the bank.

Justice Owen Dixon wrote one of the majority opinions for the court. He was not as hidebound by the principles of *Engineers* as were some of his colleagues. Dixon had maintained the court's line on the reserved power doctrine of *Engineers*, and was the proudest defender of the "strict and complete legalism" it had advocated. However, he steered the court in a different direction on implications and immunity. As a component of his legacy this strain is often pointed out as a heresy.[65] Specifically, he believed that the Commonwealth government should not be able to bind the state governments in their policy choices. This gave positive substance to section 107 of the constitution, which was set up to save the pre-federation powers of the States, but was of very little consequence once the

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[63] *A.G. Victoria (ex rel Dale) v Commonwealth* 71 C.L.R. 237 (1945).
[64] *Melbourne Corporation v Commonwealth* 74 C.L.R. 31 (1947).

reserved powers doctrine had been overruled. For Dixon, the existence of a federal system meant that some effort had to be made to ensure the States would not be rendered irrelevant by a domineering central government. Thus he argued that "the federal system itself is the foundation of the restraint upon the use of the power to control the States."[66] By discriminating against the states in their choice of banker, the Commonwealth legislation violated the basic immunity that the federal system required.

Another immunities case effectively restricted Commonwealth power that same year. In *Uther*, the States were empowered to pre-empt the Commonwealth's right to priority of debt repayment.[67] The implied immunity which was revived to benefit the states in *State Banking* was not reciprocated to exempt the Commonwealth from State law that changed the right of priority of payment. Under common-law, the Commonwealth had enjoyed the right to first repayment from bankrupt companies. Dixon dissented from the *Uther* majority's decision and had his objections confirmed by the majority of the court in the *Cigamatic* case of 1962.[68] The latter is generally regarded as the definitive statement on what exceptions can be made to a general immunity rule. Specifically, the Commonwealth does enjoy some priority where the Crown's prerogative is concerned.

The period beyond 1950 has been characterized as a much less dramatic time for constitutional interpretation. The High Court's balanced centralism was always a pressure

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[65] R.P. Meagher and W.M.C. Gummow, "Sir Owen Dixon's Heresy," *Australian Law Journal* 54 (1980), 25.
[66] Quoted in Zines, *The High Court and the Constitution*, 278.
[67] *Uther v Federal Commissioner of Taxation* 74 C.L.R. 508 (1947).
[68] *Commonwealth v Cigamatic Pty Ltd* 108 C.L.R. 372 (1962).

release for the more overt centralism of the Labor party. The fate of the 'corporations power' is a good example of the cautious but incremental centralism of the period. *Strickland v Rocla Concrete Pipes Ltd*[69] was the first significant decision in the post *Engineer's* era to address the Commonwealth's power over foreign and trading corporations granted by section 51(xx). The case concerned the validity of Commonwealth legislation to monitor restrictive trade practices by those corporations which fell under the definition of the section. Previous to *Concrete Pipes*, the court's opinion could only be found in the case of *Huddart, Parker and Co Pty Ltd v Moorhead.*[70] That case rejected the constitutionality of the Commonwealth's *Australian Industries Preservation Act* 1906, an earlier form of anti-trust legislation. The kind of commercial activity the act sought to control was considered within the reserved powers that the states retained after federation. The Commonwealth, chastened by the *Huddart* decision, kept itself at bay for more than sixty years.

Isaacs, J., the main author and force behind the *Engineers* decision, had dissented from the narrow interpretation of the corporations power made by the majority in *Huddart* on the basis of the reserved powers doctrine. Despite *Engineers* unambiguous 'explosion' of the reserved power, no other foray into corporations regulation was made by the Commonwealth. *Concrete Pipes* overruled *Huddart* along *Engineers* principles. By doing so, the court did two things: first it reaffirmed the primacy of its literalist approach with an explicit affirmation of *Engineers*; and second, it provided a potentially broad, but still cautiously expanded avenue for Commonwealth power.

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[69] 124 C.L.R. 468 (1971).

As a matter of interpretation, *Concrete Pipes* is notable for the point of view taken by the High Court on reserved powers. When speaking of the *Huddart* case, Barwick CJ in the lead judgement wrote "it is plain enough from a reading of the reasons given by the majority...that the influence of the then current reserved powers doctrine was so strong that the court was driven to emasculate the legislative power given by section 51(xx)."[71] That would not be allowed to stand. Reserved powers would not limit the corporations power in 1971. With the nasty business of overruling the *Huddart* court out of the way, he proceeded to the task of determining what limitations were necessary to make the corporations power viable. He did not find that just any legislation related to trading or foreign corporations would qualify under the power. If the Commonwealth were to be granted a power to make laws for trading corporations, it would not represent a general grant over commercial and corporate activity. Rather, Barwick noted that the legislation at hand was justified because the sections "were regulating and controlling the trading activities of trading corporations."[72] Trading was the operative word. Production and other facets of commerce were not included, but a literal reading of the power gave the Commonwealth considerable room to expand its activities in the area of trade. On a cautious note, Barwick articulated a need to evaluate legislation on a case by case basis to ensure that the corporations power was not used overbroadly – "the decision as to the validity of particular laws yet to be enacted must remain for the Court when called upon

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[70] 8 C.L.R. 330 (1909).
[71] *Concrete Pipes*, 488.
[72] Ibid., 489

to pass upon them."[73] Still the Commonwealth could take this decision as a clear indication that trade practices legislation, particularly as it applied to the trusts and monopolies of foreign or trading corporations, was permissible. The range of those interests to which the law was applicable and those activities which could be deemed trading would expand in later cases.[74]

External affairs was another power broadly interpreted by the court in this same period. In fact, the logic of expanding central power was eventually pushed to its limits by an external affairs case, *Tasmanian Dam*, in 1983. The case accorded greatly increased jurisdiction to the Commonwealth for domestic policymaking based upon treaty commitments made in the name of external affairs. This case will be the starting point for Chapter Five which examines the recent federalism decisions of the High Court.

3.5 A Brief Review of Canadian Federalism in the Courts

The Canadian constitution's development has occurred, like Australia's, on a relatively short timeline, but unlike Australia's, without a revolution of constitutional interpretation. Nonetheless, it is equally useful to divide the judicial development of Canadian federalism into eras. The main variable distinguishing these periods is the place of the Supreme Court of Canada, first as a junior to the Judicial Committee of the Privy Council (JCPC) until 1949 and then as the sole high court for Canada for the years after. The

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[73] Ibid., 490.

decisions of the imperial court had the effect of decentralizing Canadian federalism in the opinion of most observers. That influence has since been tempered by the efforts of the home court.

3.5.1 THE JCPC

If the American legal and political academy had the New Deal court to alert it to the extent of judicial power, the Judicial Committee of the Privy Council stirred the souls of the Canadian legal academy in a similar manner. The JCPC's supremacy in constitutional matters for 82 years generated an intense conflict between itself and those who felt the true constitution was being distorted. By the 1930s, in the shadow of the American conflicts described above, the conflict finally came to the boil. The vitriol felt by Canada's legal academics towards the interpretation of federalism by the JCPC in the 1930s and 1940s was barely surpassed by the American critics of the 'four horsemen.'[75] As Alan Cairns has masterfully demonstrated, there were flaws in the logic of these critics and they were noticeably blinded by a certain social democratic central-government bias. However, they are a useful source for exploring the evolution of the *British North America* (BNA) *Act* for those years in which it remained in the care of the JCPC.

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[74] *R v Federal Court of Australia; Ex parte WA National Football League* (Adamson's Case) 143 C.L.R. 190 (1979) and *State Superannuation Board of Victoria v Trade Practices Commission* 150 C.L.R. 282 (1982).

[75] Cairns, "The Judicial Committee and Its Critics". The critics included Frank R. Scott, Bora Laskin, Vincent L. Macdonald, W.P.M. Kennedy, and William Lederman. For a more biographical account see Richard Risk, "The Scholars and the Constitution: P.o.g.g. and the Privy Council," *Manitoba Law Journal* 23 (1995):496-523. Representative works of the critics include: Bora Laskin, "Peace, order and good government Re-examined," F.R. Scott, "The Consequences of the Privy Council Decisions," *Canadian Bar Review* XV (1937),

Three issues are of primary importance for federalism in the interpretation of the *Constitution Act*, 1867. The preamble to section 91, the p.o.g.g. clause, granted the power to implement laws for the general welfare of the country to parliament. Secondly, the provincial legislatures were granted the general power over property and civil rights in the provinces. Third, the federal government was given power over trade and commerce. The interpretation of these three provisions has determined, in large part, the degree of centralization or decentralization in Canadian federalism. The JCPC basically interpreted p.o.g.g. and trade and commerce narrowly and property and civil rights expansively. They clearly favoured the provinces by doing so. Their interpretation has been generally regarded as in conflict with the apparent intentions of the Fathers of Confederation who sought to create a centralized union of the provinces.

Bora Laskin, one of the more eminent constitutional scholars and jurists of this century, called p.o.g.g. "the favourite whipping boy of constitutional commentators."[76] Critics point to the misinterpretation of p.o.g.g. as the primary culprit for Canadian federalism's misdirection. Similarly, the clause is seen as an ever present threat to the stability of provincial autonomy by those more sympathetic to provincial aspirations. Laskin was no less guilty of pinning big hopes on p.o.g.g. than any of his colleagues. Theoretically, p.o.g.g. can be interpreted in one of two ways. According to more centralist assumptions, p.o.g.g. should be interpreted as a general grant of power, the enumerated powers in section

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"Centralization and Decentralization in Canadian Federalism" and Vincent Macdonald, "The British North America Act: Past and Future," *Canadian Bar Review* XV (1937).

[76] "P.o.g.g. Re-examined," 1054.

91 serving only as examples of how the general power may be exercised. The Privy Council supported such a vision of p.o.g.g. for a short period following Confederation. In a series of decisions, the committee endorsed what has become known as a 'two compartment' theory of federal jurisdiction. P.o.g.g., along with the enumerated examples in section 91, comprises the federal compartment and the section 92 list for the provinces comprises the other.[77] Alternately, p.o.g.g. was interpreted as a part of a three compartment interpretation of the constitution. In that case the section 91 list and the section 92 list comprised the main compartments for the federal and provincial governments respectively and p.o.g.g. existed as an extraordinary power. P.o.g.g. is, in effect, a third compartment to be used by the federal government in extraordinary circumstances which the court can only review on a case by case basis.[78]

Extraordinary circumstances, in the collective mind of the JCPC, basically came to mean emergency. Justifications based upon the p.o.g.g power were available to the federal government, but only in those instances where it could be proven that, for the sake of a

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[77] *Russell v the Queen* 7 A.C. 829 (1882). Sir Montague Smith, in a fury of negatives wrote for the committee that "if the Act does not fall within any of the classes of subjects in sect. 92, no further question will remain, for it cannot be contended...that, if the Act does not come within one of the classes of subjects assigned to the Provincial legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order and good government of Canada," full legislative authority to pass it." Ibid., 836.

[78] *A.G. Ontario v. A.G. Canada* (The Local Prohibition Case) A.C. 348 (1896). The committee ruled that "the exercise of legislative power by the parliament of Canada, in regard to all manners not enumerated in sect. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sect. 92." Ibid., 360. Determining what qualifies as a matter of Canadian interest and importance continues to occupy the court. The effect of the last part of the quotation above makes p.o.g.g a third compartment. There is a prior claim to section 92 - legislation must first be found to not fit a section 92 heading before it can qualify for p.o.g.g. justification.

national emergency, provincial autonomy had to be overridden. The *Board of Commerce* case in 1922 provided the committee with its first opportunity to define the emergency power.[79] Led by Viscount Haldane, the JCPC balked at the broad powers incorporated in the federal anti-profiteering legislation before them, but hinted that a more dire form of extraordinary circumstances would qualify. A year later in the *Fort Frances* case,[80] they found such a dire circumstance. However, the JCPC narrowed the scope of emergency two years later in *Toronto Electric Commissioners v Snider*.[81] *Snider* provided grist for the satirical mill of critics, as Viscount Haldane justified the two-compartment decision in *Russell* as a result of the Committee's impression that the government supposed drunkenness (the upheld legislation imposed a temperance regime) had reached 'emergency' proportions in the Dominion.

The JCPC briefly indicated that potential justification for federal legislation under p.o.g.g. outside of emergencies might exist in *Re: Regulation and Control of Aeronautics in Canada*.[82] The Committee upheld legislation creating a national regime for the control of aeronautics under the auspices of section 132 which dealt with the implementation of Empire treaties. Writing for the Committee, Lord Sankey indicated that aeronautics might also be a matter of national interest to be dealt with under the p.o.g.g. power of the federal government. The Committee gave further encouragement to centralists in the *Radio* reference of the same year,[83] which gave treaty implementation power to Parliament without

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[79] *In re: Board of Commerce Act* 1. A.C. 191(1922).
[80] *Fort Frances Pulp & Power Co. v. Manitoba Free Press* A.C. 695 (1923).
[81] A.C. 396 (1925).
[82] A.C. 54 (1932).
[83] *In Re: Regulation and Control of Radio Communication in Canada* A.C. 304 (1932).

reliance on the Empire treaties clause. The potential opened for central government activity by this decision encouraged the government of R.B. Bennett to proceed with some confidence in committing Canada to international standards on labour and other matters. P.o.g.g. did not fair as well as was hoped when further cases were put before the Committee. The Committee did not admit of any emergency as justification for the so called "Bennett New Deal" legislation that had been passed to cope with the vagaries of the Great Depression.[84] In addition to rejecting the existence of an emergency, the Committee also rejected the argument introduced by counsel for the federal government and later Prime Minister Louis St. Laurent that unemployment insurance was a matter of national concern and thus fell under the rubric of p.o.g.g. without any reference to emergency.[85]

The JCPC's intractability spurred a successful effort to amend the constitution so that the federal government could have power over unemployment insurance[86] and further spurred a movement for halting appeals to the Privy Council. That the federal government had to rely upon arguments establishing an emergency before it could exercise p.o.g.g. powers made a mockery of the centralist belief that p.o.g.g. was a comprehensive residuary power. F.R. Scott, with his tongue firmly in cheek, gave faint praise to the JCPC for its

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[84] The New Deal package was originally referred to the Supreme Court of Canada in November of 1935 by the Mackenzie King government which had replaced the Bennett administration that October. The package of cases included the *Labour Conventions Reference*, A.C. 327 (1937), *The Employment and Social Insurance Reference* A.C. 355 (1937), and *The National Products Marketing Act Reference* A.C. 377 (1937). Five of the eight legislated reform measures presented to the JCPC were rejected as *ultra vires* the federal government. The decisions enraged the critics of the Committee, so much so that the *Canadian Bar Review* for June of 1937 was devoted solely to a series of chastising articles on the decisions.

[85] *Employment and Social Insurance Reference.*

[86] Sec 91 (2A) added by the *British North America Act*, 1940 3-4 Geo. VI, c. 36 (U.K.).

interpretation of emergency. "Canadians know they can at least engage in wars without constitutional difficulties."[87] Despite the setback in the Bennett New Deal cases, the p.o.g.g category was provisionally expanded by the JCPC in its last days to include matters of national dimensions. One of the last major cases to be heard by the committee opened up space for p.o.g.g that did not depend upon the existence of an emergency. In the *Canada Temperance Federation* case, the JCPC, through Viscount Simon, refuted much of its p.o.g.g. jurisprudence (including the emergency explanation for *Russell)* and gave credence to a national concern 'branch' for p.o.g.g.

The JCPC's hostility to federal expansion was matched by a generosity toward the provinces. The committee expanded property and civil rights in the same way it restricted p.o.g.g. The JCPC interpreted property and civil rights as a positive grant and accordingly increased the jurisdiction of provinces. In this way property and civil rights played see-saw with the federally enumerated power over trade and commerce. What did not qualify as a matter of trade and commerce (and thus accrue to the federal government) was likely to qualify as a matter under property and civil rights. The first case to consider either power demonstrates this tug-of-war best. In *Citizens Insurance Co. v. Parsons*, [88] the JCPC found that the national regulation of fire insurance was not within the scope of trade and commerce, but within the scope of property and civil rights. The court went further and suggested that the power over trade and commerce was effectively limited to the regulation of trade with other nations, interprovincial trade and "the general regulation of trade

[87] Scott, "Centralization and Decentralization," 1106.
[88] 7 A.C. 96 (1881).

affecting the whole Dominion."[89] By 1916, the latter category was narrowly interpreted in the *Insurance* reference as "essentially an auxiliary power incapable of serving on its own as a primary source of legislative capacity."[90] By similar means the power over industrial disputes was placed in the property and civil rights bag[91] and the previously mentioned nation-wide unemployment insurance scheme was denied federal justification.[92] Property and civil rights effectively became the residual power that p.o.g.g. was intended to be.

3.5.2 The Supreme Court after 1949

Once matters were solely in the hands of Canada's own court, the balance of power between the federal and provincial governments began to shift slightly. The court took full advantage of the national concern possibilities of p.o.g.g. offered in *Canada Temperance* and began to define a broader scope for the power. This approach expanded p.o.g.g. to include national control of aeronautics (in *Johannesson*, 1952), atomic energy (in *Pronto Uranium Mines*, 1956), a national capital region (in *Munro*, 1966), and seabed natural resources (in *Offshore Minerals*, 1967).[93] However this generous view of p.o.g.g. did not amount to a Canadian revolution of American proportions. The Supreme Court did not shift dramatically to a centralized vision of federalism. To the contrary, it simply mimicked a particular approach of the JCPC. Lederman argued that the Canadian court did not become

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[89] Ibid., 112.
[90] *Attorney-General for Canada v. Attorney-General for Alberta* (1916 Insurance Reference) 1 A.C. 589 (1916) in Peter Russell, *Leading Constitutional Decisions* (Toronto: McClelland and Stewart, 1968), 83.
[91] *Toronto Electric Commissioners v. Snider* A.C. 396 (1925).
[92] *Employment Insurance Reference* A.C. 355 (1937).
[93] *Johannesson v. West St. Paul* S.C.R. 292 (1952), *Pronto Uranium Mines, Ltd. v. O.L.R.B.* 5 D.L.R.(2nd) 342 (1956), *Munro v. National Capital Commission* S.C.R. 663 (1966), and *Re: Offshore Mineral Rights of B.C* S.C.R. 792 (1967).

(to borrow the current slogan of the Canadian Football League) 'radically Canadian,' rather it opted for the 'ready-made' and pursued what he called the 'Watson-Simon' view. Lord Watson was responsible for the JCPC's three compartment theory. Lederman overlooks Watson's restrictive trade and commerce interpretation in order to suggest that his was a very measured view of both provincial and federal power. It amounts to a lot of 'on one hand, but on the other hand...'. Witness Watson's optimism in *Local Prohibition.*

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.[94]

Lord Simon, was an equally measured creator of doctrine. He was responsible for the late moderation of the JCPC in the *Canada Temperance Federation* case. The 'Watson-Simon' view approached the general power cautiously, but was willing to extend it beyond the impractical realm of emergency.

The expansionist p.o.g.g. strides of the post-JCPC era were made with considerable moderation. Small liberties were taken by the fully autonomous court. It stemmed the tide of aggressive Haldane-style decentralism, but the essence of the court's approach to federalism remained the same. The court did not feel an obligation to modernize the constitution through centralization as so many of the commentators in the law journals had urged. The change in court of last resort amounted to little more than a change of venue. The Canadian

jurists in whom Laskin had a measure of hope continued to fire the 'canons of construction'[95] forged and mastered by the Privy Council.

The Supreme Court has had the opportunity to rule on questions that the law lords of the Privy Council did not. The delegation of power between governments has required the court to think carefully about federalism. The ability of the provinces and federal government to skirt the requirements of the division-of-powers by assigning or delegating responsibilities to one another is a major element of co-operative federalism. Since constitutional change is by no means easy to achieve, incremental change in the form of bilateral agreements has often been seen as a means to dispel conflict and to manage the federation efficiently and effectively. The Supreme Court has not looked kindly on some of the attempts to circumvent the requirements of the constitution and has effectively forestalled the use of a certain class of such side agreements. But the Court has demonstrated a capacity for balance here as well. While the court forbid the co-operative scheme of the Nova Scotia and federal governments in the 1951 interdelegation case,[96] they permitted a similar, though slightly different form of delegation to pass a year later. In *PEI Potato Marketing Board v H.B. Willis*,[97] the federal government was permitted to delegate responsibility to an administrative board created by the provincial legislature in preference

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[94] *A-G Ontario v. A.G. Canada* A.C. 348 (1896), 361. Quoted in Lederman "Unity and Diversity," 609.

[95] Canadian constitutionalists continue to rely on imagery from their poet forefather, F.R. Scott. The image comes from a poem by Scott; "But the judges fidgeted over their digests/ And blew me away with the canons of construction." The same poem recognized the "fresh approach of Lord Simon," who was, however, smothered by 'the wet blanket of provincial autonomy.' F.R. Scott, "Some Privy Counsel," *Canadian Bar Review* (1950), 780.

[96] *Attorney General of Nova Scotia v Attorney General of Canada* S.C.R. 31(1951).

[97] 2 S.C.R. 392 (1952).

to the legislature itself. The court has kept direct delegation at bay, but has opened up considerable room for co-operative federalism through the *Willis* case.

To the presumable chagrin of Scott and Laskin, a generous interpretation of p.o.g.g. never developed in their lifetimes, despite Laskin's own best attempts from the bench as Chief Justice. Even with a centralist Chief Justice, Peter Hogg could write in 1979 that "there is no basis for the claim that the court has been biased in favour of the federal interest in constitutional litigation."[98] The provincial autonomists on the bench like Jean Beetz, from Quebec, were able to maintain the tradition of provincialism begun in the chambers of Westminster with the JCPC. Hogg concluded that the court favoured the provinces in fields such as taxation, the administration of justice (including the growth and development of quasi-judicial administrative agencies), civil liberties (in their pre-Charter form) and federal paramountcy. Small gains for the federal government in fields such as cable television regulation or aeronautics did not offset these general trends. The continued reluctance to expand p.o.g.g. or trade and commerce has kept the post-1949 Supreme Court in line with its imperial predecessor. Peter Russell agreed a few years later, emphasizing the "uncanny balance' between results favourable to federal and provincial governments.[99]

The period from 1949 until the 1970s has not been generally regarded as the finest in Canadian jurisprudence. Many observers have been critical of the approach and methods of the Supreme Court. Alan Cairns, in his *apologia* for the Privy Council, also took the

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[98]Peter Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?," *Canadian Bar Review* 57 (1979), 739.

opportunity to criticise the Canadian court. He found that, in the years since it gained final authority, the court did not live up to the standards of moderation and thoughtfulness about federalism that the JCPC demonstrated. By indulging, however little, the long- standing domestic critique of the JCPC's federalism, the domestic court may have been engaged in a fool's errand. Cairns claimed that the critics of the Committee were blinded by their own policy preferences to the detriment of their grasp on the reality of Canada's federal evolution. The kind of federalism that the critics wanted, and that they were partly successful in persuading the Canadian court to move toward, was not the kind of federalism that was operating on the ground.

Yet, the Supreme Court has never been a radical agent. Any attempt to break the bounds of interpretation along the lines of a constitutional revolution has almost always remained on the margins of Canadian decisions. Canada has no *NLRB v Jones*. The federal government could unquestionably expand with an unambiguous endorsement of the national concern branch of p.o.g.g., but no court has had the courage, or the folly, to endorse it. While Laskin's position in *Anti-Inflation* was very permissive toward the federal power, he did not write for a majority of the court. That case is something of a turning point in the doctrine of Canadian federalism and will be used to start the more detailed examination of current decisions in Chapter Six.

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[99] Peter H. Russell, "The Supreme Court and Federal Provincial Relations: The Political Use of Legal Resources," *Canadian Public Policy* 11, no. 2 (1985), 161.

3.6 Conclusion

Lest the focus here give the wrong impression, it is nowhere contended that judicially enforced changes to these constitutions are the sole force in their evolution. Judicial interpretation acts more commonly as a referee vetoing some and approving other choices whose impetus lies elsewhere. The assumed legitimacy of the exercise of judicial review gives it the power and authority to shape future behaviour. Sometimes the role is critical to the way that strategies develop. Sometimes it is not. In the American case, we saw the extremes of judicial relevance to the big picture of federal development. At times judicial review was obviously central to the progress of critical events as in the New Deal era. At other times a court can start to write itself into irrelevance - as did the post-New Deal court, by staying virtually out of the way of congressional and national government expansion.

What should be obvious from this brief review is that all three courts worked under certain assumptions when playing their role in federal evolution. Originally observers attached a great deal of weight to these judicial assumptions for the clear effect they had on the behaviour and ambitions of governments. When the courts questioned their own assumptions, they usually had a larger impact on the constitution and the nation than when they routinely relied upon doctrines. At the same time doctrines often led to courts operating in an unbalanced fashion, promoting the interests of one level of government over another. Default positions based upon past choices often magnified this effect over time. Default positions, to the parties concerned, seemed unfair. They predetermined outcomes. It is not clear, even from this modest examination, that common doctrines operated necessarily as

strict default positions. Who expected the American Supreme Court's reversal of its New Deal opposition? Other doctrinal alternatives were available and those alternatives allowed the court to short-circuit its own obstinance. Cheeky Robert Menzies was surprised by his own success in reversing the first twenty years of Australian doctrine in the *Engineers* case, but his strategy was sound. He helped the court through a door it had already opened itself.

What doctrine does do is condition the approach a court will take to problems. Doctrine is only one independent variable in a court's decision making process. To dismiss doctrine because it does not definitively force particular outcomes misses its ultimate relevance. Of course it does not tie the hand. However, it does condition the mind. The cases surveyed in this chapter and the means by which they were commonly decided are reflected in the recent doctrines of all three courts. By undermining the status of doctrine as an explanatory variable, some observers may have thrown themselves off the scent of a complete understanding of contemporary federalism. The significance of recent high court decisions on federalism has probably been too easily dismissed. It is the project of the next three chapters to try and reveal what doctrinal developments lurk in these recent pronouncements.

CHAPTER 4:

CONTEMPORARY FEDERALISM DOCTRINE: THE UNITED STATES OF AMERICA

4.1 DOCTRINE: LOST AND FOUND

The American Supreme Court is literally the 'bench' mark for students of judicial federalism. The court was the first to establish the practice of judicial review of a constitution and has been an active participant in the shaping of American federalism. This has put the court at the centre of many a political storm. While it weighed in during most periods of tumult in the republic's history, from the seminal conflicts of the Federalist era to the years of reconstruction following the Civil War, the court was never more at the epicentre of conflict than during the New Deal. The most enduring by-product of that period has been a court sanctioned, central government expansion which has lasted for more than 60 years. The court's implicit approval of Congressional expansionism was such that by 1985, in its decision in *Garcia*, the court unofficially resigned from the task of umpiring federalism conflicts.

The court's reasoning in that case suggested an unwillingness to involve itself in the fracas of federalism disputes. Jurisdictional conflicts, argued the *Garcia* majority, are a minefield of politics and subjectivity, unsuited to settlement by an unelected judiciary.

Better, they felt, that the political system itself resolve such conflicts. The court argued that the constitution already provided for as much by including direct representation of the states in the national government. If states wanted to grieve jurisdictional encroachments by the national government, the place to go was the Senate, not the high court. Coming from an institution so long situated at the heart of federalism, the *Garcia* decision was met with some astonishment by students of American constitutional law. But it appears that *Garcia* was an aberration.

Garcia pushed the logic of permissive post-New Deal federalism to an extreme, and in subsequent rulings the court has moved back from the brink. And with a vengeance. The Supreme Court has become much less willing to give up its supervisory role in the federation. Rather, the current court, under the leadership of Chief Justice William Rehnquist, is involved in a heated debate about the kind of federation envisioned by the constitution and the proper approach to take to the interpretation of its key provisions. The role of doctrine in this debate is undeniable. The seemingly polar positions that divide members of the present court are based upon an understanding of the history of constitutionalism and interpretation, and are backed up by a vocabulary of meaning and precedent found in the case law of the last two centuries. Both visions rely upon these shared understandings to develop what appear to be default positions capable of providing answers to the constitutional questions put before the court.[1] The responses

[1] Kathleen Sullivan uses the phrase 'structural default positions' to refer to the doctrinal constructs favoured by the court. There is certainly agreement on the present court about how constitutional controversies are to be decided. The members of the court simply disagree on the proper interpretation of the background material. Kathleen Sullivan,

of the court to federalism cases are closely divided and there is much room between the two sides, indicating little chance of compromise. That one position has not triumphed is largely a result of the indecision displayed by Justice Anthony Kennedy, who seems unwilling to commit to either of the two default positions, and to a lesser extent by the subtle variations in Justice Sandra Day O'Connor's delineation of federalism.[2]

The dispute among members of the court is particularly evident in its commerce clause jurisprudence. If peace, order and good government is the bell-whether of Canadian federalism, commerce is its American counterpart. Where goes commerce, goes Congress. The commerce power is the largest single determinant of formal national power in American federalism. Through the commerce power, Congress has made numerous forays into what may at one time have been considered state responsibilities. Since most matters have at least a minimal connection to or effect on commerce, the subject matters available to Congress under the commerce umbrella have been nearly unlimited. The reasoning of the *Garcia* majority seemed to affirm that lack of limits and took the logic one step further by articulating what has come to be known as a functionalist approach. Essentially the majority argued that the place of law in American

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"Duelling Sovereignties: *U.S. Term Limits, Inc. v. Thornton*," *Harvard Law Review* 109 (1995), 81.

[2] Jeffrey Rosen of the *New Yorker* has labelled Kennedy "The Agonizer." Rosen assigns the moniker more for Kennedy's unwillingness to commit to one of the court's poles on moral issues such as abortion rather than for his positions on federalism. Nevertheless, his indecision and swing vote is crucial to understanding current division-of-powers cases. See, Jeffrey Rosen, "The Agonizer," *The New Yorker*, November 11 1996, 82-90. There are indications that Kennedy is starting to favour state positions in federalism conflicts. See, Linda Greenhouse, "Justices Seem Ready to Tilt More Toward States in Federalism," *The New York Times*, April 1 1999.

federalism was less critical than the efficient operation of the federal system. To this way of thinking, federalism frictions are best reduced not by the intervention of the law, but by informal agreements and political bargaining, both intergovernmental and within the institutions of the central government.[3] This is a position which the current court, despite its differences on the appropriate vision of American federalism, would unanimously take issue with.

This chapter reviews the high points of federal judicial review in the United States from just before the court's landmark *Garcia* decision up until the present. The American situation is surveyed first because the current dispute on the court has encouraged an effective revival in federalism doctrine. It is the strongest case for the argument, in Chapter Two and throughout the thesis, that formal doctrine is critical to a contemporary understanding of federalism. By making judicial reasoning about federalism so transparent, the court has required considerable thoughtfulness of itself. The judges have had to articulate what federalism means and how their vision is translated into practical doctrines that settle constitutional disputes. More important, the subtlety demonstrated by the court shows how effective doctrine is as a tool for settling jurisdictional disputes. Observers like to accord uncompromising positions to the judges, and their current

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[3] Otherwise known, at least in Canada, as intrastate federalism. See, Alan Cairns, "The Governments and Societies of Canadian Federalism," *Canadian Journal of Political Science* X, no. 4 (1977): 695-725, and Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada*, Research Studies for the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 39 (Toronto: University of Toronto Press, 1985). On the difficulty of applying the concept to other federations see, Herman Bakvis, "Intrastate Federalism in Australia," *Australian Journal of Political Science* July (1994).

techniques, at least on the surface, seem to encourage default positions. But doctrine, since it allows fine distinctions, is proving capable of an important degree of flexibility.

4.2 *National League of Cities*: Commerce Expansion Ended?

The origins of the current disagreement can be traced back to the Chief Justice's early days as a Supreme Court appointee. William Rehnquist was elevated to the high bench in 1971 by President Richard Nixon and in short order began to exact a conservative, 'states first', influence on federalism jurisprudence. Rehnquist scored an early triumph for this perspective in 1976 with *National League of Cities v Usery* [4] (hereafter, *NLC*), the first Supreme Court decision since the New Deal to disapprove of Congressional excursions taken under the auspices of the commerce power. At issue in *NLC* was the permissible scope of the federal *Fair Labour Standards Act* which had been amended to include employment standards for state and local government workers. The legislation was actually New Deal legislation, much modified, but originally passed in 1938 following the court's famous change of heart in *NLRB v Jones*. It was also the legislation challenged in the court by *U.S. v Darby*.[5] By upholding the legislation in *Darby*, the court overturned the infamous *Hammer v Dagenhart*[6] decision and symbolically put to rest its opposition to Congressional expansion. *Darby* heralded a decades-long indulgence by the court of Congressional commerce clause expansion. By 1976, however, the sheen of the New Deal consensus on the court was starting to wear

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[4] *National League of Cities v. Usery* 426 U.S. 833 (1976).
[5] *United States v Darby* 312 U.S. 100 (1941).
[6] *Hammer v Dagenhart* 247 U.S. 251 (1918).

thin. The judicial branch had by no means become as actively hostile to the legislative programme of the national government as it had been in the years preceding 1937. However, Rehnquist led the move to challenge the scope of 'big government' at the federal level.

In *NLC*, Rehnquist wrote the opinion for the 5-4 majority of the court. He emphasised the effect that federal law mandating state behaviour would have on state sovereignty. The concept of state sovereignty was something he took infinitely more seriously than the central government expanders of the previous 40 years, or even his counterparts on the court a year earlier.[7] Post-New Deal decisions paid almost no heed to arguments in favour of state sovereignty. Rehnquist took the founding era rather than the 'revolution' of 1937 as his benchmark. The framers' intentions, he argued, should serve as a guide to the constitutionality of the legislation at hand. In defence of this method he invoked the practice of "earlier decisions of this court recognizing the essential role of the States in our federal system of government."[8] As such, Rehnquist was clearly driven by his interpretation of constitutional principles (particularly those with a states' rights pedigree) rather than the details of commerce jurisprudence and doctrine or the undue effects of the legislation.[9]

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[7] A year earlier in *Fry v United States*, the court found state sovereignty did not exempt state employees from the provisions of the *Economic Stabilization Act* of 1970. *Fry v United States* 421 U.S. 542 (1975). More detail can be found in, C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs, NJ: Prentice Hall, 1984), 234.

[8] Ibid., 844.

[9] As it was, many states and municipalities stood to incur massive cost increases if they were forced to comply with the minimum wage and overtime provisions of the Act.

Rehnquist acknowledged in his decision that the commerce power is plenary, subject only to the limits prescribed by the constitution. Those limits are generally understood to be the guarantees of individual rights provided by the constitution. Rehnquist's innovation was to interpret the federal nature of the constitution as a comparable restraint upon Congressional action. He argued that the sovereignty of the states is an affirmative limit on the scope of the commerce clause. In much the same way as the right to a fair trial or the right to due process limits the applicability of the commerce power on individuals or corporations, state sovereignty should limit the scope of the commerce power as it applies to the states. Rehnquist did not provide a great deal of evidence to suggest that state sovereignty was something which the constitution's authors explicitly sought to protect. He relied instead upon the habit of the court to respect state sovereignty in the past. This was particularly true when Congress had attempted to regulate the states as states.

Much of the commerce clause expansion that typified the post-New Deal certainly offended what might be labelled state sovereignty, but generally by means of pre-empting or overruling what was traditionally state jurisdiction. Commerce clause regulation frequently assumed tasks previously undertaken by the states or presumed to be within the ambit of the states. The commerce power had much less frequently been used by Congress to actually regulate the states themselves. By trying to set wage and

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Rehnquist detailed some of these effects, but only to demonstrate the degree to which the amendments would interfere with state policy choices, not to suggest that adverse

overtime rates for local government employees, Congress was setting out to regulate the states, or in this case instrumentalities of the states. The federal government argued that its regulation of states and local governments as employers was no more abusive of state jurisdiction than the pre-emption of state authority more typical of commerce clause expansion. Rehnquist rejected this argument as missing the point of state sovereignty. He ruled that to hive off jurisdiction is one thing – but to invade the sphere of the state government compromises its independence and autonomy. Thus he noted that the court has "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[10] In other words, the commerce power may very well allow Congress to make laws regulating employment, but it does not permit Congress to tell the states how to conduct their own affairs. What qualifies as the undeniable attributes of state sovereignty is somewhat vague. For his part, Rehnquist suggested that 'traditional state functions' needed to be left untouched by Congress. At a minimum, Rehnquist believed that the hiring and remuneration of state employees was an 'undoubted attribute of state sovereignty.'

The court's decision in *NLC* made federalism an effective limit on the commerce power. That the American system of government was intended to be federal was indication enough for Rehnquist that limits were implied on national power. While

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consequences disrupted the balance of the federal system.
[10] Ibid., 845.

Congressional regulation of the States was as unwelcome and as costly as similar regulations applied to private industry, the States had a different status and thus were exempt from such burdens. While a state could have an effect on the economy and the labour market, a state, he argued, was not "merely a factor in the 'shifting economic arrangements' of the private sector of the economy...but is itself a coordinate element in the system established by the Framers for governing the Federal Union."[11] The gist of his reasoning was that the States have special status, even if the Constitution did not explicitly grant them exemptions from federal law.[12]

NLC was a stunner. The court had not overruled an attempt at commerce regulation by Congress for nearly forty years prior to it. Rehnquist's credentials as an advocate of state autonomy were firmly cemented by his opinion. Jeff Powell credits Rehnquist for single-handedly discounting 'conventional wisdom' and reintroducing "state sovereignty as a functioning legal limitation on the federal legislative power."[13] That said, Rehnquist's doctrinal innovation was in for a big fall. State sovereignty may have challenged conventional wisdom, but it did not in turn become conventional wisdom. Herman Pritchett notes that *NLC* engendered a rash of cases at the lower court level challenging federal regulation of the states. Indeed, some 42 challenges were initiated in the two years immediately following the *NLC* result.[14]

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[11] Ibid., 849.
[12] The source of the doctrine is essentially theory, not precedent. This, for some, is its weakest point. See Jeff Powell, "The Compleat Jeffersonian: Justice Rehnquist and Federalism," *Yale Law Journal* 91 (1982): 1317-1370, 1329.
[13] Ibid., 1322.
[14] Pritchett, *Constitutional Law of the Federal System* , 537.

But when the matter was raised again in the Supreme Court, as it was in *Hodel v Virginia Surface Mining* and *Equal Employment Opportunity Commission (EEOC) v Wyoming*, the hoped for trend never took flight.[15] The court tried to put flesh on the bones of Rehnquist's theory. Thurgood Marshal, working with a precedent that he was clearly uncomfortable with, articulated a four step procedure in *Hodel* to try and codify what sorts of activities would qualify for exemption from federal legislation. The test he articulated required (1) that the federal statute at issue must regulate the states as states; (2) that it "address matters that are indisputably 'attributes of state sovereignty'"; (3) that a State's compliance must impair its ability to "structure integral operations in areas of traditional governmental functions." A footnote implied that extraordinary conditions could require the federal government to override the federalism limits. Thus, for the state to qualify for exemption, (4) the import of the federal interest (i.e. the degree of emergency) must not be great enough to justify state submission.[16] The presumption following *Hodel* was that all three enunciated criteria and the fourth implied condition would have to be met for state activities to merit exemption from federal commerce regulation. This was an excellent example of contorting an unwelcome precedent beyond recognition. Marshall accepted the criteria which existed prior to his decision, but effectively piled them one atop the other, raising the bar for a successful future claim to exemption.

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[15] *Hodel v. Virginia Surface Mining and Reclamation Association* 452 U.S. 264 (1981) and *Equal Employment Opportunity Commission v Wyoming* 103 S. Ct. 1054 (1983).
[16] *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985), 537.

4.3 *GARCIA*: FUNCTIONALISM TRIUMPHANT

The closeness of the result in *NLC* and the work it had left undone ensured that it would not be the last word on state sovereignty. As a concept, state sovereignty was not faring well. In fact it was taking a beating. *Hodel* was only a first jab. The central government boosters threw an uppercut with *EEOC v Wyoming*, applying the *Hodel* modifications to uphold Congressional regulation. The knockout punch for Rehnquist's revived state sovereignty came with *Garcia v. San Antonio Metropolitan Transit Authority*. *Garcia* would end up directly overturning *NLC* to provide a distinctly opposite interpretation of federalism, state sovereignty and the place of the court in federalism disputes.

Garcia brought the much amended and multi-faceted *Fair Labour Standards Act* before the court again. The San Antonio Metropolitan Transit Authority (SAMTA), a local government body, argued that it was effectively a state agency and that the local government activities it undertook qualified it for the *NLC* exemption. Joe Garcia, a transit employee seeking the protection of the federal legislation, challenged the exemption. The lower federal court exempted SAMTA on the basis of *NLC*. The Supreme Court heard the case to test the justification.

Few Supreme Court decisions had followed the *NLC* model, though many cases, like *Garcia*, were successfully argued on *NLC* principles in the lower courts. When given

the opportunity to reconsider *NLC* with reasonably similar circumstances, the Supreme Court did not just make the piecemeal modifications it made in *Hodel* and the *EEOC* case. In 1976, the members of the court had definitely chosen sides. In *NLC*, Rehnquist was at the vanguard of a core of state-sympathetic justices and his colleague William Brennan wrote for the more federally-inclined foursome. Justice Harry Blackmun joined the *NLC* majority with a rather qualified concurring opinion, tipping the otherwise evenly divided court to Rehnquist's state sovereignty argument. It was clear by 1985 that Blackmun had abandoned his indecision and qualification on these matters. Unfortunately for those advocating a renewed federalism, he chose the strong national government position, and preached it with the zeal of the newly baptized.

If the reason for finding against commerce regulation in *NLC* was the need to preserve traditional state functions, future jurisprudence and legislation needed to flesh out the definition of such functions to provide a boundary line over which federal activity could not cross. *Hodel* went some of the way towards providing such a technique, but still left out any explicit definition of traditional state responsibilities. Writing for the majority against state sovereignty in *Garcia*, Blackmun found that the search for such a core of traditional responsibility conducted in the interim between *NLC* and *Garcia* had been unfruitful. Of the fifteen lower court decisions Blackmun cited as relevant to this debate, five had exempted states or their agencies and ten did not. Regardless of the results, Blackmun wrote, that it was "difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of

the cases in the second group on the other side."[17] The possibility of ever articulating such principles, perhaps a task worth trying in 1976, was ultimately shown to be misconceived. In Blackmun's opinion, not only was the 'traditional state function' approach unworkable, it ultimately frustrated the principles of federalism that the *NLC* majority so proudly tried to protect.

Specifically, he found that the reliance on a historical approach was not as objective as was first claimed. The lack of flexibility in such a method left the states trapped in what amounted to historical straightjackets. This is the core of what has been called a 'functionalist' approach. Federalism, Blackmun argued, requires flexibility more than it requires formalism. For a federation to endure and for the units in a federation to flourish, he claimed, they must be allowed to experiment and work outside the bounds of rigid structures. A judiciary patrolling the border between federal and state power is ultimately hostile to such practices. Blackmun encouraged the judiciary to thin out its patrols to allow governments to blur the lines.

The most significant doctrinal issue for Blackmun was whether SAMTA qualified for exemption from the *Fair Labour Standards Act* under the third *Hodel* criteria of constituting a traditional governmental function. A definition of traditional state functions was crucial to determining if SAMTA qualified for the exemption. The challenge in *NLC* and *Hodel* was to find a historical justification for these characterizations. According to

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[17] The cases are listed in Pritchett, *Constitutional Law of the Federal System*, 538-9.

Blackmun those efforts failed and new attempts would offend federal theory. States, he argued, should be free to pursue uncommon or unorthodox approaches to problems of government. If they were hemmed in by the courts seeking to define them in terms of 'traditional' functions, their room to manoeuvre was consequently limited. The way to identify the appropriate limits on Congress was not to search for ultimately subjective and arbitrary historical standards.

The big question was how the courts were to provide flexibility for evolving federal arrangements yet avoid judicial subjectivity. Blackmun argued that it could not be done, and that subjectivity was inevitable. But what of constitutional legitimacy? Questions assumed to be judicial, he claimed, were to find their resolution much more politically. The heart of Blackmun's reasoning and reply to the formal doctrine of *NLC* was to wholly disavow a role for the court in determining the limits which were appropriate. Who was to take the court's place? According to Blackmun the constitution provided the answer in the way it structured the federal government.

Blackmun suggested two ways in which state interests are protected through the institutions of national government, the electoral college and the Senate. To him, the latter was most important. "The principal and basic limit on the federal commerce power is that inherent in all congressional action - the built in restraints that our system provides through State participation in federal governmental action."[18] One house of Congress is

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[18] *Garcia*, 1020.

made up of the nominal representatives of the states. He believed that such representation should ensure that federalism is respected. Contrast this claim with Rehnquist's articulation of federal limits in the form of state sovereignty. Under Rehnquist's model, and even by the standards of *Hodel*, protection of state interests has to come after the legislation in the scrutinising process of judicial review. According to *Garcia*, if the federal legislation at hand made it through the national political process, that meant that state cautions had been observed. It therefore became unnecessary for the court to consider state sovereignty or any other limit that might be argued to overrule congressional action.

The discussion of *Garcia* has thus far omitted any reference to the Tenth Amendment's reserved power provisions. Areas not deemed to fall within the scope of Congressional powers usually find their home among the reserved powers. A generous interpretation of the Tenth Amendment's scope is essential to a strong state position like Rehnquist's as it helps to restrict the open-ended nature of congressional powers such as commerce. Conversely, when little effort is made to define the residue, many activities can be construed as belonging to Congress under the commerce clause. The emphasis on traditional state functions in *NLC* provided an opportunity for expanding, or at least preserving, the reserve of state power. If subject matters could be characterized as historically within the realm of the states, then Congress is precluded by the Tenth Amendment from invading such a field. If a subject falls under a congressional heading such as commerce, then the Tenth precludes the states from a legitimate prior claim – in effect the subject is a matter that the sovereign states gave up at the founding. The Tenth Amendment lost much of its strength via Supreme Court interpretation in the post-New

Deal era. The willingness of the court to entertain virtually all excursions into commerce with a variety of doctrinal constructs detracted attention from the Tenth. The court even referred to the amendment as little more than a 'truism.'[19]

By pushing the logic of post-New Deal federalism as far as it did, *Garcia* gave truth to Justice Rehnquist's invective of some years earlier:

> one of the greatest 'fictions' of our federal system is that Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people...Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce... among the several states,"... one could easily get the sense from this court's opinions that the federal system exists only at the sufferance of Congress.[20]

He argued that the 'fiction' of delegated powers was created by the weak scrutiny applied to commerce regulation and the unwillingness of the court to advance or accept Tenth Amendment arguments. The logic of making Congress the site for the protection of state interests took the fiction a last, and some would say, final step. Rehnquist most certainly disagreed that this was the right approach to federalism.

For the inquiry here, *Garcia* is most relevant for its effective disavowal of the role of the Supreme Court as an arbiter of federalism. Blackmun argued that the task of determining traditional state responsibilities, while a good-intentioned exercise, could not

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[19] The text of the amendment reads, "the powers not delegated to the United States... are reserved to the States respectively." Some judges have interpreted this just as a statement of the obvious: what is not left to Congress is not left to Congress.
[20] From the dissent in *Hodel*, 307-8. Quoted in *Garcia*, 1347.

be objectively done by a court. Blackmun accepted the realist argument that the Supreme Court was not the best place to resolve conflicts between the federal and state governments over jurisdiction. The arguments are reminiscent of those made by Paul Weiler and Patrick Monahan with regard to Canada. While Rehnquist's opinion in *NLC* tried to revive the quest for limits on national power, it seemed to have the opposite effect. Instead of starting the ball rolling it alerted the court to the project's ultimate futility.

The quest for limits is a quest for formal doctrinal constructs. In *Garcia*, the majority ruled that these kinds of limits cannot be had without introducing subjectivity into the judicial process. The court may have masked its subjectivity up until that point by not limiting Congress. If a policy enjoyed the approval of the national political process, it suffered very little opposition from the Supreme Court. Up until *Garcia*, this latitude was unofficial. The court did not actually say that any foray by Congress into commerce regulation will meet with little scrutiny. The resignation by the court in *Garcia* seemed to open the floodgates of central expansion. Senators, not state politicians or the court, were the last protectors of states' rights, and they seemed a weak set of sentries. *Garcia* was an argument against doctrine in its purest form. However, with judges sympathetic to the states still on the court, it was not expected to be the last word.

4.4 *New York*: Federalism Salvaged

If *Garcia* laid down a gauntlet for advocates of states' rights, it was not immediately taken up. The decision did garner much attention from legal and other observers, many or most of whom decried its sloppy and unprincipled approach to federalism. Most felt that the court left too little jurisdiction to the states, and absolved itself of too much responsibility in matters of federalism.[21] The court's close division and the apparent strength of the viewpoints held by justices such as Rehnquist ensured that a reconsideration of *Garcia* would come at some point in the future.

New York v United States,[22] with Justice Rehnquist now in the Chief's chair, forestalled the death of court interpreted federalism and began the current era of rejuvenated federalism on the court. *New York* did not match *Garcia* in tone or enthusiasm, and did not overrule the *Garcia* precedent, as it differed on important technical grounds. Nevertheless, it did signal a desire to protect state interests over the promotion of national priorities as defined by Congress and carried out through the commerce clause. The two factions familiar to current observers of the Supreme Court started to shape up in *New York*. The two most conservative justices on the court, Antonin Scalia and Clarence Thomas, joined the Chief Justice in supporting the decision written by Sandra Day O'Connor. Justice Anthony Kennedy, who has provided the crucial swing vote in most current decisions, also joined the majority. Justice David

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[21] For example, A.E. Dick Howard, "*Garcia*: Of Federalism and Constitutional Values," *Publius: The Journal of Federalism* 16, no. Summer 1986 (1986).

Souter, who has since tended to side with the pro-federal government faction in the court, also joined. John Paul Stevens and Harry Blackmun joined Byron White in the partial dissent.

Congressional legislation mandating the methods of disposal for low-level radioactive waste was at issue in the case. A brief, but detailed explanation of the provisions is necessary, as they are more complicated than, say, the simple application of national labour law to state employees as in *NLC* or *Garcia*. At its core (and in the simplest terms) the legislation required States to comply with a timeline for bringing low-level radioactive waste disposal facilities on-line. Congress created the law at the urging of the National Governors Association in order to cope with the over-supply of low-level radioactive waste and the shortage of facilities for its processing and storage. To discourage the temptation to ship the waste to less populous states (South Carolina, Nevada and Washington originally handled all the low-level radioactive waste in the country), the States were required to take responsibility for their own waste and to build, either by themselves or in co-operation with other states, facilities for its disposal.

Those States that did not comply with the legislation or were tardy in setting up their facilities first faced a forfeiture of a special surcharge they were otherwise entitled to levy on waste producers and then faced increasingly more expensive rates for the exportation of their waste. Finally, and most severely, if facilities did not exist by 1996

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[22]*New York v. United States* 505 U.S. 144 (1992).

(11 years after the initial act was passed) the states had to assume title to the waste, which made the State, not the producer, responsible for its storage or disposal. Only by having a place for waste generators to dispose of their material before January 1996, could states avoid the prospect of being stuck with piles of low-level radioactive waste. If they did not have facilities available, the state assumed all responsibility for the ultimate disposal and the costs incurred. Congress was, in effect, compelling state action through negative sanctions.

For the most part the legislation and the strategy were successful. By the initial seven year deadline imposed in the legislation, nine new regional facilities existed, encompassing forty-two states. Four other states had made sufficient enough arrangements to keep the surcharges levied under the act, and the three states that originally had facilities were still covered. Forty-nine states had met the requirements. And then there was one. New York, coincidentally one of the largest producers of low-level radioactive waste, had begun arrangements to build a facility but ran into opposition from the two counties chosen as potential sites.

Faced with the looming negative incentives of the 'take title' clause, New York and the counties concerned applied to the Supreme Court for relief. They did not challenge Congress' ability to regulate the field. There was an evident element of inter-state traffic in radioactive waste that both parties conceded Congress was entitled to oversee as commerce. The entire field of radioactive waste was also open to Congress

through the supremacy clause. What the appellants did challenge was the ability of Congress to enlist the States, both through positive and negative incentives, as agencies of its policy. The court was not asked to decide any jurisdictional issues, simply whether Congress had the authority to compel the states into action.

The court upheld the core of the legislation as a legitimate exercise of the commerce power and of the federal spending power; it took issue only with the 'take title' provisions. The Tenth Amendment was invoked as a possible limit on the manner in which Congress exercised its powers. Most Tenth Amendment cases, as Justice O'Connor noted in her majority decision, turned on whether or not states could be regulated under the commerce clause by laws that were generally applied to private citizens and organizations. In this case, the law was designed to operate directly on the States alone. No pretence was made to make this a law about regulating producers of the waste. The burdens were placed directly on the shoulders of the States and only indirectly did the law regulate the actual producers.

Congress has been allowed leeway to regulate state behaviour through its spending power. The Supreme Court found in *South Dakota v Dole*[23] that the funding of certain projects or programs could be made contingent upon the states complying with some requirement within their jurisdictional field. In that case, States were obliged to set minimum drinking ages in order to qualify for federal highway funding. The voluntary

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[23] *South Dakota v. Dole* 483 U.S. 203 (1987).

nature of the requirements saved such programs. Even if the conditions were indirectly or even unusually connected to the purpose for which money was intended, the court ruled that if the conditions bore some relationship to the funding in question they were to be generally permitted.[24] As the states technically remained in control, the coercion exercised by Congress was saved from the constitutional junk heap. The court required some minimum conditions: that the spending served the general welfare, that the conditioning of state behaviour was unambiguous and that States entered knowingly into the conditionalities. Finally, conditions were considered illegitimate if there was little relation between the requirement for funds and the federal interest in national projects or programs.

In *New York*, although the incentives were monetary, the money that was involved came from levies charged against waste producers for the disposal of their detritus, not from otherwise expected federal funds. The legislation made it explicitly clear that federal funds from general revenue were not involved – in fact it appeared to be a point of some pride. The federal government acted as a trustee, holding the fees charged for disposal until the legislative conditions were met by the States. The majority did not find

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[24] South Dakota challenged the requirement that they set a minimum legal drinking age of twenty-one or give up five percent of their federal highway construction grant entitlement. The state argued that the spending power could not be used to invade the state's constitutional power over liquor sales. The court disagreed, characterizing the requirement as encouragement rather than coercion. A minimum drinking age was found to bear some relationship to highway safety. Not an immediately obvious relationship mind you, but on closer scrutiny it appeared that many youths took advantage of their ability to drive to travel to jurisdictions with a lower drinking age. The trip home obviously warranted some concern. Since highway funds are allocated for the provision

this an invalid use of the spending power. While the money was kept out of general revenues, the levy was in the form of a tax and it remained Congress' prerogative to commit those revenues to the purposes it saw fit.

Where the court disagreed with the legislation was in the structuring of the 'take title' provisions. O'Connor cynically noted that the states had the 'choice' of accepting title to the waste or disposing of it according to Congress' wishes. This did not constitute choice in the manner suggested by the voluntary test in *Dole*. The federal government argued that the States implied their consent by requesting that Congress pass the legislation. In fact, the legislation was a textbook case of post *Garcia* co-operative federalism. The states producing the waste and those few states handling it no longer found themselves in a tolerable situation. Congress brokered a compromise which looked likely to solve the problem. Jurisdictional squabbles to be formally resolved in the courts appeared unnecessary. The Supreme Court, however, found that the legislation's success rested on an illegitimate foundation. The majority argued that it was not the states' privilege to give up their sovereignty, even by negotiation. State sovereignty, it claimed is not solely about protecting the States to serve their own purposes. Rather federalism, and the division of authority inherent in it, was designed for the protection of individuals.

The majority argued that exercises in co-operative federalism had to adhere to the rules of sovereignty. Otherwise, they reasoned, accountability was lost. In the State of

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of safe roadways, the court ruled that there was a reasonable relationship between the

New York, where there were clearly local objections, public officials at both the state and national level seemed able to elude personal responsibility through a compromise between them. The commitments in an agreement like the one contested in *New York* give the impression that officials at both the federal and state level have no choice – they thereby sought to avoid the political consequences of unpalatable decisions when facing their constituency (electoral or otherwise). To avoid creating such an accountability vacuum, the court ruled that Congressional direction of the States as agencies, as in the take title provisions, was not permitted.

The result of *New York* was to rescue some status for the States. Jurisdictionally it did not increase the reserved powers or restrain the scope of commerce. In that sense it did little to weaken the centralism of *Garcia*. *New York* did not usher in a state-centred perspective, but it did prime judicial minds for one. The majority articulated the possibility of limits to functional federalism. Even though the states consented to the co-operative arrangement featured in the legislation, the court found that federalism had formal legal structures that must be enforced. These limits did not restrict the jurisdictional scope of commerce. The court's main contribution with *New York* was the revival of the court as an agent of federalism and the constitution. Doctrine on the court's historical understanding of the spending power helped O'Connor to clarify the issue in the case and to enforce the formal structures of accountability demanded by the law of the constitution.

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condition and the funding.

4.5 *LOPEZ*: COMMERCE NARROWED

1995 was a mixed year for American federalism in the Supreme Court. The 'case celebre' was *U.S. v Lopez*,[25] which struck an almost unprecedented blow to the scope of the commerce clause. It was the first decision since the New Deal era to find unconstitutional an entire piece of commerce clause legislation. The law at issue was classic post-New Deal congressional handiwork. With a tenuous justification under the commerce clause, Congress passed the *Gun Free School Zones Act*. The act established 'zones' surrounding public schools and made it a criminal offence to possess a firearm within the zone. The intent of the legislation was clear enough: to promote public safety and provide the means to promote a gun free environment in schools. Similar laws existed in various states, but public concern for the safety of school attendees in all states seemed to warrant Congress' intervention. In one fell swoop, through its near plenary power over commerce, Congress provided protection to students, teachers and staff in all the nation's public schools, at least as far as making illegal the possession of firearms on school grounds and surrounding areas could provide.

Alfonso Lopez was charged under the act for possessing a firearm on school property. Hoping to circumvent the charge, he challenged Congress' jurisdiction to enact such a law. Congress passed the law as an exercise of the commerce power based on a link between interstate commerce and schools. The case law to that point suggested there were three categories under which Congress may legislate in regard to commerce: the

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[25] *U.S. v. Lopez* 115 S. Ct. 1624 (1995).

channels of inter-state commerce; the instrumentalities, persons or things of interstate commerce; and matters which had a 'substantial relation' to interstate commerce. Of the three, the last was the most general and unspecified category, and the federal government sought to justify the regulation of gun-free school zones under it.

Chief Justice Rehnquist arose from a relative silence on federalism in the years after *NLC* to deliver the majority opinion for the court. He was joined by the same justices that joined O'Connor in the *New York* majority, with the exception of David Souter, who by this point had become more closely aligned with the pro-federal government faction. While *New York* limited Congress on the margins of its authority, it did not actually challenge federal jurisdiction, just the way that Congress operated within its jurisdiction. The *Lopez* decision struck directly at the heart of federal legislative dominance by challenging its seemingly infinite jurisdiction over commerce. That the law challenged by *New York* was ever passed was a testament to the confidence of Congress in federal-state relations. By limiting the ability of Congress to force the states' hands, the court did little to diminish the source of that confidence: an expansive commerce clause. The consequences for federal power would be much greater if the court were to focus on limiting this power.

The court's jurisprudence on what constituted a 'substantial relation' to commerce was the primary issue in the decision and dissent. The federal government argued that the provision of education had a direct effect on commerce, and thus justified Congress

mandating the terms of school safety. Unsafe schools, they argued, would affect the national economy in that the costs of violent crime are substantial, the willingness of persons to travel is reduced by the perception that areas are unsafe and the educational process, which influences the productivity of the citizenry is handicapped by a 'threatening learning environment.' Accepting such an argument, Rehnquist reasoned, placed within the ambit of Congress a seemingly unlimited field of jurisdiction. He would have none of it. To his mind this so called 'national productivity' reasoning seemed limitless. How could any activity not qualify as somehow impacting, however indirectly, on national productivity? Rehnquist argued that "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."[26] For too long, in his opinion, such extensions of commerce had been allowed to progress under flimsy rationales. He did not actually contend that the court had been wrong in the past, but that it was perhaps misunderstood in its willingness to approve Congressional forays into uncharted territory. Rehnquist noted several times in his opinion and most notably at the outset, that the federal government possesses enumerated powers. Congressional frontiersmen had not been encouraged by the court to respect any borders for federal power. Rehnquist reminded them that commerce does have finite limits.

Anthony Kennedy filed a concurring opinion along with Justice O'Connor. The bulk of the opinion was devoted to determining the locus of accountability and what should constitute 'areas of traditional state concern'; a concept reminiscent of *NLC*.

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[26] Ibid., 1634.

O'Connor too had expressed similar accountability concerns in her *New York* opinion. Here her caution did not seem as necessary. The attempt to avoid ultimate responsibility, so clear in *New York*, was missing in this case, as both levels of government were tripping over each other to be the saviour of the schools. In the Kennedy opinion, it seems duplication, thanks to the confusion it causes, is as much a vice as is outright avoidance of responsibility. The Kennedy opinion also noted that the federal balance was best maintained by the judiciary – in the absence of other structural mechanisms. Kennedy hoped to ensure that political convenience did not result in the creation of less politically accountable arrangements. *Garcia*-style abdication by the court of its oversight was not tolerated. Kennedy ruled that on occasions where Congress overstepped the already generous lines drawn around commerce, they would not be allowed by the court to further encroach upon state jurisdiction.

Justice Thomas also filed a concurring opinion that constitutes some of the most state sympathetic judicial text in recent memory. He was most adamant about registering his discontent with the way that the 'substantial effects' doctrine aggregated powers through a class of subjects rather than through particular exercises in isolation. The general practice of the court had been to allow Congress substantial leeway by examining the activities it sought to regulate in context rather than on their own. The classic example was the post New Deal case of *Wickard v Filburn*.[27]

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[27] *Wickard v. Filburn* 317 U.S. 111 (1942).

In that case, the defendant Roscoe Filburn was charged with growing wheat in excess of the quota allowed under the federal *Agricultural Adjustment Act*. The production of such crops was regulated by Congress in order to mete out some of the effects of the market and to avoid oversupply and subsequent low prices. In his defence, Filburn argued that he used the excess on his own farm. The excess wheat was not intended for sale and therefore did not enter the stream of commerce. The Secretary of Agriculture replied that even by growing wheat for his own use, Filburn had a negative effect on the marketing system. While his farm's volume did not have the kind of impact on its own that Congress was worried about, the effect of many farmers growing over-quota wheat to supply their own needs would have eventually pervert both the system's intent and its effectiveness. The court upheld congressional authority to regulate wheat destined for farm use as well as that destined for market. The court literally aggregated the field of wheat. The court claimed that Congress could not effectively regulate those fields it was responsible for if it could not be sure that activities on the margins did not subvert the greater whole. Cumulatively, the actions of someone like Filburn, while outside strict boundaries of commerce, potentially had a substantial effect on commerce and were thus subject to congressional oversight. Thus, the substantial effects doctrine was born.

Thomas argued that this typical style of post-New Deal reasoning deeply undermined the original intent of the constitution and expanded the commerce power beyond recognition. In support of his argument, Thomas cited many of the pre-1937 decisions which limited attempts to expand regulation of the national economy through

the commerce clause. The substantial effects doctrine was most responsible for the changes Justice Thomas was uncomfortable with. Substantial effects justifications flourished, he claimed, because of the aggregating power that control over one aspect of a field required. In other words, when Congress was given an inch, it often took a mile. So in *Lopez*, the need to ensure that schools produce graduates for the effective continuation of commerce was expanded to include school safety. Thomas vehemently objected to all sorts of little things being pulled under the umbrella of commerce because aggregates of little things potentially have substantial effects on interstate commerce. In his words, "one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce."[28]

The main dissenting opinion, setting out the pro-commerce position, was that of Justice Breyer. To his mind, the court had quite properly refrained from narrowly defining the substantial effects test. For Breyer, the expressions 'significant' and 'substantial' had been left unclear on purpose. That way the test did not require the court to look for reasons to exclude activities. The court did not demonstrate either in intent or practice that the test was to be severely conducted. Second, he argued that cumulative effects (what Thomas called aggregates) were an entirely appropriate way of considering whether there was a significant effect. Breyer cited *Wickard v Filburn* to this end. Finally, and critically from Congress' viewpoint, Breyer wrote that the court should give substantial leeway to the legislature in determining the significance of the connection

[28] *Lopez*, 1650.

between an activity and interstate commerce – both because it was Congress' power and because the legislature was better equipped to make such empirical inquiries.

Breyer did not argue that the court should forego altogether its responsibility for making an independent judgement. He was, however, prepared to accept Congressional findings on the connection between the possession of guns and school performance and some measurable effect on commerce. He did so even though Congress included no evidence of such effects in the initial legislation and only provided such justifications after passing the legislation. Several pages of his dissent were spent documenting this connection with material from Congressional findings and academic study. On legal points he found the majority troubling not so much for refusing to recognise this connection, but for being restrictive about investigating such connections when it has been the court's practice to allow Congress considerable leeway in such circumstances. In addition, Breyer was troubled by the majority's attempt to distinguish the activity at hand as non-commercial and thus distinct from the kinds of activities allowed in precedent. He objected to the manner in which the decision unsettled an area of law previously believed to be quite certain. Since the volume of activity and legislation that occurs under the auspices of the commerce clause is substantial, he argued, any tinkering with what is permissible under the clause, especially from a 'principle' position threatens the clarity of a large body of regulation.

4.6 *TERM LIMITS*: SOVEREIGNTY DEBATED

The companion to *Lopez* in 1995 was *U.S. Term Limits, Inc. v. Thornton*, on its face a victory for federal power. U.S. Term Limits, Inc., a public interest group, had sought to impose limits on the time federal politicians serve in office by altering state constitutions to that effect.[29] The court was left to determine whether or not the states actually had the authority to alter the requirements for Congressional membership, whether this was a matter for Congress itself, or if in fact term limits required an amendment of the federal constitution. [30]

The case is important in the current federalism debate as the arguments from both sides solidify the contending theories of federalism developed by the court. The federalists (again Rehnquist, Scalia, Thomas and O'Connor) were on the short side this

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[29] The group's initial strategy was to work on a state by state basis to implement restrictions on the number of terms that Congresspersons could serve. Given the difficulty of constitutional amendment at the national level, this seemed the most effective route to the imposition of term limits. In addition, the movement took advantage of the availability of the referendum and initiative procedures in many states to exact changes in state constitutions mandating the form of election of members to Congress. Many state campaigns were successful in altering state constitutions, Arkansas among them. The Arkansas amendment was challenged on the grounds that the states could not restrict the membership of Congress.

[30] Arkansas passed Amendment 73 by referendum in November 1992. It prohibited the name of otherwise-eligible candidates from appearing on the ballot if they had served three terms in the House of Representatives or two terms in the Senate. There was something of an attempt to bullet-proof the provision in the way that it was drafted. By only excluding names from the ballot, the state law played it safe in that Congress is to be the sole judge of qualifications (and disqualifications) of its members. This way the states were merely fine tuning the electoral process as they are entitled under Article 1 sec 4 of the constitution. Candidates were not truly excluded – they could mount a write-in

time, but in their dissent articulated a theory of federalism with a wholly different concept of where sovereignty lies in the federal system than that propounded by the majority. The majority made reference to the founding and ratification debates and determined that the originators of the constitution intended the qualifications of members of Congress to be fixed and certainly not alterable by Congress itself. In their opinion, constitutional amendment is the only means to alter the qualifications for membership to Congress. With the limited framework for change at the national level in mind, the majority then addressed the question of whether the states could make changes to the qualifications through the powers reserved to them by the Tenth Amendment. This required, in the majority's opinion, an examination of both the original powers of the states and the nature of the compact entered into through the constitution.

For the majority it seemed there was no means by which the states could reserve powers that did not exist prior to the creation of the national government itself. How, they asked, could the states claim that their pre-federation powers included an ability to determine the qualifications for members of a national legislature which did not exist? The majority referred to the nineteenth century jurist, Joseph Story who wrote "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them... No state can say, that it has reserved, what it never possessed."[31] The majority also emphasised the

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campaign and serve if elected, but a ballot exclusion effectively barred most if not all candidates from achieving electoral success.

[31] *U.S. Term Limits, Inc., v Thornton* 115 S. Ct. 1842 (1995), 1854. Quoting from Joseph Story, *Commentaries on the Constitution of the United States*, (3rd ed. 1858),627.

"revolutionary character of the government that the Framers conceived."[32] A national government was created that required national loyalties of its citizens as much (or more) as it required state loyalties. The national government under the present American constitution, they claimed, unlike its Articles of Confederation predecessor, created a direct relationship between the national government and its citizens. While some elements of national representation were still mediated through the states (the state selection, until the passing of the Seventeenth Amendment, of senators and the state-based electoral college), representation in the House of Representatives was a direct demonstration of popular sovereignty at the national level.[33] The majority ruled that since members of Congress specifically owed their allegiance to the people and not the states, their conditions of office and qualifications were to be decided by those same constituents, rather than by the states. The nature of the federal compact they claimed, precluded the existence of a state power over qualifications of congresspersons.

The majority further argued that in order for the states to have such a power, it had to be delegated to them by the constitution. The Elections Clause, in Article 1 section 4 of the constitution was the only obvious grant of such power to the states.[34] In the majority's reasoning, there was no legitimate construction of the Elections Clause consistent with the term limits amendment of Arkansas challenged in the case. Justice

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[32] *Term Limits*, 1855.
[33] The majority referred to Federalist 52 on the qualifications of members of the House of Representatives Cooke, ed. *The Federalist Papers*, 353-359.
[34] The section reads. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

Stevens wrote on this point that, "the Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with licence to exclude classes of candidates from federal office."[35] This was consistent with, if not derived from his theory of sovereignty. The Framers, he argued, were acutely conscious of the possibility that jealous or difficult state governments would seek to undermine the national government, especially if they had the ability to determine to any extent the composition of the membership of national institutions. With this fear in mind – Stevens found it in the *Federalist* as well as in convention debates - the Framers "adopted provisions intended to minimize the possibility of state interference with federal elections."[36] Allowing the states to impose term limits as a qualification on Congressional membership, he found, was clearly not the founders' intent.

The minority opinion was also based on its understanding of sovereignty. Like the majority, they did not dispute that sovereignty ultimately lay within the hands of the American people, but they conceived 'the people' in a radically different manner. In the most basic sense, the people, for constitutional purposes, are not to be understood as the undifferentiated masses of the nation. Rather, the people are holders of a sovereignty that is mediated through the states. "The ultimate source of the Constitution's authority" Justice Thomas wrote, "is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[37] This theory was based largely upon the procedures used for the ratification of the original constitution, and how

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[35] *Term Limits*, 1869.
[36] Ibid., 1857.

they served to mitigate the expression of popular sovereignty through the States. This theory of sovereignty, in turn, provided a different theory of reserved powers, one that precluded the need for a State power over Congressional qualifications. Thomas agreed that the setting of qualifications for members of Congress was not a delegated power, however, he did not agree that it needed to be. Instead he advanced the claim that setting qualifications was a power inherent to the sovereignty of the people and thus the States. When Thomas spoke of popular sovereignty he often used the phrase 'people of the States' to indicate the mediated character of popular assent. The constitution was of course ratified by state conventions rather than by any single national affirmation. The mediation of sovereignty that this represents did not indicate anti-democratic tendencies to Thomas, but rather a reluctance to surrender authority to the national population. He argued that when the states entered into the federal compact, they surrendered discrete portions of their authority, but as states, they preserved a significant portion of their powers.

The fallacy in the majority's argument, Thomas reasoned, was the suggestion that state governments could not reserve powers which did not exist prior to the creation of the national government. The reserved powers had an altogether different character for Thomas than they did for the majority. The powers reserved to the States were those also reserved to the people - the people of the States – to reuse his phrase. It is incoherent, Thomas argued, to claim that the people needed to have exercised their powers prior to the founding in order to claim them afterwards. By analogy he suggested, "if someone

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[37] Ibid., 1875

says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar."[38] By conceiving sovereignty differently Thomas constructed the Tenth Amendment and the powers of the States to restrict those eligible for membership differently. Doctrine was an aid to his decision, but it did not force him to find adverse to his structural preference

Term Limits seems to be a doctrinal wasteland. The majority relied upon *Powell v McCormack*, a decision of the Warren Court, in its determination of who can set congressional qualifications, but otherwise, there is little specific material from previous cases that appeared to guide the two opinions. The constraints that came from previous decisions were much more abstract. The court effectively raised grand theorizing about sovereignty to the status of doctrine. How a judge understood sovereignty ultimately determined the response to questions regarding federalism. This situation has led one notable commentator to label both approaches 'structural default positions.'[39] It would seem that no matter what the issue put before the court, the respective sides can retreat to these structural positions to determine the appropriate outcome. In contrast to the functionalist approach which had its nadir in *Garcia*, the *Term Limits* opinions demonstrated a growing tendency on both sides of the court to formalise decision making in some of the most absolute terms available. The *Term Limits* majority was seeking to

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[38] Ibid., 1878.
[39] Kathleen Sullivan, "Duelling Sovereignties," 81.

protect federal power in much the same way that the *New York* majority sought to protect state power, only this time the swing vote of Justice Kennedy favoured the federal government.[40] Kennedy was motivated by the doctrine of classical federalism that he articulated in *New York* to find against the states in order to preserve the same value. His understanding of accountability helped him to decide the case.

The functionalist approach briefly held by the court in *Garcia* is not inherently centralizing. However, it tended to favour enumerated powers over the less concretely expressed reserved powers. By contrast, a formalised approach can favour either level of government. Which government it does favour depends upon what reading of the sovereignty question a judge or group of judges favours. Hence the 'structural default.' The answer to federalism conflicts for the current court seems not to lie in the circumstances of any given conflict, but in the judges' understanding of the way that the federation was designed. This approach abandons some of the specific doctrines of the court, like those that have slowly grown up around the commerce clause, in favour of general doctrines about the nature of the constitutional system. Regardless of the source,

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[40] Justice Kennedy did write a separate, concurring opinion. His point of view on the sovereignty issue seems clear. "In my view...it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system...Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." The last sentence is perhaps most telling of Kennedy's outlook on federalism. His concern for independence within the spheres allotted to both levels of government could be described as classical federal or of the 'watertight compartments' school. This may help explain his shifting allegiances, he is more interested in seeing the clean lines of accountability preserved than proudly trumpeting his understanding of sovereignty. *Term Limits*, 1872.

these structural understandings are clearly embedded in the minds of the judges as they go about deciding specific cases.

4.7 *PRINTZ*: SOVEREIGNTY APPLIED

With this fundamental dispute in the air, the court has continued to rule on important federalism cases. *Printz v United States*,[41] decided in 1997, mixed elements of both the *Lopez* and *New York* decisions in the subject matter it addressed as well as in its results. It found again against the extension of federal jurisdiction in gun control and the conscription of state officials in the application of federal law. Congress passed the *Brady Handgun Violence Prevention Act* in 1993 which implemented a system of background checks for prospective handgun buyers, in order to limit the legal possession of such firearms among those with criminal records or histories of violence. The legislation provided for the eventual creation of a national registration infrastructure, but in order to apply the law in the interim, the chief law enforcement officials (or CLEOs) of local areas were compelled by the legislation to conduct the background checks and clearances. It was not long before some state officials applied to be absolved from this burden on federalism grounds. Jay Printz, CLEO of a Montana county, and Richard Mack, a colleague from Arizona, applied to be relieved from their obligations under the act. They argued that it was not within Congress' power to compel local officials to carry out federal policy, even on an interim basis.

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[41] *Printz v U.S.* 117 S.Ct. 2365.

Justice Scalia's majority opinion agreed wholeheartedly. Scalia admitted there was no explicit constitutional prohibition on the states being employed in the application of congressional law. However, he found that (1) historical practice, (2) the structure of the constitution, and (3) the jurisprudence of the court suggested that such a prohibition existed.[42] As to the first source, he found no relevant historical instance in which the states had been pressed into the service of the federal executive. Nor did he find any evidence that such a practice was conceived by the founders. Relying in part on the court's *New York* decision, Scalia claimed that the system of dual sovereignty envisioned by the founders presumed the exact opposite. The constitution was structured to make the two levels of government responsible for their own spheres, not compel one level to fulfil the edicts of the other.

Scalia argued that the most compelling reason to dismiss the enlistment of CLEOs by Congress was the prior jurisprudence of the court, specifically, *New York*. The government claimed that *New York* was distinguishable from this case in that the 'take title' provisions of the act challenged there compelled legislatures to make certain policies, whereas in this case, officials, not legislatures were compelled. The CLEOs were issued a final, non-discretionary directive to help implement the law. This, claimed the federal government, was sufficiently different from the kind of compulsion mandated in *New York*. This argument far from satisfied Justice Scalia and the majority. The enlistment of state officials in a non-policymaking role was perhaps distinguishable from the enlistment of state legislatures in a policymaking role, but both offended the principle

[42] Ibid., 2370.

of state sovereignty affirmed by the majority in *New York*. The fatal flaw in the *Brady Act* was its conscription of state officials, even on a temporary basis.

Justice Stevens wrote for the dissenters in *Printz*. He found the *New York* precedent much less convincing. The enlistment of officials instead of legislatures made all the difference to the minority. They found that the impelling of local officials did not qualify as a matter of impugned state sovereignty. Stevens claimed that no evidence, certainly no written rule, exists to bar Congress from enlisting state officials. In fact, historical practice seems to suggest that in times of emergency the enlistment of state personnel by Congress is common. Why, asked Stevens, was the court willing to substitute its judgement for that of Congress? It should be up to Congress to decide if gun violence is an emergency and if so, the court should not interfere but should defer to Congress' better judgement.

But Stevens did not stop with a simple deference argument. He engaged the *Printz* majority on its own terms, specifically on its interpretation of *New York*. Far from reading *New York* as an indictment of co-operative federalism, Stevens read the case as an endorsement of the practice. Of the three sets of incentives in *New York*, only the 'take title' provisions of the legislation were thrown out. Otherwise, the case speaks to exactly how Congress can enlist the states. The take title provisions were thrown out in *New York* because Congress compelled the state legislatures. That was the sole basis for the court's decision. Stevens agreed that compelling a state legislature certainly qualified as an

infringement of state sovereignty. Compelling a state official to co-operate in the implementation of federal legislation did not seem to him to be on par as a violation of sovereignty. In fact, he argued, the majority may have done more to upset the federal balance by requiring the federal government to create an entirely new bureaucracy to carry out the work it requested of local officials.[43]

4.8 Conclusion

Some recent literature suggests that, on the basis of its recent decisions, the Rehnquist court is reinventing federalism. At least one observer disputes that characterization. Political scientist Richard Brisbin argues that the court may indeed be interpreting federalism with more favour toward the states than at any time since the New Deal, but that does not constitute a reinvention of federalism. To reinvent federalism the court would have to ask different kinds of question than these recent cases have. In short, he argues, the Rehnquist court has not challenged the 'constitutive' (his term) structures of American federalism in its decisions. Instead, the questions asked by the court "assume that a legally bounded politics, as manifested in the federal Constitution and two centuries of judicial interpretations of the U.S. Constitution should provide rules that divide power between the federal and state governments."[44]

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[43] Ibid., 2396

[44] Richard A. Brisbin, Jr., "The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations, 1991-1997," *Publius: The Journal of Federalism* 28, no. 1 (1998), 190.

Brisbin might say that the court's current approach is contentedly doctrinal. He believes that despite the court's current internal differences, the court as a whole endorses the status quo of American federalism's institutional arrangements. Rather than reconstitute American federalism, as *Garcia* presented an opportunity to do, the court has only revitalized debate about the deployment of government power within the formal legal understanding of federalism. The court has not propounded "a new institutional structure of politics or nonlegal arrangement of political power."[45] The argument of this thesis has been that federalism benefits from such a revival. Consider again the alternative.

Garcia was certainly the most constitutive case of the court in modern memory. Beside it, the recent cases of the court do lack constitutive traits. The *Garcia* majority articulated a vision of federalism that did not require the concerted involvement of the court. This so-called functionalist approach claimed that American federalism would operate better without the artificial restraints and false certainties of judicial review. Better, claimed the majority, that the court defer to Congress on matters of federalism than try and impose artificial, if legal constraints upon the scope of the enumerated powers. The current court takes its inspiration not from *Garcia*, but from the approach in *National League of Cities* (*NLC*).

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[45] Ibid., 191

The *Garcia/ NLC* split is a battle between functionalism and formalism as ideal types. Formalism as a method for deciding constitutional cases is currently in the ascendant. Both the states' rights advocates on the court and their opponents have adopted the methodology. What bothers someone like Kathleen Sullivan is that this method seems to structure decisions in an uncompromising way. To her mind, this new formalism allows judges to retreat to 'structural default rules' rather than spend any time considering the circumstances of a particular case or how the court could help the federal system to smoothly function. This battle between 'duelling sovereignties' is more formal than she feels it needs to be, and comes at the cost of removing compromise and concession from the court's federalism adjudication. But Sullivan presumes too much of the structural positions. The doctrines currently applied by the court are not that rigid. They do not 'lock in' positions which compel all future results as she claims.[46] The court has not even developed entirely polar doctrinal categories. There is room in the understanding of federalism held by the court generally for considerable manoeuvre by individual judges.[47] The structural positions, like all doctrines, only go part of the way to determining how a case will fall out. Sullivan's concern suggests that the historical understandings shared by the factions of the court have become all important. They are more important; more important than they were twenty-five years ago, but they are still only one amongst a host of variables.

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[46] Kathleen Sullivan, "Duelling Sovereignties," 81.

[47] As further evidenced by the court's recent decision in *Lopez v Monterey County* (97-1396). The court upheld the application of the *Voting Rights Act*, which required counties to 'pre-clear' changes to their voting rules with federal officials. Only Justice Thomas

The American Supreme Court has abandoned the purely functional position it articulated in *Garcia*. This is not a small development. Alone, it demonstrates a continuing place for judicial reasoning in the study of federalism. By engaging with federalism as it has, the reasoning of the court has never been more critical to the outcomes of federal-state conflicts. A summary of the recent doctrines and approaches such as that offered in this chapter can also be a summary of recent developments in federalism. These ideas matter to the operation of federalism. What the court has to say and how it arrives at that outcome are more determinative of the general structure of federalism than has been the case since the New Deal. Divining the preferences of the judges has once again become constitutionalist spectator sport. That there is wiggle room within the positions held by the court makes the reasons for judgement in every case all the more critical. The court has revived the belief that it can decide matters of federalism on the basis of a reasonably defined set of principles and does not need to leave the settlement of division-of-powers disputes to political institutions alone. Doctrine is again an independent variable. The contrast between the federalism of the court in *Garcia* and the present day cannot be overstated. The court has effectively moved from a position that cast doubt upon its own ability and suitability to contribute to the resolution of federalism disputes to a point where federal-state conflicts hang in the balance of evolving and subtle ideas about the interpretation of federalism and the division-of-powers.

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objected to the substantial 'federalism costs' which the practice exacted from the political subdivisions of the states.

CHAPTER 5:

CONTEMPORARY FEDERALISM DOCTRINE: AUSTRALIA

5.1 LEGALISM, LITERALISM AND DOCTRINE

Australia's High Court has always expressed a preference for formal methods of decision making. Australian constitutionalism has been invariably legalistic. Only recently has the High Court indicated any willingness to question strict legalistic methods. Otherwise, it has expressed continuous endorsement of this 'neutral' method ever since its most famous articulation in the *Engineers* case of 1920. The most important consequence of the Court's legalist tradition has been that Commonwealth powers in section 51 of the constitution have been read literally or according to the 'natural meaning of the text.'[1] This literal reading has invariably expanded section 51 powers in preference to the 'reserved' and notably, unwritten, powers assigned to the States.

The *Engineer's* revolution cemented an approach to the interpretation of the division-of-powers which has yet to be other than cosmetically altered. The early doctrines of the court were abandoned in favour of much stricter analytical techniques. Legalism has its own set of doctrines – even a literalist technique relies upon tools to divine meaning.

[1] *Amalgamated Society of Engineers v Adelaide Steamship Co.* 28 C.L.R. 129 (1920), 150.

Legalism does purport to be less dependent on extra-textual aids, but critics of the court have amply demonstrated the reliance of legalism on doctrine to carry out judicial review.[2] That said, recently some of those same critics have been suggesting that the court may be less interested in using legalism as a justification for its approach to the division-of-powers. Brian Galligan, for example, argues that legalism was never anything more than a public-relations strategy for the court. Legalism reassured the Australian public that undemocratic and unaccountable judges were not just deciding cases on a whim. Legalism, according to this thinking was never really a philosophy so much as it was a rhetoric to cloak the messier process of balancing interests and preferences that is judicial review. Legalism cannot be written off wholly as an animating philosophy. While there are indications that the court is willing to decide controversies outside the bounds of its traditional lines, literalism and legalism have by no means been wiped off the map. There may be a change in the way the court makes decisions about federalism, but legalistic methods are still a part of the way that the court forms its results.

The court no longer appears as willing to endorse expansion of the central government's power through a generous reading of the Commonwealth headings in the constitution. Going into the 1980s there was little indication that the court would relent in favouring central over state authority. But in order for a revolution to occur sometimes the extravagance of the existing regime must first be made undeniable. Judges seem to back off a system reasoning only after it comes to a sort of logical endpoint by forcing obtuse results

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[2] Brian Galligan, "Legitimating Judicial Review: The Politics of Legalism," *Journal of Australian Studies* 8, no. June (1981), 39-45. Leslie Zines, *The High Court and the Constitution* (Melbourne: Butterworths, 1991).

– the textual equivalent of closets full of Guccis or the palace of Versailles. Once the practice of a court demonstrates an overt degree of circularity or bias, it is much more vulnerable to challenge, particularly if results appear to be perverse. The best example of this phenomenon is the way that the American Supreme Court's indulged a radically centralist position in *Garcia* and has since subjected commerce clause regulation to much more rigorous review. A similar change in current Australian developments can be traced to the *Tasmanian Dam* case and the way in which the court pushed the literalist method to an almost absurd, but logical endpoint, threatening in the process the very idea of the division-of-powers.

After writing off federalism in *Tasmanian Dam*, the court appears to have been left with nothing to do but reinvent and revive federalism. This chapter will explore how the court pushed the logic of the division-of-powers to its brink and has since retreated to a more measured view of the balance between Commonwealth and State powers. The continued role of legalism in this development will be closely noted. This 'super doctrine' has endangered the relevance of the court as a force in federalism, but it is doctrine (albeit of different sorts) that has renewed the relevance of the court and of federalism.

5.2 *KOOWARTA*: EXTERNAL AFFAIRS EXPANDED

It did not take the *Tasmanian Dam* case to alert all observers to the threatened status of federalism. The historian, Winston McMinn, proclaimed the end of federalism in Australia some years earlier. He credited its apparent demise largely to the liberal interpretation of the powers of the Commonwealth. "There are other definitions of

federalism" he noted, "but to accept Wheare's is to accept that Australia has long since ceased to be a federation."[3] The broadly defined Commonwealth powers, in his view, had effectively robbed the States of the independence necessary to live up to Wheare's co-ordinate definition. That was four years before the *Tasmanian Dam* case.

The trend was not as entirely one-sided, or as dramatic as McMinn's evaluation might suggest. The High Court only expanded Commonwealth powers to a point. This is particularly evident when one compares the pace of centralization with the avowedly anti-federal goals of the Labor Party. Comparatively, Australia's federal system does seem centralized, but the Labor Party's more hostile, anti-federalism agendas were left unfulfilled by the court.[4] The most intense struggles between Labor and the constitution were confined to the 1940-50 period, but continued to mark the tone of judicial review. Thus, the net effect of the High Court's jurisprudence was to centralize power, albeit at a slower rate than the political branch preferred. The Commonwealth's power over external affairs is the best example of how this occurred.

The Commonwealth was accorded the power to conduct Australia's external relations by section 52 (xxix) of the constitution. This power was historically understood to include the making of treaties on behalf of the federation. The treaty power was not limited

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[3] W. G. McGinn, *A Constitutional History of Australia* (Melbourne: Oxford University Press, 1979), 197.

[4] The court was not the only, and perhaps not even the most significant, obstacle to centralization. The Labor party was stymied by a population unwilling to endorse constitutional change via referendum. Only eight of the forty-four referendums put to the Australian electorate have achieved the double majority necessary for approval, making Australia, in Geoffrey Sawer's words, the 'frozen continent.'

to those areas in which the Commonwealth government has jurisdiction, but was plenary and independent.[5] The implementation of treaties for which the Commonwealth did not have an enumerated power commonly depended upon the goodwill of the States, or required the Commonwealth to justify laws as ones made in the name of external affairs. The Commonwealth had been advised for some time that a more aggressive use of the external affairs power would provide a legitimate means to increase power at the centre without any likely opposition from the High Court. The great Labor expansionist Gough Whitlam advised such a course in 1957[6] largely on the basis of the High Court's decision in *R v Burgess; ex parte Henry*.[7] Robert Menzies too saw the potential of external affairs to expand the scope of Commonwealth power without resort to constitutional amendment.[8] The court necessarily became involved as States challenged the variety of agreements and treaties to which the Commonwealth was a signatory.

The logic of external affairs expansion was simple. The Commonwealth government passed legislation to fulfil the obligations it made in the course of Australia's external relations. The only apparent limits on this power were the same ones, such as implied immunity, that applied to all Commonwealth powers. Additionally, the law had to

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[5] Leslie Zines, *The High Court and the Constitution* (Melbourne: Butterworths, 1991), Chapter 13 "Australia as a Nation in External and Internal Affairs."

[6] "A Labor Government should make more use of the external affairs power to extend its legislative competence, in particular by implementing conventions and treaties ... There would seem good ground for believing that the High Court would not be prone to invalidate Commonwealth legislation in such fields." Whitlam, *On Australia's Constitution*, 40-41.

[7] In this case, the court upheld Commonwealth regulation of aeronautics as a matter 'international in character.' The majority of the court found that section 51(xxix) encompassed anything reasonably required for living up to a treaty. *R v Burgess; ex parte Henry* 55 C.L.R. 608 (1936).

be seen as a reasonable means of living up to a treaty commitment. Finally, the court argued in *Burgess* that for matters to qualify as external affairs, the activity in question had to be 'international in character.' That is, the matter must be perceived to be a subject of legitimate international co-operation and agreement. The court argued that such an activity did not have to take place outside Australia to qualify as a matter of external affairs, but had to have an element of legitimate internationalism. What this meant was left largely undefined.

The modern expansion of the external affairs power came with *Koowarta v Bjelke-Petersen.*[9] In this case, the Commonwealth invoked anti-discrimination legislation to overrule the Queensland State government's decision to refuse pastoral leases to Aboriginal communities. The Commonwealth defended its action as necessary to the fulfilment of a treaty obligation. *Koowarta* presaged much of the *Tasmanian Dam* decision, expanding what was acceptable as an international agreement, and thereby the scope of the subject matters in which Commonwealth legislation was permissible. The disposition of lands within the state, which was the nominal activity in dispute in *Koowarta*, was commonly thought of as a State rather than a Commonwealth matter. However, the Commonwealth had passed, some years earlier, the *Racial Discrimination Act* [1975] in conformity with its commitment to the International Convention on Human Rights. The Commonwealth was

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[8] Menzies, *Central Power*, 134.

[9] A.L.J.R. 625 (1982). At least one observer was able to state that "it is a tenable view of *Commonwealth v Tasmania* that as a matter of *ratio decidendi* it added nothing to the judicial construction of the Commonwealth's external affairs powers...which was not already...clearly established in *Koowarta v Bjelke-Petersen.*" Geoffrey Sawer "The External Affairs Power" *Federal Law Review* Vol. 14 (1984), 199.

drawn into the dispute as the Queensland government was effectively discriminating against Aboriginals.

The court was obliged to decide what was permissible under external affairs, the definition left by *Burgess* being relatively unclear. The court's reasoning turned not so much on whether the Commonwealth's agreement had an international character, but whether or not it comprised a matter of 'international concern.' This subtle shift had expansive potential. According to this test, a matter did not need to be international at a functional level. In this example, there was nothing really international about racial discrimination or making laws to prevent its practice. However, by becoming the subject of an international treaty, racial discrimination took on the attribute of an international concern. While the court upheld the *Racial Discrimination Act* as a matter of external affairs, no majority actually agreed upon the reasons why. Three of the four judges accepted the external affairs justification on the grounds of the international concern evidenced by the treaty.[10] The fourth justice did not accept such an easy proof of international concern, but preferred to consider history and context as necessary to its determination.

The case signalled that the court was willing to permit Commonwealth legislation on wholly domestic matters arising out of an international obligation. While the court was cautious and divided on just how much proof of international concern was necessary, it was moving away from a definition of external affairs that only included actual relations outside the country. This proved to be a major new policy tool, particularly for a Commonwealth

Labor government which faced States unwilling to co-operate with it on Aboriginal and environmental matters.

Tasmanian Dam has been recognised as an important case, but *Koowarta* may in fact be the more revolutionary of the two.[11] The wide scope which the three judges in the majority gave to the external affairs power differed critically from that accorded the Commonwealth in the *Burgess* case. After *Koowarta*, matters did not have to possess an international character to qualify under external affairs, rather they simply had to be matters of international concern. *Koowarta* essentially failed to articulate a single vision of external affairs, or of the race power (sec. 51 (xxvi)) which was also advanced as justification. Much less did it provide an alternate vision which limited the scope of the Commonwealth.

5.3 *TASMANIAN DAM*: THE LOGIC OF EXPANSION CONFIRMED

5.3.1 THE CONFLICT

Australia, like Canada, has no shortage of natural wonders. Also like Canada, it has no shortage of entrepreneurs and corporations eager to draw as much bounty from the earth as possible. Tasmania, the smallest Australian state, is no exception to this pattern. Indeed given its relative compactness, not a single stone has been left unturned in the quest for making the most of what nature has to offer. The State government has traditionally been supportive of this development, the prosperity of its residents being intimately related to the

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[10] Tony Blackshield, George Williams and Brian Fitzgerald *Australian Constitutional Law and Theory: Commentary and Materials* (Sydney, Federation Press, 1996), 458.

pace of exploitation. The Commonwealth government, not unlike other federal overseers, tends to take a more dispassionate approach to the direct issues at hand, generally seeking 'national standards' in preference to promoting development.[12] In the Australian case these roles are magnified by the already overwhelming size of Commonwealth jurisdiction as compared to the States. The stereotypical roles of reckless developer and overseeing environmental conscience would be fulfilled to the letter in the controversy over the damming of the Gordon River in Tasmania[13].

The Labor-led government of Bob Hawke, shortly after its ascension to office in 1983, sought to halt the development of a dam at the junction of the Gordon and Franklin rivers in south-western Tasmania. This project had been pursued by the Tasmanian Hydro Electric Commission with the co-operation of the State government. The pro-development premier, Robin Gray, found little reason to preserve the natural state of the Franklin. By his description, the river was not among the first rank of Australia's natural gifts, rather it was "a brown ditch, leech-ridden and unattractive."[14] The area was already protected, at Tasmania's request, in 1981 under the auspices of the United Nation's World Heritage list. The State government changed its mind after making the request, but failed to convince the

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[11] Coper acknowledges as much when noting that little change had actually taken place in the law as a result of *Tasmanian Dam.* Michael Coper, *The Franklin Dam Case*, (Melbourne: Butterworths, 1983), 25.

[12] Some doubts have been cast on the ability of federal governments to be effective in the development versus environmentalism trade-off. See the example of pulp and paper regulation in Canada in Kathryn Harrison, "Regulation of Pulp Mill Effluents in the Canadian Federal State" *Canadian Journal of Political Science*, XXIX:3 September 1996, 469-496.

[13] *Commonwealth v Tasmania* (1983) 57 A.J.L.R. 450

[14] Quoted in Mary Crock, "Federalism and the External Affairs Power" *Melbourne University Law Review* 14: 1983, 239.

Commonwealth to withdraw the region from protection. The Tasmanian parliament later passed legislation exempting the area from its own conservation legislation, enabling the project to proceed. The Commonwealth government, despite representations from some concerned groups, did nothing to counter this action until the election of the Hawke government, which quickly passed legislation giving effect to the UN protection and stopping Tasmania's attempts to begin the project.

5.3.2 External Affairs: *Koowarta* Plus

The Commonwealth cited its powers over external affairs as justification. Putting a halt to the dam was necessary, it argued, for Australia to meet its treaty obligations as a signatory to the Convention for the Protection of the World Cultural and Natural Heritage adopted by the General Conference of UNESCO (the United Nations Education, Scientific and Cultural Organization). The Commonwealth also argued that it could halt the dam under its power to make laws relevant to race, as some Aboriginal archaeological sites would be flooded by the dam's reservoir. If it was constitutional, the Commonwealth legislation would overrule the earlier Tasmanian legislation as the Commonwealth enjoys supremacy through section 109. The conflict is of interest here largely for its interpretation of the relevant powers of the Commonwealth and State governments. The court found, by a narrow majority,[15] that the suspension of development was justified under external affairs, opening the flood gates to substantial exploitation of the power by the Commonwealth.

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[15] Mason, Murphy, Brennan and Deane, JJ., made up the majority. Gibbs C.J., Wilson and Dawson, JJ., were in dissent.

The court made it clear in *Tasmanian Dam* that the definition of 'external affairs' did not limit the Commonwealth to exercising jurisdiction over areas solely outside the country. The majority upheld the legislation as a necessary adjunct to the international obligation that Australia had undertaken through UNESCO. It ruled that Commonwealth laws, whose purpose is to implement treaty obligations, can be justified as matters of external affairs. What subjects qualified as matters of treaty obligation was a separate issue. Again the international concern test, imported from *Koowarta*, was used, but it was applied very loosely. International concern, according to the majority in this case, was essentially an unenforceable limit. Mason J, as he then was, wrote that as long as the obligation was incurred by a real international agreement, there was no real limit to the possible subject matters upon which the Commonwealth could enter into agreements. To determine whether there was indeed an 'international concern', he believed it was enough to rely on the executive's discretion. He wrote;

> Whether the subject matter as dealt with by the convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the Executive Government for determination.[16]

The dissenters were more interested in dissecting an international concern test. They found no reason to qualify the damming of a Tasmanian river as a matter of international concern, regardless of a treaty commitment, and thus rejected the need for Commonwealth intervention. Gibbs, C.J. sought a more definite theory of international

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[16] *Commonwealth v Tasmania*, 486.

concern in the *Koowarta* minority that included matters which "in some way involve a relationship with other countries or persons or things outside Australia."[17] This time, again in dissent, he desperately sought some manner of limiting Commonwealth discretion. He rejected the majority's loose vision of international concern, in favour of a more 'precise test'. "Whether a matter is of international concern" he argued, "depends on the extent to which it is regarded by the nations of the world as a proper subject for international action, and on the extent to which it will affect Australia's relations with other countries."[18] He did not see any of these elements in the specific controversy at hand.

Since the limits of the external affairs power would only be defined by the types of treaties signed by the Commonwealth, the court tried to articulate a minimal standard for these treaties to live up to. At minimum, they argued, international agreements must be entered into *bona fide*, that is, in good faith and not simply for the purpose of accumulating power at the centre. How the court was to ensure such colourable activities were not undertaken was less clear. A test for *mala fide* agreements was never really contemplated; the court seemed prepared to rely on the Commonwealth's good judgement. Considering the genesis of the conflict at hand, that did not seem very encouraging for Commonwealth-State relations. For Gibbs, C.J. in dissent, the *bona fide* doctrine is at best "a frail shield."[19] Another commentator has referred to the *bona fide* criteria as nothing more than a "purely

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[17] *Koowarta*, 201.
[18] *Commonwealth v Tasmania*, 101
[19] *Koowarta*, 200.

theoretical limitation"[20] given the genuine difficulty of finding a case in which the Commonwealth could be caught making subversive international agreements. More likely to happen was exactly what happened in this instance - the Commonwealth sought out international agreements to legitimise its intervention when it had an agenda at odds with that of a particular state.

A perhaps more demanding set of limitations was placed on the Commonwealth by the requirement that even the broad range of feasible international agreements must respect the principle of the *Burgess* case. External affairs were still to "be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which generally restrain the exercise of Federal power."[21] What were these limitations? Well, they were something short of simply 'the federal nature of the constitution' which the *Tasmanian Dam* minority suggested was enough to invalidate the whole scheme. Gibbs, C.J. forcefully put it for the minority that "no single power should be construed in such a way as to give the Commonwealth parliament a universal power of legislation which would render absurd the assignment of particular, carefully defined powers to parliament."[22] However, the limits of which the majority decision spoke are more modest. Still, they amounted to the remnants of federalism in the post *Tasmanian Dam* era.

Academic criticism has been levelled at the minority judgements in *Tasmanian Dam* and *Koowarta*. Particular issue has been taken with the limits which they hoped to derive

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[20] Coper, *The Franklin Dam Case*, 10.
[21] *R v Burgess*, 608.
[22] *Commonwealth v Tasmania*, 475.

from the constitution's commitment to federalism. The critics argue that a narrow interpretation of external affairs really seems like a case for reserved powers, a concept unambiguously rejected by the court in *Engineers*. Given the general esteem in which that case is held, both by the legal community and by the bench (it has never been more than cautiously detracted and has never been rejected in principle or result), any effort to revive reserved powers seems immediately on shaky ground. The minority argument should be taken seriously, however, as it is concerned with federal balance. The legalistic technique which the court has favoured since *Engineers* has precluded it from giving too much stock to the potential outcomes of the court's pronouncements. Unfortunately for the minority, or anyone seeking to achieve federal balance, consequences are important to making such determinations.

But there may be more to the legalistic technique than simply an expansive reading of Commonwealth powers. There was something of a 'survivalist' instinct in the way that the minority presented the case for federal balance in both *Koowarta* and *Tasmanian Dam*. For example, Gibbs' plea that no single power ought to be construed so broadly as to make other grants seem absurd is also a plea to make federalism exist in practice as well as in name. Gibbs sounded the most dire notes in *Tasmanian Dam*. With alarm, he wrote 'the division-of-powers between the Commonwealth and the States.. could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of Parliament so that they embraced literally all fields of activity."[23] The only concessions that the

[23] Ibid., 475.

Tasmanian Dam majority allowed were those from the *State Banking* case; the Commonwealth's power could not be used so as to discriminate against a single state, or prevent a state from continuing to exist and function as an independent unit.[24] The federal balance argument, while not determinative, is an important caveat for the court.

5.3.3 Corporations Power

In addition to radically expanding external affairs, the court also marginally expanded the federal power over corporations in *Tasmanian Dam*. Section 51 (xx) of the Constitution provided the Commonwealth with a power over "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." At issue in this part of the case was whether the Tasmanian Hydro Electric Commission qualified as a trading corporation, and if so, whether or not its activities in relation to the Dam were subject to Commonwealth regulation. The court took the *Concrete Pipes* case as its starting point in this regard. That case, recall from Chapter Three, prevented the reserved power of the States for regulating the internal-state activities of trading corporations from barring Commonwealth regulation. *Concrete Pipes* essentially introduced *Engineers* doctrine to the corporations power and set aside the presumed reserve of the States. This made the Commonwealth power over trading corporations plenary and independent. In addition,

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[24] Zines, *The High Court and the Constitution*, 242. H.P. Lee suggests that the 'federal balance' doctrine is only relevant today to the extent that it protects these two principles. H. P. Lee, "The High Court and The External Affairs Power" in H.P. Lee and George Winterton eds., *Australian Constitutional Perspectives* (Sydney: The Law Book Company, 1992), 88. Cheryl Saunders also recognizes the survival of the implications theory as a minor, but possibly crucial indication that federalism is not entirely dead as a result of the *Tasmanian Dam* decision. Cheryl Saunders, "The Federal System" *Papers on Federalism 6*, (Melbourne: Intergovernmental Relations in Victoria Program, University of Melboure, 1985), 13.

Concrete Pipes made it clear that the Commonwealth's power was not limited to the trading activities of corporations, but was designed to deal with corporations themselves. However, the High Court did not leave the power completely open ended. Legislation justified under the power was required to have a substantial connection to the topic of corporations rather than to simply apply to them. For example, the corporations power did not open the door to environmental legislation simply if it applied to trading corporations. Rather, the legislation had to be about the kinds of specific activities undertaken by trading corporations. Trade practices, such as monopolies and trusts, were considered relevant enough and most expansions after *Concrete Pipes* were made in such areas.

The World Heritage Act related not to trade practices but to the activities involved in the building of a dam, namely cutting down trees and building roads. If the corporations power was extended to include these non-trading activities of trading corporations, it would represent a substantial increase of power for the Commonwealth in terms of the kinds activities it could then control. The court demonstrated some restraint and took the narrowest view available. It found the Hydroelectric Commission to indeed be a trading corporation and thus subject to corporations legislation. The court also allowed Commonwealth jurisdiction to apply to those activities which were strictly "for the purposes of trading," even though the acts themselves were non-trading. The court formed no conclusive majority behind a wider interpretation that would include all activities undertaken by trading corporations. As it stood, the court's definition was wide enough. They found that the building of a dam was an activity related to the trade in which the corporation was engaged and thus could be halted by the Commonwealth legislation.

The crux of the corporations power was the definition of what activities relate to trade. This became a critically important definition as a result of the *Tasmanian Dam* decision. With a wider scope of activities covered by the corporations power, those subject to it were in for more regulation. Thus there was an automatic incentive for corporations to avoid falling within the definition of a trading corporation. According to the court, manufacturing corporations, if they intend to sell their wares, automatically fell within the ambit of the power. The test used by the court was whether or not trading makes up a 'substantial' part of the corporation's activities. The test not only included manufacturing interests but other enterprises like football clubs and leagues. Previous distinctions had been built into the test to exclude mining and municipal corporations, but the court found the maintenance of such distinctions problematic.[25] *Tasmanian Dam* standardised what was probably the accepted definition of trading corporations up to that point. It left open one crucial exception. States could not be characterized as trading corporations; their activities were considered to fall under the rubric of public service. In *Tasmanian Dam*, the State was exempt, but the Hydro-Electric Commission, having been created as an autonomous organization by the State, was not considered so.[26]

The exception of states from the corporations power is reminiscent of the implied immunity doctrine. The states do engage in trade and trading activities, and so by a perfectly literalist reading they should be considered subject to the Commonwealth's power. But federalism imports the implied immunity of the States regardless. The implied immunity

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[25] Zines, *The High Court and the Constitution*, 76.

doctrine has not been rejected by the court as has the doctrine of reserved powers. Unfortunately for the Tasmanian government, the Hydro Electric Commission was too far removed from the state to qualify for immunity. However, the doctrine's survival remains an important potential limit for the central government to heed.

Like *Garcia* in the U.S., *Tasmanian Dam* left the protection of the states to the political rather than the legal realm. Michael Coper, for one, refused to take the High Court's obvious centralism too seriously. "It should not be forgotten," he argued, "that the High Court has determined and can determine only that certain powers exist, not whether or how those powers should be exercised. There is still room for political constraints and for political negotiation."[27]

5.4 External Affairs after *Tasmanian Dam*

The High Court has restrained its expansion of Commonwealth powers since the *Tasmanian Dam* case. Occasionally the States have claimed small victories. However, literalism has endured as a technique, despite showing some signs of wear. Literalism, being doctrine, has proven to be flexible. Despite presumptions to the contrary, it will likely outlast some of the challenges made to its legitimacy by a 'states rights faction' (albeit a small one) that has always claimed it was due for such an evaluation.

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[26] Ibid., 77 and Coper, *The Franklin Dam Case*, 16.
[27] Coper, *The Franklin Dam Case*, 25.

Justice Daryl Dawson, who throughout his career strongly dissented from the court's centralizing decisions, cautioned that not only was the external affairs power open-ended and infinitely expandable as a result of *Tasmanian Dam*, but "even with existing treaties to which Australia is party, the Commonwealth presently has the capacity to cut a swathe through the areas hitherto thought to be within the residual powers of the States."[28] Thus, even if the Commonwealth did not consciously seek to grow its jurisdiction at the expense of the States, the external affairs power would increase it almost by default. Such a situation has not come to pass.[29] In fact, in the post-*Tasmanian Dam* world external affairs has yet to become the plenary power that doomsayers such as Dawson believed it would.

The High Court held back from further expanding external affairs in the two major decisions on that power since *Tasmanian Dam*. In *Richardson v Forestry Commission* (1988)[30], the court did little more than affirm the basic principles of *Tasmanian Dam*. This time, a larger majority of the court accepted a broad interpretation of external affairs. The judges really had little choice. The circumstances in the case were similar to those in *Tasmanian Dam* and thus the latter served as a clear precedent. Dawson wrote what could at best be considered a qualified endorsement of *Tasmanian Dam*. In *dicta* he rejected the general approach to external affairs taken by the *Tasmanian Dam* majority, but agreed that the *Tasmanian Dam* precedent was binding regardless of whether it was right or wrong.

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[28] Sir Daryl Dawson, "The Constitution – Major Overhaul or Simple Tune-up" *Melbourne University Law Review* (1984) 14, 358.

[29] Brian Galligan sees some gains in the national government's power over the environment in the wake of *Tasmanian Dam*, but recognizes that "in practice...the potential expansion of Commonwealth powers under external affairs has been limited by the countervailing political power of the States." Brian Galligan, *A Federal Republic* (Melbourne: Cambridge University Press, 1995), 179.

In *Queensland v Commonwealth* (Tropical Rainforests Case)[31], the court continued its pattern of deferring to the Commonwealth on what actually qualified as a matter of international concern. In fact, the court's deference extended one degree further. The State of Queensland contested the protection of a portion of its tropical rainforest by the Commonwealth. The Commonwealth protected the area at the urging of the World Heritage Committee. The Committee, not the Commonwealth, determined that the affected area required protection under the auspices of the World Heritage List. Queensland objected to such a determination, on the grounds that the Commonwealth could not pass its decision-making off to an international body. The court disagreed. In this case the international community had been empowered to make a determination on behalf of the Commonwealth government and protecting those areas was part of the Commonwealth's treaty obligation.

Again, Dawson dissented from the majority. States, in his opinion, were better able to determine which areas of their natural heritage were in need of protection. Again, he deferred to the majority and the controlling status of *Tasmanian Dam*. A statement from the *Richardson* case explains why. "Precedent must, however, have a part to play, even in the interpretation of a constitution. Considerations of practicality make it necessary that the law should as far as possible, take a consistent course. The constant re-examination of concluded questions is incompatible with that aim."[32] For the record Dawson was willing to articulate his objection but deferred to precedent and its role in legal reasoning.

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[30] 164 C.L.R. 261 (1988).
[31] 167 C.L.R. 232 (1989).
[32] *Richardson*, 322.

The most recent considerations of the external affairs power have not involved domestic activity undertaken by the Commonwealth under the guise of external affairs. The court has instead been asked what kinds of activities fit within the definition of external affairs. In 1991, the *War Crimes Act* case decided if crimes committed outside Australia were within the scope of external affairs. The Commonwealth had amended its war crimes legislation to permit the prosecution of Australian residents who had committed war crimes abroad during the Second World War. The court found that the Act was within the purview of external affairs by virtue of its extraterritorial application. This extended the Commonwealth's power under external affairs beyond the scope already afforded to it by the broad reading of treaty powers. The willingness to defer to the discretion of parliament was again affirmed. Mason argued that "it is not necessary that the court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained. It is enough that Parliament's judgement is that Australia has an interest or concern. It is inconceivable that the Court could overrule Parliament's decision on that question."[33]

Similarly, in *Horta v Commonwealth*,[34] the court found that the extra-territoriality of Commonwealth action was sufficient to bring it under the external affairs power. The case itself was politically controversial. The litigation sought to void a treaty between Australia and Indonesia over the Timor Gap. Both governments laid claim to the oil and gas reserves in the Gap which are outside both of their territorial waters. They were unable to settle the

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[33] *Polyukhovich v Commonwealth* (War Crimes Act Case) 172 C.L.R. 501 (1991), 531.

sovereignty dispute, but reached a working agreement, in the form of a co-operation zone treaty in 1989. Complicating matters was the legitimacy of Indonesia's claim to sovereignty in East Timor; while generally accepted by the international community, it is contested by many non-state actors. East Timor remains something of a *cause célèbre* among international activists, and a source of infamy for the Indonesian government which occupied the area with considerable force in 1975. The Australian activist community was a flag-bearer of international dissent, as it included many former East Timorese who had fled the occupied province. In an effort to embarrass the Australian government for bargaining with Indonesia over the spoils of its occupation, activists applied to the court to invalidate the treaty. They argued that co-operating with Indonesia violated Australia's international obligations under the Universal Declaration of Human Rights and other UN commitments. If the agreement was contrary to international law, a question the activists hoped the High Court itself would examine, the Commonwealth could not justify its treaty with Indonesia under the external affairs power. The court found it unnecessary to examine this question. Rather, writing as one, its members found that the matter was unquestionably extraterritorial and therefore *primae facie* within the scope of external affairs. Even if the Commonwealth was contravening the international law to which it was already a party, the agreement itself was still justified as external affairs on the ground that it was concerned with extra-territorial matters.

The High Court has stuck by its broad interpretation of external affairs. Fortunately, it has not been met with a rash of litigation from disgruntled States bullied into

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[34] 181 C.L.R. 183 (1994).

compromises by an over-bearing Commonwealth. However, the effect of the power has been noticeable, serving as something of a chill on ambitious development projects.[35] Nevertheless, the court seems to have collectively (and somewhat subconsciously) seen an abyss in *Tasmanian Dam* and turned back lest it fall down the bottomless pit of emasculated federalism. This response has not diminished the external affairs power. To be fair, the court has not had to settle a tough case on external affairs since *Tasmanian Dam*. It has not been required since to test for the *bona fides* of an international agreement. Nor has it been required to expand the power to cover further types of domestic regulation under the auspices of external affairs. *Richardson* and the *Rainforests* case were both on their facts essentially similar (albeit on a smaller scale) to the dispute in Tasmania.

More recent decisions have dealt with entirely non-domestic applications of external affairs and have not pressed the international concern logic of *Tasmanian Dam*. Every indication is that, if the Commonwealth is so inclined, it can continue to expand its jurisdiction over the environment through the external affairs power. One observer has noted that commitments made by the Commonwealth at the Rio Summit on the environment in

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[35]The Commonwealth itself has found itself subject to the environmental protections it agreed to in international treaties. The current Commonwealth government, led by a Liberal party coalition, has been stymied by the international community in what has been referred to by one newspaper as the biggest 'environmental stoush since Franklin Dam.' Activists have sought to halt the development of the Jabiluka uranium mine in Kakadu national park. UNESCO inspectors were invited to the site to determine if it should receive the protection of the convention's provisions. The proposed mine is in the Northern Territory an area administered by the national government. Unfortunately for the protesters and aboriginal groups seeking the halt, the Commonwealth appears less sympathetic to their aims than its 1983 predecessor. The UN however, has argued that the area requires protection. The Commonwealth has vowed to ignore the UN's wishes and development is proceeding. Chris Ryan "Biggest environmental stoush since Franklin

1992 could potentially expand that power considerably.[36] The unwillingness of the present Commonwealth government to pursue aggressive conservation policies will likely keep that power in check. External affairs has not grown by leaps and bounds, nor has it obliterated the logic of the division-of-powers. The potential for expansion remains, as the modest upholding of *Tasmanian Dam* in *Victoria v Commonwealth* has most recently demonstrated.[37]

5.5 Other Commonwealth Powers

5.5.1 The Corporations Power

Recently, important developments in division-of-powers matters have been taking place, and largely under the continuing guide of literalism. While centralists had reason to be optimistic about the corporations power in the wake of the *Tasmanian Dam* decision, there was a degree of qualification therein that made the future of the Commonwealth's corporations power more uncertain than its power over external affairs. Expansion of the power was halted when the Commonwealth tried to develop a general law of incorporation that regulated how trading companies were structured and registered. A major package of corporations legislation was put together by the Commonwealth government in an attempt

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Dam" *The Age* (Melbourne) July 11, 1998 and Janine MacDonald and Chris Ryan, "UN says no to mining at Jabiluka," *The Age* (Melbourne) November 26, 1998.

[36] See generally, Richard Marlin, "The External Affairs Power and Environmental Protection in Australia" *Federal Law Review* 1997.

[37] In that case the High Court upheld changes to the Industrial Relations Reform Act on the basis of external affairs. The changes were introduced to implement commitments made in the International Labour Organization (ILO) treaty of which the Commonwealth is a party. The majority refused to grant the state's argument that labour, despite the presence of international treaties on the subject, was not an issue of international concern according to the test in *Koowarta*. The majority argued that according to the *Tasmanian*

to exact new control over corporations and securities law with a national regime of incorporation. The court rejected this attempt in *New South Wales v Commonwealth (*the *Incorporation Case)*, limiting the scope of the section 51(xx) power significantly.

The court was nearly unanimous in this decision. It did not rely upon federalism to limit the corporations power. Rather, the old technique of literalism did the trick. Literalism giveth, but literalism also taketh away. The court used what has historically been a centralizing technique to exclude the registration of corporations from the definition of the corporations power. Crucial to the decision in the *Incorporation Case* was the generosity with which the court read the power to make laws with respect to corporations. At issue was whether or not the process of incorporation could be included in the general corporations power. Section 51(xx) gives the Commonwealth power over "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." For the literalists on the court, the presence of the word 'formed' was critical. By having a power to regulate 'formed' corporations, was the Commonwealth left to wait for corporations to be formed before they could come under the corporations power? Rather than simply provide a wide reading, the majority dwelt on its belief that the use of the word 'formed' excluded the regulation of incorporation and envisaged the regulation only of existing corporations by the Commonwealth. To support this contention, the majority looked to federation-era evidence of the founders' intent when including corporations in the Commonwealth's list of powers. Based on a perusal of the federation-era debates and successive drafts of the constitutional

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Dam test, the ILO treaty was well within international concern. *Victoria v Commonwealth (Industrial Relations Reform Act)* 187 C.L.R. 416 (1996).

bill, the majority concluded that "the history of section 51 (xx) confirms that the language of the paragraph was not directed towards the subject of incorporation."[38]

Much has been made of the fact that the court relied upon the federation debates to seek the intention of the founders. Some wonder if this amounts to a rejection of literalism in favour of 'intentionalism.' Greg Craven has been an unremitting critic of the literalist approach, and has made some effort to articulate intentionalism as an alternative. The *Incorporation Case* seems to him to support such an approach.[39] Intentionalism works from a different 'objective' standard than literalism. If the literalist technique places great stock in the common meaning of phrases in the constitution, the intentionalist method seeks to make more of those phrases than simple semantics. Much like the 'original intent' school in the United States, intentionalism seeks to interpret the constitutional text on the basis of the stated aims of the founders. The method presumes that the founders had cause for assigning particular powers to the Commonwealth. For an intentionalist court, it is a matter of consulting the detailed records of the debates and conventions which produced the federation compromise to sift out intent. Given the decentralized leanings of the founders (so plainly exemplified by the first generation High Court), relying upon these sources will likely produce a less centralized jurisprudence.

Craven advocates intentionalism because he believes that the literalist method has been nothing more than a beard for the centralist leanings of High Court appointees. He recognizes that intentionalism is unsuited to new and unforeseen subject matters and may

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[38] *New South Wales v Commonwealth* (Incorporation Case) 169 C.L.R. 482 (1990), 501.

also give the impression that the country is being ruled by the 'dead hand of the past.' Craven has altered the concept somewhat, and, instead of specific intent, looks to the guidance of 'fundamental constitutional values.' This approach has much of its roots in an intentionalist reading of the constitutional document. In addition, the fundamental values approach compensates for intentionalism's weakness in dealing with new matters by dictating that new subjects be approached through the lens of intent, seeking to reproduce with contemporary subjects the balance originally struck by the founders. Again this method favours the states, which have consistently lost power since the federation's inception.

Other commentators have approached the *Incorporation Case* differently. Geoff Lindell, for example, emphasizes the fact that the case was the first major decision in some time that the Commonwealth had lost a claim to jurisdiction. In contrast to Craven, who is struck by the historical intent approach of the court, Lindell stresses the role that literalism played in the decision and the relative novelty of literalism working to the benefit of state power. For him, the case is a testament to the flexibility of literalism. Lindell actually contends that the case may have been wrongly decided, as the court failed to live by its own practice of reading an indeterminate power liberally rather than narrowly. This technique of liberal interpretation, while not necessarily literalist, has been something of a handmaiden to literal expansion of the Commonwealth headings. That the court departed from this routine, and summoned the federation debates as evidence, signals a potential shift away from favouring the Commonwealth. From this observer's view, it seems to signal little difference

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[39] Greg Craven, "The Crisis of Constitutional Literalism", 27.

in the manner of judicial reasoning – rather the court is further refining the practice of literalism.

The Commonwealth was further restricted under the corporations power in 1995 in *Dingjan's Case*.[40] For the first time since *Tasmanian Dam*, the court was asked to determine the extent to which the activities of 'constitutional corporations' (those within the definition of sec 52(xx)) were subject to Commonwealth law. Dingjan and his wife operated as sub-contractors to a wood-chipping operation in Tasmania. The Dingjans supplied timber to a contractor who subsequently sold it to a pulp and paper mill. When the contractors sought to change the terms of their arrangement with the Dingjans, the latter objected and applied through the labour union to which they belonged for relief under the Commonwealth's *Industrial Relations Act*.

At issue in the case was whether the sub-contracts could actually be subject to Commonwealth law, being that they were some degree removed from the trading and financial activities of the pulp mill corporation. The Act provided, in section 127C(1), a review by the Australian Industrial Relations Commission for contracts entered into by constitutional corporations that were suspected of being harsh or unfair. The court found in a close 4-3 decision that the scope of the corporations power could not be extended so far as to include just any contract related to the business activities of a constitutional corporation. Justifiable Commonwealth laws, it argued, had to be laws 'with respect to' constitutional corporations. Chief Justice Mason, in the minority, strongly protested that

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[40] *Re Dingjan; Ex parte Wagner* 69 A.L.J.R. 284 (1995).

the scope of the Commonwealth power was never intended to be limited solely to the financial and trading activities of constitutional corporations. Rather, he argued, the regulation of the everyday business activities of these corporations seemed to be contemplated by the power. He found that contracts and sub-contracts are part of how some constitutional corporations do business and thus should be part of the regulated activity of these corporations. Despite the indirect relationship that the sub-contractor had with the constitutional corporation, what "the subcontractor does in performing the subcontract is ultimately done for the purposes of the corporation and constitutes a relevant part of its business operations."[41] The majority was not persuaded to this view.

Dingjan's Case did not really determine the scope of the corporations power, as the majority did not agree on the scope of the power for corporations, just that contractors were exempt from it. According to the majority, a Commonwealth law regulating the activities of the people with whom corporations do business was not a law for corporations. *Dingjan* did not answer the question of whether the Commonwealth can make rules controlling all the activities of corporations. The *dicta* – which seemed to contemplate a wide scope of application - may prove critical to future discussions of the corporations power and eventually turn the tide in the Commonwealth's favour.

5.5.2 Taxation and Excise

The tax regime in Australia seems entirely unsuited to a federal nation. The development of a uniform income tax system during the Second World War, which was

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[41] Ibid., 286.

approved by the High Court, grants a *de facto* monopoly on income taxes to the Commonwealth. This has left the States with a dearth of revenue sources; certainly nothing commensurable with their jurisdictional responsibilities. The Commonwealth Grants scheme, which actually predates the income tax monopoly, involves substantial transfers to the States to ensure that they are able to meet their responsibilities. However, the dependency on the Commonwealth which it creates robs the states of flexibility in fiscal matters. The Commonwealth's predominance is further enhanced by section 90 of the constitution, which provides it with exclusive power over excise. In the quest for alternative revenue sources, the states are limited to those fields in which the Commonwealth does not hold exclusive power.

In a broad historical account of federal finance, Russell Mathews and Robert Jay laid blame squarely on the shoulders of the High Court for much of the 'vertical fiscal imbalance' that characterized Australian fiscal federalism.[42] To help remedy the fiscal imbalance, the states have traditionally collected excise-like revenue from business franchise licences for retailers of products like tobacco, alcohol and petrol. The Commonwealth has turned a blind eye to these fees in an effort to provide the states with some discretionary revenue and to lighten its own fiscal burden.[43] The states effectively

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[42] R.L. Mathews and W.R.C. Jay, *Federal Finance: Intergovernmental Financial Relations in Australia Since Federation* (Melbourne: Nelson, 1972).

[43] The Liberal-National Party coalition was re-elected in October 1998 with a mandate to implement a broad based consumer tax. The revenues from the tax will flow directly to the states and replace several indirect taxes currently collected by them. There was some trouble determining what goods would be subject to the tax and marshalling support in the Senate. The Senate passed the enabling legislation at the end of June, 1999. Brendan Nicholson, "Hand-over redresses imbalance," *The Age* (Melbourne) August 14, 1998 and Phillip Hudson, "Senate Passes the New Tax Deal" *The Age* (Melbourne) June 29, 1999.

taxed consumption by including a surcharge, equivalent to a percentage of sales, in the fee for a business license. These so-called franchise fees proved too ingenious to hold up to judicial review. In order to give the appearance that the fee was not a tax on the direct consumption of goods, the fee was 'back dated' and calculated on the basis of past sales. In a typical case, a percentage of product sales from two months prior to the issuing of a license was added to a base license fee. The states were actually forced into this cumbersome means of collection by the High Court. The so-called *Dennis Hotels*[44] formula of collecting on the basis of past rather than current sales was legitimised by an extremely close decision in 1960. Although the fee was obviously anticipatory of further sales and was necessarily passed on by retailers to their customers (characteristics of excise), the court was originally willing to look the other way.

The court was unwilling to entertain challenges to the authority of the *Dennis Hotels* formula for some years. Indeed, it approved of it again in *Dickenson's Arcade,*[45] allowing the system of business licences to continue. The court's patience did not preclude continual challenges to the various state provisions by the retailers and manufacturers of the affected products. One such challenge occurred in 1989 in the *Phillip Morris* case.[46] Although divided, the court maintained the system of business licences as it then existed. It excluded the license fees from the definition of excise and thus kept them out of exclusive Commonwealth jurisdiction. At the same time, the case, like many of the other challenges to

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[44] *Dennis Hotels Pty Ltd. v Victoria* 104 C.L.R. 529 (1960).
[45] *Dickenson's Arcade Pty Ltd v Tasmania* 130 C.L.R. 177 (1974).
[46] *Phillip Morris Ltd. v Commissioner of Business Franchises* 167 C.L.R. 399 (1989).

licence statutes, revealed some of the inconsistencies and oddities in the court's definition of excise. The field remained ripe for reconsideration.

When the tobacco licence fee in New South Wales was again challenged in *Ha v New South Wales*,[47] state governments hoped the court would take the opportunity to settle the doubt that always hung over the fees and clean up the 'dog's breakfast'[48] that jurisprudence in this area had become. The reasonably positive result in the *Philip Morris* case gave the states some reason for optimism. Given the opportunity to reconsider, the court certainly simplified the field, but did so by finding that all charges on commodities were excise and the state franchise fees were constitutionally insupportable.

The reasoning of the court was quite simple and the decision was short given its drastic consequences for the states. The reasoning, like in the *Incorporations Case*, betrayed a reliance on literalism. For the court, excise was only to be defined in the most simple terms. The majority believed that previous attempts to fashion a form of excise that allowed the co-existence of franchise fees lacked definitional clarity. Thus, the court amply cited former Chief Justice Dixon's dissent in the *Dennis Hotels* case. Dixon refused to characterize the liquor taxes challenged in that case as anything other than excise. The judicial history of this field showed that many attempts, Dixon's among them, were made to read excise literally. Several close judgements had allowed the excise-like franchise fees to continue. This time the court refused to consider the fees generously. In fact, state

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[47] *Ngo Ngo Ha and Anor v New South Wales* 189 C.L.R. 465 (1997).

dependence on these revenues was so great and the fees themselves had increased so dramatically over the years, that they could no longer reasonably be characterized as license fees. The court found that "the *Dennis Hotels* formula cannot support what is, on any realistic view of form and of "substantial result" a revenue-raising inland tax on goods. The States and Territories have far overreached their entitlement to exact what might properly be characterized as fees for licenses to carry on businesses. The imposts which the Act purports to levy are manifestly duties of excise on the tobacco sold during the relevant periods. The challenged provisions of the Act are beyond power."[49]

With the franchise fee on tobacco outlawed, the states were immediately left in the lurch and out of pocket for fees not only on tobacco, but petroleum products and liquor too; imposts which had been conceived according to similar constitutional reasoning. The shortfall immediately amounted to close to five billion dollars a year, nearly one sixth of the revenue collected by the states.[50] The Commonwealth intervened with an emergency measure to collect the fees and remit the proceeds to the states, but again state flexibility was lost to central control. Through successive decisions, the High Court expanded the definition of excise. Whenever it expanded excise, it subsequently contracted the independent revenue-generating power of the states. When the states were finally forced out of excise-like fields, the imbalance of fiscal capacities was extended even further. The uniform tax scheme and

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[48] Deborah Z. Cass, "Lionel Murphy and Section 90 of the Australian Constitution," in Michael Coper and George Williams, eds., *Justice Lionel Murphy: Influential of Merely Prescient?* (Sydney: Federation Press, 1997), 21.
[49] *Ha*, 488.
[50] Bhajan Grewal, "Economic Integration and Federalism: Two Views from the High Court of Australia," in *Upholding the Constitution*, ed. John Stone (Melbourne: The Samuel Griffith Society, 1998).

the judicial expansion of excise were the main contributors to federal fiscal imbalance. The court exacted great influence in this field, and literalism was central to the way it exacted it.

5.5.3 Immunity

Implied immunity is a pre-*Engineers* doctrine that had its strongest support in the court of the founders' era. However, unlike the doctrine of reserved powers, which was so unambiguously rejected by the *Engineers* case, immunity managed to live on. The idea of implied immunity is described in more detail in Chapter Three. Essentially, the doctrine has drawn the implication from the mere existence of a federal system of government that the individual levels of government need immunity from the application of each others laws in order to operate independently within their jurisdictional spheres. The doctrine has worked in both directions – protecting the states from Commonwealth law and vice versa. The *Cigamatic* case in 1962[51] left the Commonwealth with a somewhat enhanced scope of immunity based upon the Crown's prerogative. In the post-*Tasmanian Dam* era the immunity doctrine has found continued expression.

The Commonwealth tested the limits of its ability to compel the states in 1985. The court's decision in *Queensland Electricity Commission*[52] nullified Commonwealth legislation intended to fast-track an industrial dispute involving the Queensland state utility. Again, as in *Koowarta*, a Commonwealth Labor government clashed with the Queensland Liberal government. The court found that the Commonwealth legislation violated the protection states enjoy from 'discriminatory' national legislation. At a minimum, it ruled

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[51] *Commonwealth v Cigamatic Pty Ltd* 108 C.L.R. 372 (1962).

that immunity still existed in the form established by the *State Banking* case. Recall, in that case, that the Commonwealth was stopped from forcing states or their instruments into doing their financial business with the Commonwealth's choice of bank when individuals were allowed to choose whatever bank they wanted. In *Queensland Electricity Commission*, the court extended this principle of non-discrimination to include discrimination against states vis-à-vis other states; a state could not be singled out from other states for discrimination. The fast-track arbitration attempted by the Commonwealth was specifically designed to circumvent the regular procedures of the labour arbitration system in order to resolve the single Queensland dispute. The court ruled that such discrimination could not occur in a federal system.

While *Queensland Electricity Commission* protected state immunity from discriminatory Commonwealth legislation, the Commonwealth has tended to enjoy greater immunity from State legislation. In *Cigamatic*, a broad scope of Commonwealth immunity was created that has since irked many state officials. The court recently undertook the task of re-examining the *Cigamatic* principle of Commonwealth immunity from state law. In the 1997 decision *Re Residential Tenancies Tribunal (NSW)*,[53] the court once again endorsed the two-fold protection enjoyed by the states: first, that Commonwealth legislation could not seek to single out states; and, more radically, that Commonwealth legislation could not alter the status of states as entities. The latter was recognized as a baseline protection which actually prevented more than just the dissolving of states.

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[52] *Queensland Electricity Commission v Commonwealth* 61 ALR 1 (1985).
[53] *Re: Residential Tenancies Tribunal (NSW); Ex parte Defense Housing Authority* 190 C.L.R. 410, (1997).

The court also attempted to articulate the extent of the reciprocal immunity enjoyed by the Commonwealth. On the basis of *Cigamatic*, the Commonwealth enjoyed a wider grant of immunity from the application of state law. This was particularly evident in contrast, as the states were granted immunity under much more restricted circumstances. The court reconsidered the immunity granted by the 1962 decision. The Commonwealth sought to have its agency, the Defence Housing Authority, exempted from the State's landlord-tenant act on grounds of Crown immunity. The court found against the Commonwealth by a sizeable majority.

The majority went to great lengths to distinguish the general perception of Commonwealth immunity as nearly unlimited from a more qualified version. The popular legal perception going into the case was that, under the protection of section 61 of the constitution, Crown immunity (bolstered by the finding in *Cigamatic*) gave the Commonwealth a special exemption from the laws of the states. The court found this not to be the case at all. In fact, it affirmed that, in the matter of laws of general application, the Commonwealth enjoys no special immunity whatsoever. Therefore, in the case at hand, the Commonwealth Crown had to enter into contractual relationships on the same grounds as its subjects and be subject to the same state laws. Brennan C.J., in concurring reasons, pointed to the need for a distinction between "capacities and functions of the Crown" and the transactions which the Crown may choose to enter. It is undoubted, he argued, that the Crown in the 'capacities and functions' sense has an immunity from state law. No state, for example, could seek too alter the character of the Crown through its laws. Yet, he argued,

the Crown does not enjoy anything resembling total immunity from state laws. The court did leave the Commonwealth an escape hatch. If the Commonwealth Crown wished to be exempt, it must either have a similar law which can take precedence over the state law, legislate an exemption for itself under its 'protective power,' or prove that the state law is not one of general application. Otherwise the Commonwealth, when entering into a transaction or engaging in an activity covered by state law, must be prepared to be bound by it.

These immunity cases do not represent a great shift either way in terms of centralization or decentralization. The Commonwealth may be more cautious in conforming its behaviours to certain state laws, but the court has clearly signalled the more appropriate means by which the Commonwealth can circumvent the application of state restrictions if it so chooses. The Commonwealth Parliament will simply have to be more up front about not wanting to obey state regulations. More importantly, these cases are relevant to the discussion because the court has relied on the doctrine of immunity as a guide.

5.6 Conclusion

Greg Craven suggests in a series of articles that the High Court's literalism may be a victim of its own success. [54] The centralization which it enabled has been realized in spades. Literalism has been so successful at concentrating power in the Commonwealth government that he claims "the federal balance of power is largely a dead (or comatose)

issue."[55] Craven is unhappy with the duplicitous politics that he believes the formal methods of the court cover up. "To the extent that literalism is underpinned by centralism," he argues, "one is faced with the spectacle of a constitutional methodology whose avowed essence is an inadvertence to political issues, but whose intellectual genesis lies in precisely such considerations."[56] Seeking to fight fire with fire, Craven advocates his own method – intentionalism. If the court looks to the intent of the founders, he argues, they will be able to overcome their present subjectivity. Craven claims that literalism makes a "facile promise of certainty," yet intentionalism may do the same. Craven gets off on the wrong foot by claiming an alternative certainty in intentionalism. The American court has shown how contrasting understandings of the federation period can be used to bolster contrasting interpretations of the founders' intentions.

Brian Galligan is one of the court's most watchful critics. He also criticizes the court for being essentially dishonest about its politics. He believes that the court has had undeniable effects upon the balance of federalism and the form of politics in Australia, despite its protests of apoliticalism. The court, he argues, has retreated behind a cloak of legalism because it is fundamentally uncomfortable with admitting to its political role and risk criticism for its lack of democratic pedigree or accountability.

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[54]Greg Craven, "After Literalism, What?," *Melbourne University Law Review* 18, no. December (1992): 874-898, and Greg Craven, "The Crisis of Constitutional Literalism."
[55]Greg Craven, "Cracks in the Facade of Literalism: Is There an Engineer in the House?" *Melbourne University Law Review* Vol 18, (1992), 563.
[56] Ibid., 545.

In Galligan's most recent appraisal of the High Court's politics, he has written that by "abandoning legalism and taking a more active role as shaper and developer of the Constitution, the current High Court has indeed put itself at the eye of the political storm. The court will need to develop a defensible methodology and give a better public presentation of itself if it is to retain the support of the people in continuing to carry out its constitutional function of judicial review."[57] Like Craven, he feels the legitimacy of legalism appears to be waning, both on and off the bench. "In particular" he adds, "the court needs to jettison the legalistic methodology of *Engineers*, which is antithetical to Australia's federal Constitution. It is quite inappropriate to interpret the Commonwealth's enumerated heads of power in a literal way irrespective of the broader federal architecture of the constitution and regardless of the centralizing effect that such a method produces." He closes, "the High Court needs to develop an interpretive method appropriate for a federal constitution for the next century of federation. That...should be its primary constitutional agenda for the centenary decade."[58] In Galligan's opinion, a dismissal of the general legalist approach and the specific literalist technique is central to the proper reorientation of the court's energies. Whether the evidence from the cases indicates this to be true has, in retrospect, been the task of this chapter. It seems that legalism - which can be loosely affiliated with formalism of the American sort - may be the best means to ensure the court remains relevant in the coming years.

Federalism in Australia may very well have died somewhere in the muddy waters of the Gordon river in Tasmania, but if it did, its passing was brief. *Tasmanian Dam* provided

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[57] Galligan, *A Federal Republic*, 187.

the court with all that it needed to abdicate any role in containing Commonwealth power. The subsequent interpretation of external affairs has not brought such a reality to pass. Idle judicial hands, while not necessarily the devil's playthings, do seek to make themselves relevant. Redressing the federal imbalance, particularly as states continue to demonstrate their relevance to the political life of Australians, has become the new challenge for the court. As a part of that revival, *Engineers*-style literalism, some believe, is under threat. The court's overt role in centralizing power in Australia, demonstrated so fully by *Tasmanian Dam*, may have given it second thoughts. Craven believes that "the present High Court has clearly had occasion to look somewhat askance at the Commonwealth juggernaut that it has helped to create."[59] As part of that re-evaluation, he believes, it has started to experiment with new techniques.

But do the developments surveyed above really resemble a different approach to constitutional adjudication? I do not think that they do. The rejection of literalism, much less legalism, does not seem at all complete or even really begun. They may be out of favour as a way of publicly justifying the court's role in federal politics, but as techniques, both seem quite alive and well. The court has not taken the *Tasmanian Dam* case as an opportunity to ask 'constitutive'[60] questions, but rather seems to have seen the danger of going that route. The moderate approach to judicial review is to remain legalistic but to develop new lines of argument that favour both levels of government. Craven's option

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[58] Ibid., 187-88.
[59] Craven, 563.
[60] The term is from Richard Brisbin. He uses it to refer to the kinds of questions a truly innovate American court might ask of the federal system. See the concluding section of Chapter Four, above.

would be to replace one bad turn with another. The American evidence shows that this is clearly not necessary to enliven debate about federalism. Indeed a formal approach to the division-of-powers might prove more invigorating than any attempt to divine guiding 'intentionalist' principles. Legalism can be abandoned as public rhetoric, but the doctrinal discipline inspired by legalism is in the court's best interest.

CHAPTER 6:

CONTEMPORARY FEDERALISM DOCTRINE: CANADA

6.1 LOW IMPACT JUDICIAL REVIEW?

The Canadian Supreme Court has the shortest history as a court of final resort among the three surveyed here. While the court has practised the task of judicial review for more than 100 years, 1999 marks only the 50th year that the court has had the final word in matters of Canadian law.[1] As a result, the court has had less of an opportunity than its counterparts to put its defining mark on the way that federalism is understood and practised. In addition, the Supreme Court has made no decisions which have dramatically demonstrated the capacity of judicial review to change a federal system. There has not been a Canadian equivalent to the *Engineers* case or *NLRB v Jones*. The decisions with the most radical impact on Canadian federalism have come from the JCPC. There has been no period when the court's vision of federalism has been in serious conflict with the vision of the political branch of the Canadian government.

[1] The legislation abolishing appeals to the Privy Council came into effect on December 23, 1949- any actions begun before that point retained a right of appeal to the JCPC. All actions following that date were determined in the final instance by the Supreme Court of Canada. See Hogg, *Constitutional Law of Canada*, 200. The Australian constitution retained a right of appeal to the Privy Council until 1968. However, the High Court itself determined whether or not its decisions could be appealed. The High Court, in all but one case, denied appeals to the Privy Council and so had in effect always been the final court of appeal for Australia.

During its tenure as Canada's final court, the JCPC generally favoured the provinces and had a profound effect on the balance of Canadian federalism as a result. However, in the period since, the work of the Canadian court has had far less impact on the powers of either level of government. Nevertheless, political scientists still want to know what effect the court has on the balance of powers between the federal and provincial governments. The conventional belief is that the court, over the long term, has been relatively even-handed.[2] While some decisions have favoured the federal government, the court has also endorsed the expanding power of provincial governments or limited federal incursions into the provincial realm. Not only is the net effect of the Supreme Court's intervention in Canadian federalism balanced, but most decisions seem to be balanced in themselves. Rarely are members of the court identifiable as enthusiastic supporters of a 'states-rights' style of provincialism or an excessively centrist position. Similarly, no portion of the federal constitution has been interpreted out of recognition. Even the peace, order and good government clause of section 91 (possibly the most expansive power offered to any government in all three federations) has been interpreted with continued reserve.

The devil is in the details of Canadian federalism jurisprudence. The Supreme Court's decisions on federalism are not dramatic pronouncements on the nature of the federation, imbued with ideological preferences for centralized or decentralized political control. What animates the court's decisions and divisions are fine points of distinction

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[2] Russell, "The Supreme Court and Federal Provincial Relations" and Hogg, "Is the Supreme Court of Canada Biased?" for a dissenting view see, Bzdera, "Comparative

in doctrine rather than global theories of federalism. This chapter surveys developments in Canadian division-of-powers jurisprudence, from the *Anti-Inflation Reference* of 1976 to the present. As in the previous two chapters, doctrine is the primary variable used to evaluate trends in the jurisprudence of the court. Doctrine has been most important in the interpretation of the federal power to make laws for the peace, order and good government (p.o.g.g.) of the nation and the trade and commerce power. In addition, it has been critical in balancing the parallel provincial category of property and civil rights. These three jurisdictional categories, primarily due to their generality, have been the source of most judicial doctrine on federalism, and decisions about these powers continue to shape the kind of federalism that Canadians experience. Judicial doctrine has also been developed in recent years to clarify the legal position of co-operative federalism. Much of the day-to-day operation of Canadian federalism occurs regardless of the niceties of the division-of-powers. The court has not refrained from supervising this activity, largely because it has been called upon to patrol the terms of some of the extra-constitutional agreements hammered out between governments. The chapter reviews doctrine in this area as well.

6.2 *REFERENCE RE: ANTI-INFLATION*

The *Anti-Inflation* reference of 1976 is not chosen as the starting point for the clarity of the vision of federalism it reveals. To the contrary, unlike the *Tasmanian Dam* case in Australia, or the *Garcia* decision in the U.S., the contemporary era in Canada

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Analysis of Federal High Courts." Bzdera's arguments are critically appraised in Chapter

begins with a less than bold statement on the division-of-powers and the place of the court in adjudicating federalism. Not that the court lacked the opportunity for such a statement. With the *Anti- Inflation* case, the court was faced with some of the most political circumstances in the post-1949 era and with the most ambivalently decided clause in the constitution, the federal government's power over p.o.g.g. The case might better be labelled the 'anti-climax' reference. Only in that sense does it serve as a landmark for the present era. The internal balance on the court and the subtle distinctions between the contending views of p.o.g.g. among its members did not make for compelling jurisprudence. Nevertheless, the style of the judgement has been replicated many times over in the more than twenty years that have passed since it was decided.

The *Anti-Inflation Act*, passed by the federal Parliament in 1976, provided for the control of prices and wages in some sectors of the economy in response to the oil-crisis induced tide of seemingly uncontrolled inflation. With a number of interest groups in business and labour clamouring to challenge the legislation, the Liberal government led by Prime Minister Pierre Trudeau decided to refer the act to the Supreme Court to test its constitutionality.

In its submissions to the court, the federal government argued that jurisdiction for such an exercise of federal authority existed under p.o.g.g. because inflation was a matter of national concern and had attained the status of a crisis or emergency. The members of the court responded in a decidedly mixed manner. However, out of the welter of

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Two, above.

opinions, Chief Justice Laskin, managed to cobble together a majority to uphold the act. The victory was by no means complete. Laskin wrote an opinion for himself and three others conceding both the national concern and emergency arguments of the federal government. The Laskin-led four were joined by three who approved the act's constitutionality, but only on the basis of the emergency justification. The final pair, led by Beetz, J., dissented, accepting neither justification for the act.[3] By a margin of seven to two, the court accepted federal jurisdiction, but by five to four it rejected the more radical contention that inflation was a matter of national concern.

Part of the reluctance of the court to ever accept a national concern argument in support of p.o.g.g. jurisdiction had always been the potential limitlessness of such reasoning. If matters were to be routinely promoted to the status of national concern, there would seem to be bountiful incentives for an expansionist central government to define whatever areas it wanted to enter under that description. The emergency doctrine was always a more risk averse strategy for the court to take. While the kinds of circumstances that constituted an emergency certainly waxed and waned, it was always confined by that basic definition. By contrast, any effort to narrow the scope of national concern seemed to require much more explicit limits. In that sense, national concern is a highly doctrinally dependent construct. The limits must be articulated by the courts for them to become real and effective. Various attempts have been made in the constitutional literature to provide a sound basis for the use of the national concern branch. The task has

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[3] Chief Justice Laskin was joined in the plurality decision by Spence, Dickson and Judson, JJ. The three partial concurrers were led by Ritchie, J. - with Pigeon and Martland, JJ. Justice Beetz wrote the dissent for himself and de Grandpre, J.

been particularly favoured by those enamoured of p.o.g.g.'s possibilities but not willing to expand it as generously as someone like Laskin might have.

W.R. Lederman, in his article "Unity and Diversity in Canadian Federalism," argued that the division-of-powers in the then *BNA Act* effectively put the enumerated powers in competition with one another. Unlike the American and Australian constitutions, the two-list system used in the Canadian constitution created an immediate tension between the lists. For every federal grant of power there is a provincial grant that could be characterised in such a way as to justify provincial control over a similar matter. This was especially true of the general powers left to both levels of government. In Lederman's view, p.o.g.g. was neither a mere appendage, nor was it the source of all federal power with the twenty–nine subject matters of section 91 being mere illustrations. The federal general power, he argued, had to be seen as on par with the provincial general power. The main difference between the two was simply that the provincial general power was for matters of a local nature, and the federal general power was for matters of a national nature. He continued that in order for excursions of federal power to be justified under the national general power, they had to be demonstrated, as a matter of evidence, to be both (1) "something that necessarily requires country-wide regulation at the national level," and; (2) to "have an identity and unity that is quite limited and particular in its extent."[4]

[4] W. R. Lederman, "Unity and Diversity," 606.

Lederman suggested that aviation was an ideal candidate for inclusion under the national power. The Fathers of Confederation obviously did not conceive of aviation as a potential field of regulation and as such it should fall to one of the two residual categories. But rather than hand aviation to the federal government by dint of its newness or because all residual subject matters should fall to the federal government, as the most expansive interpretation of p.o.g.g. would claim, the assignment can be made on a more qualified basis. Lederman argued that, as a subject, aviation belonged to the federal category as it appeared to require country-wide regulation and was sufficiently different from other modes of transportation to have the necessary unity of purpose and demonstrable limitations on its scope required to keep expansion under p.o.g.g. discrete.

Lederman represented one of the unions challenging the wage controls in the *Anti- Inflation Act*. As counsel he presented an equally narrow view of national dimensions to the court. He argued that, absent emergencies, the p.o.g.g. clause supports federal legislation only in discrete, narrowly defined subject matters that clearly fall outside provincial jurisdiction.[5] The Laskin faction did not accept such limits on national concern. However, Justice Beetz's dissent was the majority decision for the court on national concern.

Beetz took this case as an opportunity to state definitively his views on federalism. He presented the national concern and emergency branches as the respective 'normal' and 'abnormal' branches of p.o.g.g. Under the normal, national concern branch,

he wrote, the dominating factor to consider has to be the newness and indivisible distinctiveness of the subject matter. Otherwise, he argued, the door is open to unlimited expansion of federal jurisdiction under such ubiquitous headings as inflation or the environment.[6] In order to limit the reach of national concern, Beetz sought to de-legitimize the use of broad categories that tend to engulf provincial powers. His means to this end was to require unity and coherence in subject matters. These traits appeared difficult to acquire and would hopefully be uncommon.

In a detailed analysis of the *Anti-Inflation* case, Peter Russell suggests that Laskin and Beetz were not so far apart in their interpretations of p.o.g.g. as might first appear. Where they differed is a matter of some import though. The Chief Justice tried to rule out an interpretation of p.o.g.g. that required either the extreme of national emergency or national concern. In Russell's phrase, Laskin "tries to weave a single piece of cloth out of all the strands to be found in previous decisions."[7] By recognizing both a national concern and an emergency branch for p.o.g.g., Beetz was similarly unwilling to endorse extremes. However, he favoured a more limited form of national concern than the version preferred by Laskin. The issue that divided them was what qualified as a matter of national concern. Laskin took a relaxed and consequently expansive view. Beetz was more demanding, particularly if provincial jurisdiction appeared threatened. The *Anti-Inflation* case left a constrained view of what qualified under the national concern branch,

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[5] Lederman's argument to the court is summarized in Russell, "The *Anti-Inflation* case," 651.
[6] *Reference Re: Anti-Inflation Act* 68 D.L.R. (3rd) 524 (1976).
[7] Russell, "The *Anti-Inflation* case,"656.

despite the fact that it ultimately favoured the federal government's intervention to control inflation.

It is plain that the court did not satisfy the centralist hopefuls, although Laskin did try. What the court did do was begin a tradition of somewhat ambivalent federalism jurisprudence. The anti-climax of the *Anti-Inflation* decision was enough to convince Peter Russell that judicial review had limited importance to the politics of Canadian federalism. By taking the middle ground, the court had done nothing more than endorse the model of Canadian federalism already at work. Rather than determine the shape of Canadian federalism, judicial review mirrored it. The decision, Russell argued, reflected the balance of political power in the country fairly accurately. Russell's implicit criticism was that the court acted in an essentially political manner by reflecting this balance, but that the end product, the judicial decision, was still legalistic and framed in the formal language of federalism. According to Russell, this contrived formalism contributed to the waning relevance of the court. While federal politics would continue partly to play itself out through the law, the provinces and the federal government had already changed the real rules of the game. This was to be the era of co-operative federalism. Negotiation was to have pride of place over legal wrangling.[8] In the more than thirty years since the case, the preference for co-operative federalism has prevailed.

The court, it seemed, would only contribute an uncreative and confined legalism to the dialogue of Canadian federalism, a contribution which befit its lack of electoral

legitimacy and accountability. In order to give clearer policy reasons for their decision, Russell argued, the court's majority would have needed to be much more explicitly in favour of the federal government. The only policy-based reasoning he saw was that of Justice Beetz, who favoured the provinces. Russell noted with some irony that, "for policy reasons, a jurisprudential style which would make policy reasons more transparent is rejected. As a result, Canadians cannot expect judicial reasoning to add very much to the country's stock of constitutional wisdom."[9] By its unwillingness to make bold constitutional pronouncements (or refrain from dispensing constitutional wisdom), the court signalled that the tenor of Canadian federalism would have to be set by someone else.

Has the court's approach changed since then? Or have the judges continued to mask judicial power and thus constrain their influence in the development of Canadian federalism? Developments in p.o.g.g. jurisprudence suggest that the court has continued to avoid broad pronouncements about federal power, but in the search for such avoidance it may have created an entirely different monster. To demonstrate, this chapter will now turn to more recent developments in federalism jurisprudence. First it will continue the chronicle of the p.o.g.g. power that started with the description of the *Anti-Inflation* case. This is followed by a discussion of developments in non-p.o.g.g. jurisprudence. Among them are recent interpretations of the federal government's trade and commerce power and developments in the area of co-operative federalism.

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[8] Richard Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1971).

[9] Russell, "The *Anti-Inflation* case," 665

6.3 Provincial Inability and P.O.G.G.

6.3.1 Provincial Inability Born

Anti-Inflation seemed to indicate judicial ambivalence about the interpretation of p.o.g.g. Unlike older decisions which betrayed a preference for either the centralist or the provincialist interpretation of p.o.g.g., *Anti-Inflation* could be read as an endorsement of p.o.g.g. both as a general power or as a restricted power. Since *Anti-Inflation*, the court has continued to seek limits on the national concern branch of the power. Emergency has almost disappeared from the vocabulary of p.o.g.g. decisions. In its place has emerged the concept of provincial inability.[10]

What is provincial inability? It is ultimately the product of the generation of JCPC nay-sayers like Lederman who hoped to place national concern on a solid footing in order that the patriated system of judicial review would look more favourably upon it as a justification for federal power. To make national concern more palatable, a limited version of it had to be available to the court. If national concern could be found to exist in discrete categories, the court would be more likely to endorse it as a justification. Limits would also help national concern avoid descending the slippery slope of a general power interpretation of p.o.g.g. Centralist thinkers came to realize that in order achieve centralization through p.o.g.g., it was critical to define limits on the scope of the power,

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[10] I have explored the development of this concept more fully in "Tempering Peace, order and good government: Provincial Inability and Canadian Federalism," *National Journal*

otherwise it might never be used to justify federal government activity. While Lederman put such an argument before the court, Dale Gibson formulated a theory of national concern with similar limits on the scope of federal power to ensure its palatability. In an article entitled "Measuring National Dimensions,"[11] Gibson proposed a test of provincial inability as a principled way to concede jurisdiction to the federal government without establishing a broad or open-ended grant of power. The test basically ensured that jurisdiction could be claimed under the national concern doctrine only after all provincial capabilities had first been exhausted. He argued that this would give a limited, residual scope to p.o.g.g.

For Gibson, "*a matter has a national dimension to the extent only that it is beyond the power of the provinces to deal with it*"[12] (italics in original). 'Power' appears to be understood ambiguously as both a matter of jurisdiction and of actual capacity. Provincial inability is first determined by reference to the enumerated powers of the provinces. If the provinces were not accorded jurisdiction by the constitution then provincial inability exists.[13] This is something of a tautology, the provinces cannot do what they cannot do. But making the point confirmed Gibson's characterisation of p.o.g.g. as a residual power, even in those instances where a national dimension exists. In the secondary, and more important sense, the dimensions of the problem at hand are to be considered. The

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of Constitutional Law 9, no. 3 (1998): 1-29. The following draws directly from the discussion therein.

[11] Dale Gibson, "Measuring National Dimensions," *Manitoba Law Journal* 7 (1976)

[12] Ibid., 33.

[13] Ibid., 33.

question becomes whether a province is actually able to control all the necessary elements of a problem, or has the capacity to regulate it effectively.

As an example, Gibson considered the capacity of a province to deal with a pestilence. Air borne diseases do not respect provincial boundaries, thus they cannot be controlled by just one province and a national need or concern is created. Less catastrophic examples can also be imagined, the important characteristic being that some trait prevents a single province from coping effectively with the problem on its own terms. National concern ensures that the potential harm to all provinces, that can come when one province does not act, or is unable to cope with the scale of a threat, is avoided. In order to maintain a narrow view of p.o.g.g., Gibson argued that the federal jurisdiction that exists as a result of provincial inability, must be limited solely to those matters that are beyond provincial competence. Inability, he argued, is not an invitation to plenary federal jurisdiction. Rather it is an attempt to take advantage of federal competence to deal with issues that overlap provincial boundaries and to "fill the gap in provincial powers."[14]

Anti-Inflation provided fertile soil for germinating this concept and allowed it to emerge quickly as the prevailing orthodoxy on national dimensions. A year after the reference, in the first edition of his now standard text on Canadian constitutional law, Peter Hogg approvingly cited Gibson on the point.[15] Hogg's formulation of provincial inability, however, omitted reference to jurisdiction and focused exclusively on the lack

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[14] Ibid., 34.

of capacity of a province, or even a few provinces, to accomplish some ends. Hogg wrote that when uniformity of policy or standards is necessary, and not simply desirable, federal jurisdiction should be granted. In a passage that came to play a clear role in subsequent judicial reasoning, Hogg described national concern:

> The most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences for the residents of other provinces. A subject-matter of legislation which has this characteristic has the necessary national dimension of concern to justify invocation of the p.o.g.g. power.[16]

The Supreme Court approved this interpretation shortly thereafter. In three decisions following the *Anti-Inflation* reference, the court endorsed the concept of provincial inability as a legitimate standard for measuring national dimensions or concern. In the first of these cases, *Labatt Breweries of Canada v. A.G. Canada*,[17] the court considered the constitutionality of federal legislation regulating the production and labelling of malt liquors and beer. Labatt Breweries, in a whimsical attempt at marketing semantics, produced and bottled a beer with 4 percent alcohol and labelled it "special lite." However, the federal *Food and Drug Act* only permitted beer with 2.5 percent alcohol or less to be labelled 'light.' Replacing the 'g' and 'h' with an 'e' was looked upon unfavourably by federal authorities. Equally unhappy with being hauled to court for replacing two consonants with a vowel, Labatt challenged the legislation as *ultra vires* the federal Parliament. Estey, J. writing for the majority, found in Labatt's favour and

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[15] Peter Hogg, *Constitutional Law of Canada*, 1st ed. (Toronto: Carswell, 1977), 260.
[16] Ibid., 261.
[17] *Labatt Breweries of Canada v A.-G. Canada* 110 D.L.R.(3rd) 594 (1980).

rejected the idea that federal regulation of the brewing and labelling of light beer was a matter of national concern as such regulation did not appear to transcend the legislative abilities of the provinces.[18] His finding was based in part on Hogg's reasoning and conformed to Gibson's narrow vision of p.o.g.g., which maintains provincial jurisdiction where it is clear the provinces have the capacity to be effective.

Three years later, in *Schneider v The Queen*, the court again had an opportunity to consider provincial inability as a test of national concern.[19] At issue in this case was whether the province's *Heroin Treatment Act*, which provided for a mandatory six month treatment program for heroin abusers, was *intra vires* the legislature of British Columbia. Schneider, wishing to avoid the mandated treatment, challenged the legislation, arguing that the control of narcotic drugs and their users was the responsibility of the federal government.[20] While agreeing that traffic in drugs was a national matter, the court failed to find a national dimension to the problem of heroin dependency. Instead it found the treatment of abusers to be an aspect manageable under the health jurisdiction of the provinces. The case was particularly relevant for the way in which the court looked at older cases through the lens of provincial inability. Gibson admitted in 1976 that his formulation of provincial inability could not be found explicitly in the case law. However, he did believe that the concept conformed to much of the court's jurisprudence.[21] *Schneider* legitimized this belief. In applying the test, the court basically

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[18] Ibid., 627.
[19] *Schneider v The Queen* 2 S.C.R. 112 (1982).
[20] Established by its power in criminal law as well as the court's own awarding of authority under p.o.g.g. in *R. v Hauser* 98 D.L.R.(3rd) 193 (1979).
[21] Gibson, "Measuring National Dimensions," 35.

reinterpreted several important national concern cases such as *Re: Regulation and Control of Aeronautics* (1932), *Canada Temperance Federation* (1946), *Johannesson* (1952) and *Munro* (1966). While none of these decisions contained a reference to the provincial inability test, the court invoked them in *Schneider*, thereby implying that they conformed to such a model of thinking about national dimensions.

The final case of the trio was *R v Wetmore*. Again at issue was the *Food and Drug Act*. The federal government initiated a prosecution against pharmacist Steven Kripps for violations of the act related to selling contaminated or adulterated drugs. Kripps countered that the sections of the act in question were criminal law and thus the provinces were responsible for the prosecution of offences under them. County Court Judge Wetmore agreed, and his decision was appealed by the federal government. The Supreme Court reversed the initial finding and allowed the federal prosecution of Kripps to proceed. However, in dissent, Dickson, J. (as he then was) rejected federal involvement, as there appeared to be nothing in the offence at hand that necessitated it. He failed to see anything that went "beyond local or provincial interest and must from its intrinsic nature be the concern of the dominion as a whole."[22] For Dickson, there was in effect no provincial inability and thus federal involvement was unnecessary. In this case, like the two before it, the provincial inability test clearly stood as an impediment to central government expansion under p.o.g.g. Further refinements of the test, however, served to diminish this potential.

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[22] *Regina v. Wetmore* 2 D.L.R. (4th) 577 (1983), 587.

6.3.2 PROVINCIAL INABILITY MODIFIED

The real tests of provincial inability as a doctrine have only come in the last ten years. The most important initial case was *Crown Zellerbach* in 1988. In it, the court took the opportunity to define provincial inability in a much more precise manner than in the three previous cases, which admittedly made much more oblique reference to the concept. While the decisions above legitimated the spirit of provincial inability, the court never endorsed the term specifically. It only referred to conceptual elements of the test as propounded by Gibson or Hogg, despite the clarity it seemed to bring to thinking about national concern. The ambiguity disappeared in *Crown Zellerbach.*

The case provided ideal circumstances for a nuanced application of the test. Crown Zellerbach, a major lumber producer with logging and milling operations in British Columbia, had been charged with dumping wood waste into the sea without a permit, in violation of the provisions of the federal *Ocean Dumping Control Act.* The company challenged the legislation as *ultra vires* the federal Parliament, arguing specifically that waste not shown to have a pollutant effect on extra-provincial waters could not be regulated by the federal government.[23] In response, the court deemed that Parliament's power over fisheries and the sea coast did not give it jurisdiction in these circumstances. However, the majority did find that the legislation, as a measure to control marine pollution, could still be justified on the basis of p.o.g.g. as a matter of national concern. In doing so, the majority attempted to provide a clear and systematic test of what qualifies as an object of national concern.

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[23] *The Queen v. Crown Zellerbach Canada Ltd.* 49 D.L.R. (4th) 161 (1988), 173.

Justice Le Dain's majority opinion explicitly referred to provincial inability for the first time in judicial text. Le Dain sought to develop a consistent set of criteria for the evaluation of claims made under the national concern branch of p.o.g.g. Drawing from jurisprudence he believed to be 'firmly established,' he articulated a four-step test of federal jurisdiction, the last step of which entailed a determination of provincial inability. In short, the test required: (1) that matters of national concern be divorced from matters of national emergency, the latter being distinguishable chiefly by their temporary nature; (2) that they be new, or if old, be matters of a local or private nature that have become ones of national concern; (3) that they have a singleness, distinctiveness and indivisibility, a requirement necessary to avoid national matters being created out of aggregates of provincial powers, and does not upset the basic balance inherent in the distribution of legislative powers; (4) that singleness and distinctiveness be tested by an examination of provincial inability, or the "effect on extra provincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter."[24] In construing the test the way he did, Le Dain effected nothing less than a complete alteration of provincial inability from its original character as a limit on national concern.

Le Dain's formulation used provincial inability to determining singleness and indivisibility. Since this differed from the approach of the court in earlier decisions, he was required to distinguish these differences. He made direct reference to Gibson's

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[24] Ibid., 184.

argument that a subject matter attains national dimensions under p.o.g.g. only in parts that the provinces cannot address. Le Dain believed that this "appears to contemplate a concurrent or overlapping federal jurisdiction,"[25] as opposed to the so-called 'classical federal' notion of single ownership of fields.[26] He was unwilling to venture into the overlapping jurisdictions that flow from such a test, so he rejected Gibson's positioning of it and put provincial inability to the task of testing singleness and indivisibility, thereby helping to keep federal divisions clear. Le Dain drew on Hogg to affirm this change. The provincial inability test in Hogg's formulation, he wrote, "is adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power."[27] This fit more readily with Le Dain's desire to test for singleness. The provincial inability test's utility, he wrote, is not in "providing a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government," but is its ability to help determine "whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view."[28] Le Dain held up the spectre of plenary federal power, a tool of rampant centralization, as a realistic fear in order to justify removing provincial inability as a precondition of national concern. His preoccupation with singleness revealed a preference for a different, more classical form of national concern.

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[25] Ibid., 185.
[26] The classical notion is embodied in K.C. Wheare's definition of the federal principle. Namely, "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" *Federal Government*, 10.
[27] *Crown Zellerbach*, 185.
[28] Ibid., 185.

Understanding Le Dain's repositioning of provincial inability is crucial to appreciating the potential effect of an evolving doctrine of national concern. In its academic, pre-Supreme Court formulation, provincial inability was proffered as a means to determine national concern without unduly infringing upon the jurisdiction and autonomy of the provinces. Indeed, in the first few cases in which the court considered the concept of provincial inability, that is how it was used. In *Labatt, Schneider* and *Wetmore* when the court failed to see a need for federal involvement or could not find the existence of inability, national concern was excluded as a justification. However, if provincial inability is used at a later stage in the analysis, as it is by Le Dain, it loses some of its limiting effect. In Le Dain's version, provincial inability is a last chance to deny the existence of national concern rather than a means of proving the possibility of a national concern. Whether the new and improved provincial inability would still serve as a check on national expansion in this role is revealed in the application of the test.

6.3.3 Provincial Inability Applied: *Crown Zellerbach*

Armed with his revised concept of national concern and provincial inability, Le Dain went to work on the matters at hand in *Crown Zellerbach*. With provincial inability no longer a question of capacity and more a test of singleness, the initial determination of 'national concern' became a less restrictive process. National concern could be claimed on grounds such as 'extra provincial' effects or the existence of an international dimension, both of which Le Dain advanced as reasons for national concern in *Crown*

Zellerbach.[29] The scope of federal power seemed likely to increase under such reasoning.[30] In *Crown Zellerbach*, little effort was devoted to examining the existence of national concern- it was almost assumed to exist without debate given the extra-provincial or international elements involved. The difficult question, as Le Dain saw it, was not the *primae facie* existence of national concern, but whether pollution in marine waters, including provincial marine waters, could be considered a single, indivisible matter. He wrote that, given the evidence before the court, the difficulty of finding the terminus of provincial marine waters and the beginning of federal marine waters "creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions."[31] Thus, provincial inability existed and federal jurisdiction under p.o.g.g. was justified.

In dissent, La Forest, J. dismissed this kind of broad reasoning by taking a more detailed approach to the facts of the case. Crown Zellerbach was charged with dumping wood waste, not chemicals or by-products, an activity which La Forest believed could not strictly be defined as pollution. If the material was toxic or dangerous, the matter would be resolved as extra-provincial marine pollution which was already the domain of the federal government. La Forest used provincial inability in the "effect on extra provincial interests" sense. Since he could not perceive an effect in the dumping of

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[29] Ibid., 187.
[30] La Forest, J., writing in dissent recognized this possibility. "As I see it, the potential breadth of federal power to control pollution by use of its general power is so great that... the constitutional challenge in the end may be the development of judicial strategies to confine its ambit." Ibid., 195.
[31] Ibid., 188.

benign material, he found no need for national concern, despite the extra-provincial or international elements that might have been involved.

Provincial inability did not enter La Forest's test of singleness and distinctiveness. La Forest, like Le Dain, shared Beetz's *Anti-Inflation* concern that "one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction."[32] He found that Le Dain's formulation of provincial inability did not offer a clear enough approach to avoid this problem. Instead, it offered the opportunity to take a number of areas of jurisdiction and consider them collectively as single and indivisible without first asking if this actually needed to be done at all. La Forest situated this matter in the historical struggle over p.o.g.g. much better than Le Dain by noting that the attempts to accumulate jurisdiction through broad general headings are "fighting on another plane the war that was lost on the economic plane in the Canadian new deal cases."[33] Just as Bennett was denied broad power to deal with the crisis of the depression, new crises do not necessarily justify the granting of broad powers. By applying provincial inability the way he did, Le Dain weakened its initial, necessity-based, narrowing effect and opened doors for national concern.

6.3.4 *Friends of the Oldman River*

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[32] Ibid., 199.
[33] Ibid., 199.

Although the p.o.g.g. clause is infrequently considered by the court, concepts that emerge from p.o.g.g. cases can have an influence on other federalism decisions. The doctrinal effect of provincial inability is a good example of this phenomenon. The concepts of national concern and provincial inability did not arise again in the Supreme Court until four years after *Crown Zellerbach*, in *The Friends of the Oldman River Society v Canada*.[34]

The society sought to halt the development of a dam on the Oldman River in Southern Alberta. They challenged the Alberta government's authority to build the dam without first subjecting the project to a federal environmental review as per the *Environmental Assessment and Review Process Guidelines Order*, being that some areas of federal jurisdiction such as Indian lands and fisheries were potentially affected. While the case was largely occupied with issues other than p.o.g.g., the court did allude to provincial inability. The Alberta government, wishing not to incur further delays, challenged the validity of the federal legislation conferring authority for the review. Part of that challenge was to suggest that federal review would upset the balance of federal/ provincial jurisdiction over the environment. The court affirmed the federal government's legitimate place in environmental assessment. It agreed with the society but it did not compel the federal government to undertake an actual assessment in this instance.

La Forest, J. wrote the majority decision for the court. La Forest, let us recall, had written for the dissent in *Crown Zellerbach*, arguing that 'pollution' or 'the marine

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[34] *Friends of the Oldman River Society v. Canada (Minister of Transport)* 88 D.L.R. (4th)

environment' did not have the requisite distinctiveness as subject matters to qualify as ones of national concern. Here he had the opportunity to readdress his views on the environment as a subject matter of federalism. In large part, La Forest picked up where he left off in *Crown Zellerbach*, pursuing a version of provincial inability that would be more to Dale Gibson's liking than to Justice Le Dain's. Given that jurisdiction over the environment is not a power specifically assigned to either level of government, La Forest affirmed that both levels of government had to accept a degree of responsibility for ensuring that environmental concerns are taken into account in the exercise of their respective jurisdictional activities.[35] In La Forest's mind, the federal government must be responsible for reviewing projects that fall under or affect federal jurisdiction and the provinces likewise. He denied a plenary jurisdiction over the environment to either level of government, preferring that both levels intervene on the basis of capacity or incapacity.

At the same time, La Forest recognized that environmental assessments, if they are to be at all useful, must be comprehensive and not be restricted by the affected heads of federal or provincial jurisdiction. Where jurisdiction permits an assessment, it must be as comprehensive as possible. While alert to the possibility of a Trojan-Horse in this line of reasoning, La Forest was confident that it would prove negligible. Environmental impact assessments, he suggested, are just that, assessments, and are strictly decision-

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1(1992).
[35] Ibid., 42.

making adjuncts. Since whatever policy might result from a review was still made by the government which had jurisdiction, any 'unbalancing' effect would be diminished.[36]

6.3.5 *Ontario Hydro*

Ontario Hydro v. Ontario, [37] a decision handed down by the Supreme Court in the fall of 1993, is the first post-*Zellerbach* test of national concern and provincial inability. The appeal dealt with the applicability of federal labour regulation to employees in Ontario Hydro's nuclear power plants. Labour relations as a general category, like the environment, is not assigned to the federal or provincial governments. However, most labour matters have fallen under the provincial heading of property and civil rights, the exception being labour relations in federal agencies and areas of enumerated federal jurisdiction, such as fisheries or shipping and navigation.[38] Also important to the appeal was the accepted understanding that works and undertakings for the production of atomic energy are considered to be for the general advantage of Canada and therefore fall under the declaratory power of the federal Parliament.[39] Atomic energy has also been specifically confirmed as a subject matter that falls under the national concern branch of p.o.g.g.[40]

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[36] Ibid., 47.
[37] *Ontario Hydro v Ontario (Labour Relations Board)* 107 D.L.R. (4th) 457 (1993).
[38] *Toronto Electric Commissioners v. Snider* A.C. 396 (1925).
[39] Section 92(10)(c) of the *Constitution Act, 1867* omits from provincial jurisdiction "Such Works as, although wholly situated within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."
[40] *Pronto Uranium Mines v. Ontario Labour Relations Board* O.R. 862 (1956).

Whether federal jurisdiction over atomic energy also included labour relations at an atomic energy plant had to be decided by the court. A prospective union for the employees of Ontario Hydro who worked in nuclear plants sought certification under provincial law from the Ontario Labour Relations Board. The Board denied certification and the union challenged the Board's decision. Much of the court's ruling hinged on issues surrounding the declaratory power of parliament. However, for good measure, the court tested p.o.g.g. jurisdiction as well. The p.o.g.g. argument was presented by the Attorney General of Canada as a fall back in the event that the court did not extend the declaratory power to include labour relations. The majority of the court, led again by La Forest, J., agreed that Parliament was responsible for atomic energy on the grounds of the declaratory and p.o.g.g. powers, and that this responsibility required jurisdiction over all labour relations at the plant. Lamer, C.J. concurred, but limited federal jurisdiction to those workers specifically concerned with the production of nuclear or atomic energy, and excluded those workers responsible for transformation or transmission of the energy as electricity. In dissent, Iacobucci, J. argued that control over labour was not essential to the federal government exercising its rightful role over atomic energy and that federal and provincial regulation could co-exist.

The court was forced to consider directly the expanded national concern criteria enunciated by Le Dain in *Crown Zellerbach.* All three opinions noted the onerous threshold the court had created for a matter to qualify as one of national concern. However, the real effects of the test can be seen in the way that the judges responded to the purportedly difficult set of criteria. Of particular interest is how they determined

national concern at the outset, and where and how provincial inability entered their analysis.

In the determination of national concern, the opinions did not differ greatly. La Forest's majority followed Le Dain's example in *Crown Zellerbach* by advancing little evidence to demonstrate that the matter was of national concern. The fact that atomic energy has international and extra-provincial characteristics was deemed reason enough to justify the existence of a national concern. Extra-provincial or international characteristics had effectively replaced provincial inability as the means to determine that a potential national concern exists. The Iacobucci dissent did not stray far on this point. In fact, Iacobucci noted that the existence of a general p.o.g.g. jurisdiction in the field of atomic energy was an undisputed point - the issue was simply whether the extension of that jurisdiction to include labour relations could be justified. Thus Iacobucci actually advanced no argument to justify national concern and limited his discussion to the scope of Parliament's jurisdiction.

Provincial inability only entered the analysis as a determinant of the singleness and distinctiveness required by *Crown Zellerbach*. La Forest simply stated that power over labour relations was necessary for the proper regulation of the subject matter. He remarked that he was "at a loss to see how one can have exclusive power to regulate, operate and manage a work without having exclusive power to regulate the labour relations between management and the employees engaged in that enterprise."[41] La

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[41] *Ontario Hydro*, 478.

Forest offered further evidence of this necessity through an expanded concept of security, noting that "safety and security are as much in jeopardy from the manner in which employees do their work as in the manner in which a facility is constructed."[42] In his concurring opinion, Lamer, C.J., agreed and amplified the need for labour regulation as a part of the general authority over atomic energy. However, Lamer struck a note of reserve by separating the workers specifically engaged in the production of atomic energy from those responsible for other functions in the nuclear plant. With this distinction, he narrowed the subject matter through the distinctiveness criterion. The workers engaged directly in production were seen as sufficiently distinct to justify their exclusion from provincial labour legislation. La Forest, like Le Dain in *Crown Zellerbach*, did not see a clear enough distinction, and like Le Dain, gave the benefit of the doubt, as well as the expanded jurisdiction, to the federal government. Whether it was truly necessary for labour relations to be included in the regulation of atomic energy became the provincial inability issue.

This was well demonstrated by the dissent. Iacobucci, J. did not deny jurisdiction over atomic energy to the federal government, but did deny that control over labour relations was a part of that jurisdiction. Using the singleness test of *Crown Zellerbach*, he was unable to find that labour relations were a part of the single, distinctive problem of atomic energy, and therefore subject to Parliament's control. For Iacobucci, "to allow Parliament to control labour relations at these facilities where such regulation is not integral...[to the regulation of atomic energy] would not be reconcilable with the

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[42] Ibid., 486.

distribution of legislative powers."[43] The doctrine did act as a limit in this sense, at least as far as it limited the scope of federal power. When it determined national concern, the court never considered what the province was unable to do jurisdictionally or practically, or the potential harm that could come from provincial inaction on this issue. Why would the province of Ontario be unable to deal with the local aspects of atomic energy generation? For Iacobucci it was not clear that they could not, so he proposed that the federal government be excluded from intervening.

In the manner in which it was used by Iacobucci, provincial inability lived up to the limiting role that Gibson proposed for and ensured that federal jurisdiction only extends to those matters that are proven cases of inability. However, even if Iacobucci had written for the majority, he was defending provincial authority on the margins. The court was not using provincial inability to determine if a subject matter qualified as one of national concern, but instead used the test to determine what provincial powers the existence of a national concern allowed Parliament to plunder. Conceding greater power to the federal government up front through national concern and then scaling it back through the singleness test, substantially weakened the capacity of provincial inability to control central government expansion.

6.3.6 *RJR-MacDonald*

In the aftermath of *Ontario Hydro*, the Supreme Court purposely turned away from p.o.g.g. justifications for federal jurisdiction. In the two most recent attempts to

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[43] Ibid., 523.

maintain federal regulatory power under p.o.g.g., the court preferred to accept the federal government's power over the criminal law as an alternative justification. Little has changed in the way the court approaches the provincial inability test, but, by ignoring p.o.g.g. justifications entirely, the court clearly expressed some reservation about working under the national concern heading - provincial inability or not.

In *RJR-MacDonald v. Canada (A.G.)*,[44] a major multinational tobacco company challenged strict federal legislation that almost entirely prohibited the advertising of tobacco products. RJR-MacDonald argued first that the legislation was *ultra vires* the federal Parliament, and second that, even if it was within federal jurisdiction, the legislation offended section 2(b) of the Charter, the right to freedom of expression. The court agreed with the challenge and repealed the tobacco advertising regulations. Popular and academic attention has thus far focused on the expansive scope the court gave to the freedom of expression and the section 1 'reasonable limits' analysis in McLachlin, J.'s decision.[45] However, overlooked are the federal issues that were raised in the case. And it is easy to overlook them since the court dispensed with a p.o.g.g. analysis almost entirely by subsuming the issue under the much less controversial federal criminal law power.

The Quebec Court of Appeal, whose decision was disputed, demonstrated the difficulties that Le Dain's concept of provincial inability poses for p.o.g.g. analysis.

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[44] *RJR-MacDonald Inc. v. Canada (A.G.)* 127 D.L.R. (4th) 289 (1995).
[45] See, David Schneiderman, "A Comment on *RJR-MacDonald v Canada (A.G.)*" *University of British Columbia Law Review* 30, (1996): 165-80 and Michael D. Parrish "On Smokes and *Oakes*: A comment on *RJR-MacDonald v Canada (A.G.)*" *Manitoba Law Journal* 24 (1997): 665-98.

Despite its extensive overview of the provincial inability test's history, the Quebec court failed to implement the test in a manner true to the Le Dain doctrine. By looking at the history of the concept in greater detail, the court imported elements of Gibson's provincial inability into Le Dain's test. The result was ultimately chaotic rather than refining. However, the evident confusion of the court demonstrated some of the subtle but important alterations the test has undergone.

Writing the decision for the lower court, Le Bel, J. suggested that tobacco advertising was a matter of national concern based on "the nature of the activity aimed at."[46] Specifically, Le Bel found "this problem has so developed that.. the inaction of one province and its practical inability to regulate certain forms of interprovincial or especially international advertising may seriously impede, if not render impossible the realization of the objective sought."[47] The problem was one of national concern not because of extra-provincial aspects specifically, but because the provinces appeared unable to grapple with the reach of the issue.

Thus Le Bel determined national concern on the basis of provincial inability. He also used the test to determine whether the matter had the requisite singleness or indivisibility as dictated by Le Dain.[48] In this instance, he regarded tobacco advertising to be a sufficiently distinct problem. In so doing, the Quebec court put provincial inability to two uses, thereby implying that a dual function is consistent with the interpretation of

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[46] *RJR-MacDonald* (1993), 307; *RJR-MacDonald Inc. v. Canada (A.G.)* 127 D.L.R. (4th) 1(1995).
[47] *RJR- MacDonald* (1993), 307.

the concept. Given the court's careful attention to Gibson's approach, such a result is not surprising. It is not a result, however, that seems to be commanded by Le Dain's presentation of provincial inability. As the *Ontario Hydro* decision showed, the Supreme Court appears to only use provincial inability to test for singleness. The Supreme Court's silence on the matter in their consideration of *RJR-MacDonald* left p.o.g.g. unchanged.

6.3.7 *R v Hydro-Québec*

The latest pronouncement on p.o.g.g. to emerge from the top court continued the evasive manoeuvring on national concern begun in *RJR-MacDonald*. Indeed, in *R v Hydro-Québec* the court turned away from p.o.g.g. even more resolutely than it did in *RJR*. The circumstances in *Hydro-Québec* (unlike *RJR*) closely resembled those in *Crown Zellerbach*, yet the court noticeably refrained from dealing with matters under the national concern branch of p.o.g.g.

Hydro-Québec was charged with violations under the *Canadian Environmental Protection Act*, because it had dumped PCBs in contravention of the legislation. A narrow majority of the court dismissed the company's challenge that the applicable portions of the Act were outside the federal government's competence. The court preserved the federal government's guidelines under the rubric of the federal power to write the criminal law. They did so in preference to the argument before the court that the regulation of toxic substances was a matter of national concern. Thus the court forestalled the centralist logic of provincial inability in favour of a more discrete grant of federal power.

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[48] Ibid., 303.

Writing for the majority of the court, La Forest, J. recognized the power of the post-*Zellerbach* national concern doctrine. "Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism."[49] This was not his preferred approach to environmental law. Citing *Oldman River*, La Forest reiterated that neither level of government is assigned exclusive control over the environment by the constitution. Accordingly, the environment must be dealt with on a case-by-case basis - the provinces and the federal government can minimize environmental impacts or impose environmental standards in the course of exercising their traditionally assigned functions.[50] The source of legitimacy is always the originally occupied field of the government in question. If a provision cannot be adequately related to an original grant then it is likely to be insupportable.

The arguments made to the court paid considerable attention to national concern. As a result, La Forest argued, the stakes for federal balance may have been exaggerated. He noted that national concern "inevitably raises profound issues respecting the federal structure of our Constitution which do not rise with anything like the same intensity in relation to the criminal law power."[51] Essentially he posited that environmental matters such as those involved here were reasonably dealt with under the criminal law without opening the floodgates of national concern. A criminal law justification permitted "discrete

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[49] *R v Hydro-Québec* 151 D.L.R. (4th) 95 (1997).
[50] Ibid., 94.
[51] Ibid., 93.

prohibitions to prevent evils falling within a broad purpose such as, for example, the protection of health."[52]

The immediate result of this line of thinking was a tempering of provincial inability and the national concern test. The seeming menace of the national concern doctrine for cautious observers was defused by La Forest in a conscious effort to avoid the potential excesses he recognized in previous applications of the current criteria. He noted, for example, that in *Crown Zellerbach*,

> this court held that marine pollution met those criteria and so fell within the exclusive legislative power of Parliament under the peace, order and good government clause. While the constitutional necessity of characterizing certain activities as beyond the scope of provincial legislation and falling within the national domain was accepted by all members of the court, the danger of too readily adopting this course was not lost on the minority.[53]

It is too early to tell whether or not the criminal law power has become a proxy for national concern. Presumably there is a more restricted scope available under the criminal law power than there would be under an increasingly expanding national concern doctrine.

6.4 Non- P.O.G.G. Jurisprudence

Similar trends have emerged in cases which do not bear on the p.o.g.g. power and the doctrines which support it. Under the trade and commerce and property and civil rights powers, most of the court's activity has been concerned with testing the legitimacy of federal competition policy. The tendency of the court has been to justify such

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[52] Ibid., 102

regulation under the general branch of the trade and commerce power with reasoning similar to that expressed in regard to the national concern branch of p.o.g.g. In addition, the Supreme Court has been obliged to rule on the status of intergovernmental agreements, a major feature of federalism since the 1960s which has largely escaped judicial supervision.

6.4.1 Trade and Commerce

In trade and commerce, doctrine has closely mirrored the developments in p.o.g.g. jurisprudence. Like p.o.g.g., the power in section 91(2) for the federal government to "regulate trade and commerce" is potentially very expansive. One need only look to the scope of the commerce power in the United States to see how a general power over 'commerce' can be interpreted widely to include most matters of modern government and regulation. The JCPC ensured that such a power never arose in much of Canada's first century. Trade and commerce was always narrowly interpreted, with preference given to the provincial power over property and civil rights instead. The power was effectively divided by judicial review into two branches, (i) a power over international and interprovincial trade and (ii) a power over general trade and commerce affecting Canada as a whole. A number of landmark cases from the JCPC-era confirmed the preference held by the law Lords for the provincial heading of property and civil rights. The committee narrowly defined the scope of the first branch of trade and commerce.[54] The second branch was effectively ignored altogether – as Chief Justice Dickson wrote for the court in 1989, it was *terra incognita*. In the post-1949 era the Supreme Court continued

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[53] Which was led by La Forest himself. Ibid., 95.

to take a narrow view of the power over trade and commerce, particularly the second branch, allowing Dickson to quote the claim that "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."[55]

In the trade and commerce cases of the last twenty-five years, a five-part test for a matter to be included under the power has emerged. Three elements of the current test were drawn from Bora Laskin's decision in *MacDonald v Vapour Canada Ltd.*[56] In that case, the court refused to endorse a portion of the federal *Trade Marks Act*[57] prohibiting business practices "contrary to honest industrial or commercial usage,"[58] under the trade and commerce power. In his reasons, Laskin pointed to the three criteria he considered essential for a legislative scheme to be justifiable as an exercise of the general trade and commerce power: first, the governmental activity supported must be in the form of a regulation or a general regulatory scheme; second, the scheme must be enforced by a regulatory agency, not left to "the chance of private redress"[59]; and third, it must regulate trade and commerce as a whole rather than be concerned with a specific industry. In the

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[54] The cases include *Parsons*, the *Board of Commerce* case and the *Alberta Insurance Reference*. They are chronicled in Section 3.5 of Chapter Three.
[55] Bruce L. McDonald "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" 47 *Canadian Bar Review* (1969), 189. Quoted in *General Motors of Canada Ltd. v City National Leasing* 58 DLR (4th) 255 (1989), 266.
[56] *MacDonald v Vapour Canada Ltd.* 2 S.C.R. 134 (1977).
[57] R.S.C., 1970 c. T-10.
[58] Ibid., s. 7(e)
[59] A legitimate exercise of the federal power had to be patrolled by a regulator, if enforcement was left to the initiative of affected individuals alone, it risked interfering with the provincial power to oversee the conduct of civil actions. *Macdonald*, 25.

Vapour case, Laskin found nothing in the disputed section of the *Trade Marks Act* that was regulatory or enforced by such an agency, and thus he could not sustain the impugned sections under the trade and commerce power.

Justice Brian Dickson added to those three criteria two of his own in the *Canadian National Transportation* decision.[60] The case was concerned with whether federal prosecutors were constitutionally able to apply the federal *Combines Investigation Act* or if the prosecutions would have to be pursued, like most criminal matters, by provincial Attorneys-General. The companies involved in the case had been charged with anti-competitive behaviour in the inter-provincial shipping industry. They sought to preclude charges being brought by the federal Attorney General on the grounds that the act depended for its validity upon the criminal law heading of sec. 91(27) of the constitution, which is enforced by the provinces.[61] The Alberta Court of Appeal agreed and did not allow prosecution by the federal Attorney-General to proceed. The Supreme Court allowed the appeal, ruling that the federal Parliament could have certain cases pursued by federal prosecutors under the auspices of Section 2 of the *Criminal Code*. In *obiter*, Dickson agreed with the Section 2 Criminal Code justification but also gave a justification for the *Combines Investigation Act* under the general branch of trade and commerce.

The requirement that regulation under the second branch of trade and commerce be general, obligated the court to determine some way of distinguishing general from

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[60] *A.G. Canada v Canadian National Transportation Ltd.* 3 D.L.R. (4th) 16 (1983)

specific. The requirement of generality was the federalism consideration of the analysis. Apart from that test, the validity of trade and commerce regulation depends very little on any clear federalism requirements. No test for the need of such regulation in a federal system is made. The only federalism exemption was a prohibition on targeting a specific industry or trade. Such regulation risked being too local in its effects. Unresolved was the distinction between two categories of regulation that could not be considered specific - those that are genuine attempts at national control of trade but have local effects and those that are amalgams of local matters centralised simply for the assertion of national control. To distinguish between these two Dickson argued for the inclusion of a much more explicit federal test in addition to the Laskin criteria. Dickson's innovation was a spin on provincial inability, operationalized in the form of two requirements: first, "that the provinces jointly or severally would be constitutionally incapable of passing such an enactment"; and second, "that failure to include one or more provinces... would jeopardize successful operation in other parts of the country."[62] In the case at hand, national anti-combines legislation could be justified, Dickson argued, as "an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government." Specifically, he cited the fact that "Canada is, for economic purposes, a single huge market-place. If competition is to be regulated at all it must be regulated federally."[63]

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[61] Under the auspices of their power over the administration of justice in sect 92(14).
[62] *A.G. Canada v Canadian National*, 62.
[63] Ibid., 70.

Dickson continued this line of reasoning in *General Motors of Canada v. City National Leasing*. City National leased car fleets to other companies across the country. They bought General Motors cars, among others, from franchised dealers and subsequently leased the cars to their customers. City National brought suit against General Motors claiming that the manufacturer offered 'preferential interest rate' incentives to some of the national fleet leasing companies that bought cars from it, but not to City National. This practice threatened City National's competitive position with its market rivals. City National was able to bring the matter to court under the *Combines Investigation Act*.[64] This federal legislation, created under the trade and commerce power, was designed to curb anti-competitive and monopolistic practices. General Motors contested the constitutional legitimacy of sec 31(1) of the Act and consequently the act as a whole. GM claimed the legislation was *ultra vires* the federal parliament, as it created a cause for civil action, a matter more properly within the scope of the provincial power over property and civil rights. The court disagreed and affirmed that the legislation was in fact *intra vires* the federal Parliament under the second branch of trade and commerce.

Dickson built upon his position in *Canadian National Transportation*. Again he emphasized the nature of the Canadian free market as a justification for national competition policy. Quoting from Professors Hogg and Grover, Dickson wrote, "goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries."[65] This substantiated his

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[64] R.S.C. 1970, c. C-23

[65] Peter Hogg and Warren Grover, "The Constitutionality of the Competition Bill" *Canadian Business Law Journal* 1 (1976). Quoted in *General Motors*, 273.

belief that the provinces alone could not cope with the scale of the national economy. Unlike the trade mark provisions at issue in the *Vapour* case, the initial three criteria were abundantly satisfied by the *Combines Investigation Act*. How the final two criteria were met is of some interest, especially given the track record of the court of offering slim justifications for provincial inability in p.o.g.g. cases. For Dickson, the national character of the economy was sufficient to preclude the provinces from being able to co-operate at enforcing competition policy. Quoting again from Hogg and Grover, he argued , "the market for goods and services is competitive on a national basis," proof enough that "provincial legislation cannot be an effective regulator."[66] To support his claim, Dickson cited a further study prepared for the federal government in 1974 which suggested that the toleration of a monopoly by any one province could lead to a need for tariffs or subsidies to support the monopoly and end up frustrating the national free market. Dickson concluded that the consequences of one province's reluctance to regulate competition, especially in a product or service with a national market, could have negative effects for all provinces.

What Dickson did with trade and commerce jurisprudence was to reintroduce some degree of federalism analysis. His reason for doing so was fairly clear. Like many of the generation reared on disdain for the JCPC's provincialism, Dickson believed that the trade and commerce power was unwisely restrained. However, he also looked for appropriate criteria to apply to trade and commerce claims, thereby preventing the power from becoming over-inclusive. Laskin imported no federalism analysis into his test in

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[66] Ibid., 274.

Vapour. In retrospect, this may have been intentional. While he was ruling against federal power in that instance, his sympathies with a centralist position were clear and by default he might have made it easier for general schemes at national regulation to squeak by as long as they lived up to the structural needs he identified. Dickson softened that possibility by testing for inability or the risk of adverse effects from a provincial failure to regulate some types of activities in trade and commerce. This put the second branch of trade and commerce on a bit more solid ground. It has not been tested by the current court.

6.4.2 Co-operative federalism

One of the dominant themes put forward in this thesis is that a doctrinal judicial review helps to support a legalistic federalism. In turn, such legalism keeps the wolves at bay for those in a federation who would suffer were raw power to be the only means of determining outcomes. A federalism based on less concrete commitments to constitutional guarantees can hurt even the presumed powerhouses of a federation when they are up against the federal government, a lesson the so-called 'have provinces' would discover in 1990.

In that year, the federal government, in a concerted effort to control its expenditures, took aim at one of the largest liabilities on its books, transfers to the provinces. Before the changes made by the current Liberal administration in 1995, most transfers to the provinces flowed through three programs: (1) Established Programs Financing (EPF), which funded the bulk of 'established programs' for health and higher

education; (2) the Canada Assistance Plan (CAP), which provided 50 percent of the cost to the provinces for programs in social assistance and welfare; and (3) equalization, which provided block funding to those provinces that fell below a complexly-calculated national average of revenue raising capacity. In what by later standards would seem a modest cut (the Liberal government post-1993 would make much deeper cuts in transfers that affected almost all provinces),[67] the Conservative federal government in 1990 sought to place a limit on the amount that payments under CAP could grow for those provinces that did not receive equalization. Rather than allow the transfers to the 'have' provinces to continue growing in tandem with provincial spending on social assistance as the CAP had operated in the past, the federal government wished to limit growth for those three provinces (Alberta, British Columbia and Ontario) to 5 percent per annum. When enacted, this 'cap on CAP' would make the federal contribution in those provinces less than 50 percent of the cost of delivery if expenditures grew at a rate higher than 5 percent.[68]

The British Columbia government referred the proposed legislation, *The Government Expenditures Restraint Act*, to the British Columbia Court of Appeal

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[67] The Liberal government elected in 1993 altered the arrangements for fiscal transfers to the provinces by placing EPF and CAP entitlements under a single umbrella known as the Canada Health and Social Transfer (CHST). At the same time the federal government cut the total amount of transfers by something close to 33 percent. The CHST by operating as a single, 'super block fund' from the federal government to the provinces superficially masked any variations in the amounts that fiscally strong or weak provinces received.

[68] In the most extreme example, at the end of the five years that the 'cap on CAP' existed, the level of funding by the federal government for CAP programs in Ontario had dropped from 50 to 29 per cent. See, Allan M. Maslove, "The Canada Health and Social Transfer: Forcing Issues," in *How Ottawa Spends 1996-97: Life Under the Knife*, ed. Gene Swimmer (Ottawa: Carleton University Press, 1996), 288.

inquiring as to whether Parliament had the authority to limit its obligations under the CAP without the consent of the provinces affected by the cuts. CAP, along with EPF, covered a whole generation of programs begun in the late 1960s under the auspices of co-operative federalism. Both were statutory programs rather than a constitutionally-enforced system of fiscal federalism and redistribution of federal dollars. The BC Court of Appeal agreed with the provincial government that changes in CAP could not be made without the consent of the provinces affected. The Supreme Court overruled the BC decision, largely on the basis that to do otherwise would have compromised the sovereignty of Parliament. By affirming the legal (if not political) flexibility of the commitments made by the federal government through co-operative federalism, the court affirmed the superiority of the federal government in setting governmental priorities through its spending power.

A generation of scholars from the 1950s, Pierre Trudeau among them, objected to the use of the federal spending power because it would have a distorting effect on Canadian federalism.[69] Federal spending, they argued, should not be used as a lever to control the policies of the provinces in the jurisdictions assigned to them by the constitution. The concern of the classical federalists (particularly those concerned with the democratic theory of federalism) had been that governments should only raise the money they needed to fund the responsibilities accorded to them by the constitution. This, they argued, was the only true method of assuring democratic accountability. Nevertheless, most federations have had some revenue raising imbalances. The national

government's power to levy indirect taxation, or to garner a monopoly on income taxation as in Australia (detailed in Chapter Five), has tended to leave some of the states begging for money to finance their responsibilities.

A prototype of the problem of spending power distortions in Canada was the Liberal government's effort to provide direct financial aid to Canadian universities in the 1950s. As education is a matter of provincial jurisdiction, provincial governments, particularly the government of Quebec, objected to being circumvented by the spending power.[70] Not yet a Liberal politician, Trudeau even went so far as to agree with his nationalist foe Maurice Duplessis who, as Premier, objected to the receipt of such funds and actually turned down the money for a number of years. Trudeau argued that the program was the "direct negation of federalism."[71] While unitary states could pass out money with little doubt as to where it came from, it was easy to blur the lines of accountability in a federation. Trudeau conceded that there may be instances where funding from the federal government for subjects outside its jurisdiction is justified, especially in the promotion of equalization among the provinces. But he did not think that the university grants were among them since the federal government was providing grants to all of the universities regardless of the fiscal health of their home provinces. In the end and for years to come, however, the 'power of the purse' prevailed. CAP, originally unveiled in 1966 was hailed by many as an example of how the federal and

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[69] See Trudeau's "Federal Grants to Universities" in *Federalism and the French Canadians* (Toronto: Macmillan, 1968).
[70] Similar objections have been raised to the federal government's current plan to offer Millennium Scholarships directly to university students rather than through the provinces.
[71] Trudeau, *Federalism and the French Canadians,* 90.

provincial governments could co-operate to better serve the needs of Canadians. The era of co-operative federalism continued for some time, with major initiatives jointly undertaken by the provinces and federal government. All were initiated by a fiscally flush and dominant central government. As long as there were half-price dollars available to the provinces for social spending, the system was sustainable. The funding was predictable and the money was all administered (as long as certain conditions were met) by the provinces on their own. Indeed, one observer heralded CAP as 'the ultimate in co-operative federalism.'[72] The issue of accountability was buried until the era of fiscal restraint.

But what of the court's doctrine? How did the court justify its position on this important issue in Canadian federalism? The central points settled by the case were the degree to which the federal Parliament is bound by prior commitments to the provinces and whether a legitimate provincial expectation of federal funding can compel it. In a unanimous judgement, the court ruled decisively that the federal cabinet, through the co-operative measures of executive federalism, could not bind the federal Parliament should it wish to alter the provisions of a statutory device like CAP. Similarly, the court argued that the legitimate expectation of funds could not override parliamentary sovereignty by obliging transfers regardless of the wishes of Parliament. The court asserted that the hands of the federal parliament cannot be bound by anyone, including the federal government. Parliament will ultimately decide what Parliament will disburse to the provinces. Agreements made by the federal government with the provinces could only

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[72] Rand Dyck, "The Canada Assistance Plan: the ultimate in co-operative federalism,"

serve as a guide, they could not compel Parliament's assent. With those arguments rejected, the last hope for the provinces was a claim that federal cutbacks amounted to an invasion of provincial jurisdiction.

The Manitoba government, as an intervenor in the case, tried to frame the federal government's contributions under CAP as effective regulation of provincial programs which were all matters of exclusive provincial jurisdiction. Manitoba argued that the federal government, by altering the terms of CAP funding, was invalidly regulating provincial matters. Initiating a program such as CAP was well within the rubric of the federal spending power, but making alterations to the terms of those plans, after creating a legitimate expectation of funds, amounted to setting policy in those provincial fields. What for the federal government was a simple austerity measure amounted to an atom bomb for the provinces. In the more reserved words of the Attorney-General for Manitoba, the federal law "impacts upon a constitutional interest" outside the jurisdiction of Parliament.[73] The court did not accept this argument. It found instead that "the simple withholding of federal money which had previously been granted to fund a matter of provincial jurisdiction does not amount to the regulation of that matter."[74] In sum, the court affirmed that the federal spending power is unrestrained, in good times and in bad. It ruled that the federal parliament can alter the terms of its contributions to the provinces at will and without consultation from them. The court claimed that it could not supervise

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Canadian Public Administration 19, no. 4 (1976).
[73] *Reference Re: Canada Assistance Plan (B.C)* 83 D.L.R. (4th) 297 (1991), 326.
[74] Ibid., 326.

the exercise of the federal spending power even if the stability of intergovernmental compromise was at stake.

Trudeau's concern in the 1950s was dramatically demonstrated in the 1990s. The federalism that he, as much as anyone, promoted through the use of the federal spending power turned out to be built on a shaky foundation.[75] Co-operative federalism, which in practice meant ever growing commitments to social welfare programmes bankrolled by 50-cent dollars from Ottawa, became by the 1990s one of the largest liabilities on the federal government's books. Fortunately for the cost-conscious federal government, they could end this decades-long practice by their own initiative. The 'cap on CAP' was only the first step in the fiscal downsizing to come. The so called 'off-loading' of the federal deficit through massive cuts to transfers continued in the 1990s. The Liberals introduced the Canada Health and Social Transfer (CHST) in 1995 which combined, and at the same time decreased in total terms, transfers to the provinces. Only in the federal budget of 1999 has there been some indication of growth in the amount of transfers available to the provinces.[76] Fortunately for Ottawa, the commitments made to provincial programs over the years have not been set in stone. The fact that these agreements were reached extra-constitutionally, yet lie at the heart of a province's ability to acquit its responsibilities, seems to have driven current talks for formalising the 'social union.' Yet, the

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[75] Trudeau's turnaround was defended in Pierre Trudeau, *Federal-Provincial Grants and the Federal Spending Power* (Ottawa: Queen's Printer, 1969).
[76] Canada, *Budget 1999*

constitutional phobia which has plagued federal and provincial politicians in the post-Charlottetown Accord age will likely keep formal amendment off the table.[77]

6.5 Conclusion

David Beatty is not happy with the recent federalism decisions of the court. In particular he is irked by what has happened to the provincial inability test. On its face, there is much that would seem to impress Beatty in such a doctrine. Indeed, he writes that the provincial inability test "establishes an objective and normatively attractive standard for co-ordinating federal and provincial initiatives on this or indeed any other matter of common concern."[78] 'Objective' is the nicest thing Beatty could say about a constitutional concept. But something has gone wrong with the test's application, particularly in *R v Hydro- Québec*. While supportive of the ultimate result in the case, Beatty feels that the "reasoning that supports it turns out to be shockingly inadequate."[79] The test has not lived up to his expectations largely because the court has failed to use it properly. Beatty's disappointment demonstrates acutely why a different understanding of doctrine and its role in judicial reasoning needs to be advocated.

Beatty accuses the court of endorsing a subjective theory of constitutional law by choosing the criminal law over provincial inability in *Hydro Québec*. Though the majority had an objective and tested standard available to them, it opted to 'rewrite the

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[77] Lorne Sossin, "Judicial Review of the CHST," *Dalhousie Law Journal* (1998)
[78] David M. Beatty, "Polluting the Law to Protect the Environment," *Constitutional Forum* 9, no. 2 (1998), 57.
[79] Ibid., 55.

rules of constitutional law' and decide the case according to the judges', and specifically Justice La Forest's, personal views. This goes against all that Beatty claims about the potential of constitutional law. The provincial inability test, if the judges of the court were faithful to it, should have compelled a much different result. If they had followed a principled approach, the court would have had little trouble finding in favour of the federal government without resort to the criminal law. The result in *Hydro- Québec*, he argues, is the equivalent of a toxic spill polluting the law. The metaphor is telling- he believes the pure and objective standards of the law have been tainted by the court.

But should one expect so much of doctrine? No. Doctrine is not capable of the objectivity and certainty of result that Beatty demands of it. By making such demands, he demonstrates one of the real dangers of studying and understanding the court's approach to constitutional questions, namely, rooting for the answers and approaches one prefers. Provincial inability might show better than any other test surveyed here the risk of taking doctrine too seriously as a variable. The court modified the test from its original form, and has since been less willing to use the revised doctrine. This is a disappointment for someone who liked the effect that the doctrine had on the interpretation of federal power. But to be disappointed misses the essence of what doctrine is truly capable of. Recall that from the outset I have claimed that doctrine is an independent variable that <u>influences</u> judicial outcomes. For Beatty it clearly should do more than just influence outcomes, it should <u>compel</u> them. Provincial inability certainly influenced the result in *Hydro-Québec*. La Forest admits in his decision a preference for dealing with the matter under the criminal law heading because it does not raise issues of such threat to the federal balance.

The revised test may be a dream come true to centralists, but the court is likely to back off from applying the test generously for just that reason.

It is difficult to divine exactly what Beatty would prefer from the court. He claims that "generations of constitutional law teachers have taught that artificial categories and rigid rules lead to arbitrary distinctions and inconsistent decisions."[80] Yet he waxes nostalgic for the brief period during Brian Dickson's tenure as Chief Justice when "an effort was made to find common principles and tests in the large grants of power to the federal government in p.o.g.g. and section 91(2) (trade and commerce)"[81] The 'generation' of constitutional law teachers he calls to his aid includes Patrick Monahan and Paul Weiler. They would be the first to make the claim that the developments of the Dickson era are no more objective or praiseworthy than prior efforts at constitutional interpretation before Dickson came to the court's helm.[82] Does Beatty consider provincial inability natural and flexible (as distinct from artificial and rigid)? It appears that his vision of doctrine is as equally rigid as the rules he decries. With *Hydro-Quebéc* the court demonstrates flexibility not rigidity. And that is exactly what upsets Beatty. It is far better to be realistic about the limitations of doctrine and just be alert to the potential that various interpretive schemes hold.

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[80] Ibid., 57.
[81] Ibid., 57.
[82] In fact, Monahan suggests that the decade prior to 1987 (3 years of which were presided over by Dickson) provides some of the best evidence of the "essentially political nature of the Court's decision-making in the federalism arena." Patrick Monahan, *Politics and the Constitution*, 142.

Is an endorsement of this flexible, doctrinal approach just a post-hoc apology for the court's ultimate politics and inconsistency? I agree with Beatty that there is a place for formal law in federalism. But, I disagree with his idea of how that law has to be put into effect. 'Principled' doctrines should not be expected from the court, but some kind of doctrines should. That does not meant that the courts should just follow their gut feelings. The doctrines that the court has developed are useful guides to determining outcomes. So, to use the same example, provincial inability provides a useful frame for consideration of the federal general power, but it need not preclude all options. What is clear is that in having to reckon with the doctrine, the court has come up with a different result than a clean slate and pure politics would allow it. Most of all, the use of doctrine, however variable it may be, contributes to the maintenance of a federal legalism. There are tasks best done by the courts in a federation. Doctrine helps them to be done without a slide into politics.

P.o.g.g. jurisprudence right up to *Hydro-Quebec* affirms the contention of Hogg and Russell that the court is balanced in its federalism jurisprudence. Other areas of division-of-powers jurisprudence may not be as internally balanced, but they too demonstrate that 'uncanny' ability for balance in the long run. Doctrine is a significant tool in helping to achieve that balance. It is inherently flexible, and when the court pushes too much in one direction it clearly helps them to have the doctrinal alternatives that maintain the core of its balanced approach. All the while, the legal structure of federalism provides guarantees and securities that co-operative federalism cannot. The court's contributions may still be veiled in the language of law, but that might be the best thing

that the court has to contribute to the federal system. Peter Russell seemed disappointed by the clumsy legalism and lack of constitutional wisdom in the *Anti-Inflation* case. Achieving federal balance through clumsy, but still non-political means might just amount to constitutional wisdom after all.

CHAPTER 7:

CONCLUSION

7.1 TWO QUESTIONS

In this dissertation the claim has been made that the high courts of Canada, Australia and the United States rely upon doctrine to help settle federal jurisdictional conflicts. Doctrine, it has been argued, is an independent variable that can influence the course of judicial outcomes both directly and indirectly. Furthermore, it has also been argued that understanding doctrine is a useful way to depict and understand judicial review in federations. To conclude this study, two questions need to be asked of the evidence. First, is there solid empirical proof that doctrine is a variable of consequence in the federalism jurisprudence of high courts? Second, if indeed doctrine is used by the courts, is it an appropriate tool for settling jurisdictional disputes between governments? The answer to the latter question is this dissertation's modest normative contribution to federal theory. A defence of doctrine may help to rehabilitate the status of judicial review as a tool for solving the 'problem of adjustment' in federations.

7.2 DOES DOCTRINE MATTER?

Certainly there is empirical proof of the existence of doctrine in federal judicial review. From the evidence presented above, it should be clear that doctrine is a formative force in the settlement of division-of-powers disputes. In all three of the federations

examined here, doctrines have been developed to help courts cope with the challenge of adjudicating federalism disputes. To be sure, they are not the only variable that judges use to come to a decision. However, as Chapters Three through Six show, doctrine helps to explain how a federal system evolves and how intergovernmental disputes can be reconciled when competing aims or agendas come to a head.

The American experience is the starkest demonstration of the theory of judicial review presented here. The robustness of doctrine in the division-of-powers cases of the current court is apparent to all who observe it. This is in keeping with historical practice. Tests like the 'stream of commerce' doctrine have been relied upon by the American court since its earliest days. Today, the extent of state sovereignty, and tests for how that sovereignty might be offended by congressional legislation, are critical to determining the jurisdiction of the federal legislature.

The course of federal-state relations literally hangs on the developing doctrinal logic of the court. Probably the most important doctrinal dispute currently engaging the court is the degree to which federal legislation can compel states or state instrumentalities. Cases such as *NLC*, *Garcia*, *New York* and *Printz* are all concerned with this issue. State sovereignty frames all of these cases, and its implications for the division-of-powers is the single most influential variable in their outcome. Congress' attempts to regulate state employees or set other types of national standards are compromised every time a 'state sovereignty' exemption is granted by the court.

But even as the narrow majority pursues its current preference for protecting the states, it relies upon well-articulated and reasonably consistent doctrines to support its interpretation of the constitutional guarantees. When members of the court invoke ambiguous values such as a need for 'federal balance' or the need to minimize 'federalism costs' they are much less successful in convincing a majority to join them. The bombastic sovereignty arguments of someone like Justice Thomas only occasionally find favour with the majority of the court. In fact, the strength of the current state sovereignty position is that it derives from a strong doctrinal strand of the court's jurisprudence and the history of the constitution. That the contending minority holds its position with the same fervour does not diminish the place of doctrine, it just further proves its importance. That both sides are confident of the truth of their position further proves the futility of a principle-based approach to doctrine. Those principles are ultimately normative and not objective, they will always be what their creators make of them.

The Australian High Court continues to stand by its traditional approach to federalism adjudication. In practical terms, the main technique of the court has been to take literal readings of the enumerated powers given to the Commonwealth. This practice has generally benefited the central government when it has sought to gain jurisdiction, in particular, helping it to achieve fiscal dominance over the states. A literalist philosophy alone has not been enough to realize this course of interpretation. Specific doctrines have been developed along the way to clarify the scope of Commonwealth powers such as external affairs or the corporations power. The court's decision in the *Tasmanian Dam*

case appeared to relax the application of doctrine to the point where specific tests almost seemed irrelevant. The court has since retreated from that loose application and has been more measured in its results.

One doctrine in particular might help the states in jurisdictional struggles with the Commonwealth. The doctrine of implied immunity offers them some breathing room in cases where federal law is applied to them. The development of doctrine in this field has also worked to keep the Commonwealth honest by denying it blanket immunity from state legislation. The doctrines used by the court have not generally been to the advantage of the states, but there is some small evidence that the court is more amenable to balancing Australian federalism than it has been in the past.

Doctrines are also critical to the Canadian Supreme Court's approach to federalism. The p.o.g.g. power has always been shaped by doctrine. The current court has slowly adjusted the scope of the p.o.g.g. power through a provincial inability test for national concern. Provincial inability is perhaps the most ideal example presented here of how a doctrine can be slowly altered and selectively applied. Provincial inability proves the contention made at the outset that doctrine has a degree of agency, but cannot be wholly determinative. The court will make what it will of the test. An advocate of certainty like David Beatty would prefer to see provincial inability restrain judges, and any time it is not determinative he blames misapplication of the test rather than the test itself.

There is an even more important lesson to draw from the Canadian experience. The court's intervention in areas like the environment suggests that judicial review is of continuing importance for Canadian federalism. The approach of the court to unspecified fields, especially as they gain in importance, is primary to the operation of a matter like environmental protection. *Friends of the Oldman River*, *Ontario Hydro*, and *Hydro-Québec* all deal with environmental issues where jurisdiction is far from clear. When there are political obstacles to co-operation and compromise in such a field, the legal structure of federalism provides a baseline that political manoeuvring cannot waylay.

While different doctrines have emerged to deal with different constitutional problems in all three countries, there is something similar in the way that these tests come about. They are always a response to distinct interpretational problems, some specific and discrete, others more encompassing. The comparative evidence does not indicate that there is a core of universal federalism values or principles that motivates courts. This is of little surprise given the approach to doctrine this study has taken. The only truly universal lesson to be drawn from the practices of the courts investigated here is that the technique of developing tests and modifying definitions is widespread and frequent in the practice of judicial review.

The zeal with which doctrines are applied and the degree to which they operationalize deep divisions of opinion on a court vary. The deepest divisions are obviously found on the American court. The Canadian court is least likely to come out with polar positions, and disputes among the members of the court are probably the least

predictable as they do not seem to turn on as fundamental a set of beliefs. The Australian court seems somewhat in the middle, with occasionally strong-minded dissents coming from judges such as the now retired Daryl Dawson. While the American example shows that doctrine can often have the effect of entrenching polar positions, American experience also shows the capacity for compromise that doctrine can offer. Despite the fact that such vitally held positions on federalism are found on the American court, some cases still have unpredictable results. These results do however conform with the doctrines of the court.

7.3 Should Doctrine Matter?

Legal scholars and other observers of the law would generally agree that doctrine is a necessity in most areas of jurisprudence. Rules and tests, developed over time, are the analytical tools with which judges work to come to resolutions. Doctrine appears to be much more readily accepted in fields like contracts or torts. In these areas, the old practices of the common law are much more apparent and accepted. An important part of the law in these areas is largely unlegislated. Tests of fairness in contracts or of the 'reasonable person' in torts all come from precedent and traditional practice rather than directly from statutes. If doctrine is so readily accepted as a legitimate method in these fields, why is it contested in constitutional law? Perhaps it is because the stakes are so much greater. Constitutional judicial review is about the task of interpreting a nation's blueprint. Presumably this should be done on the basis of principle.

7.3.1 BEATTY AND MONAHAN REVISITED

The debate between David Beatty and Patrick Monahan chronicled earlier in the thesis demonstrates the place of principle in thinking about doctrine. Beatty is an advocate of the law as something universal in its truths. The simple task for courts, in his view, is to stick to the principled application of the law. When it comes to federalism, Beatty identifies two primary values or principles that have to be upheld - mutual modification and concurrency. Through these tools, the law of federalism is perfectible and holds within it the potential for the neutral and fair settlement of disputes. It is up to the judges to ensure that the law lives up to this potential. Patrick Monahan, on the other hand, sees little determinacy in constitutional law. For every principle articulated by a court, he believes one could find and defend an equally compelling counter-principle. To Monahan this means that judicial review cannot be understood as anything but political and the age-old effort to de-politicize judicial review is both naïve and ill-considered.

A different perspective has been taken here, one less interested in canonizing or demonizing doctrine. Rather, an effort has been made to be neutral about the content of doctrine and to study it for its own sake. What this means is that legal controversies in a federal system can be understood independent of a debate over the objective possibilities of law. Doctrine is still used by the courts whether observers believe it is perfectible or deeply flawed. The evidence of Chapters Three through Six indicates that the courts are functioning in their federalism jurisprudence with a set of tools that are drawn largely from prior jurisprudence. Those developments have definite ramifications for federalism.

Constitutional law serves a task in the maintenance of federalism that is not reliant upon the law's internal purity.

Some critics claim that a rarefied conception of the law is responsible for misconceiving the political role played by high courts. Using rules, doctrines and so-called objective tests, they argue, is the constitutional equivalent of getting away with murder. The courts are playing politics under the guise of doing otherwise and this cannot be allowed to continue. Why not? The methodology employed by the courts leads to certain kinds of outcomes, outcomes that a formalist interpretation suggests are inevitable or dictated by principles inherent in the law. The critical school has suggested that this is by no means the case and that decisions which have been made under the guise of objectivity are no more than political decisions cloaked in idealistic legal cover and actually hampered by artificial constraints. The result is a poorly informed jurisprudence that, if not directly detrimental to the health of the federal system, is at the very least illegitimate and undemocratically arrived at.

7.3.2 In Defence of Doctrine

A more modest case needs to be made for doctrine. By lowering our expectations for doctrine we might actually see more value in it. Doctrine is a reminder of the legal attributes of federalism. Federalism, as Dicey knew, is uncommonly bound to the law. A critical understanding of the law of federalism has distanced political science and constitutional study from considering judicial review's contribution to federal development. Federal theory should recognize that despite the frailties of law, the legal

order is the cornerstone of how a federal system operates. The legal forum is available to mediate conflicts and is unique in the way it serves this function.[1] The federal legal order provides a baseline set of rules and protections from which the system takes important cues. While it may not be the most critical element of a federal system, judicial review is the most important determinant of how that baseline order will be understood.

Patrick Monahan discounts the influence of federalism review on the grounds of what he considers a fundamental maxim of Canadian federalism; "it is *always* possible to do indirectly what you cannot do directly."[2] The relevance of judicial sanctions, he believes, is undermined by the ability of the parties in conflict to resolve their differences some other way, or for governments to achieve their policy goals with alternate strategies. Add to that the fact that there is nothing apparently neutral or objective about judicial decision-making anyway, and the disfavour in which it has been held is all the more understandable. Monahan, for his part, underestimates the importance of judicial review. In highly disputed policy fields, judicial review matters a great deal. Co-operative federalism only goes so far. The backbone of federalism has always been its legal character. When agreement seems impossible, the legal order enforces one. The calculus of the court is never wholly political – judges must deal with constraints alien to political decision makers. Those constraints, doctrine among them, matter. All the more important then that one understands the way that courts reach decisions.

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[1] For a general endorsement of legal reasoning as a tool for reaching what he calls 'incompletely theorized agreements' see Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford, 1996). Legal reasoning, Sunstein argues, plays a critical role in the mediation of political conflicts by not obliging parties to fully accept each other's principles.

The conception of doctrine and judicial reasoning as something rarefied or derived from self-evident and self-enforcing truths has been challenged for several decades now. Good riddance. But doctrine is the proverbial baby thrown out with the bath water. That the courts engage in judgement through doctrine is a trait that has been overlooked by those who legitimately seek to remove the veil from judicial power. In their zeal to unmask judges, the critics support an equally distorted view of the role of the law in a federal system.

Unfortunately, it does not seem that judges of the Canadian court fully share the perspective on doctrine presented here. Controversy over judicial activism on rights has tempted members of the Canadian court to defend their work as the application of 'principles'. Consider these recent comments by Justice Beverly McLachlin:

> Long before charters of rights were dreamed of, the English spoke ominously of 'palm tree' justice, evoking the image of a colonial magistrate, seated under his judicial palm tree, meting out whatever decisions happened to seem right to him in the particular case at hand. The opposite of palm tree justice ... is justice *rooted in legal principle* and appropriate respect for the constitutional role of Parliament and the legislatures. The law has developed rules and ways of proceeding to assist judges in avoiding the evils of unprincipled, inappropriately interventionist judging.[3] (emphasis added)

Justice McLachlin conflates doctrine with a principled approach. She thereby implies that the legitimacy of the legal method comes from principles rather than simple tradition or routine. Mistaking doctrine for principle throws one unnecessarily into the debate over politics and law and away from an understanding of doctrine in its own right. The

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[2] Monahan, *Politics and the Constitution*, 224.

temptation to include principle, however, is understandable. On what other grounds can one defend doctrine? Is a doctrine justified because it has been around awhile? Because it is reasonably logical and consistent? Principle is a nice way of suggesting that something other than caprice is at work. Principle is a counter to caprice, but neither need to be invoked in a study of doctrine. The public face of judging will likely continue to claim objectivity and ideal neutrality. The severest critics will continue to cry "politics!"

Justice McLachlin's account, *sans* principle, is fairly congruent with the defence of doctrine that has been offered here. Doctrine is a fact of judicial reasoning. The tests and definitions used by courts are reasonably consistent and offer judges alternatives when faced with complex choices. Doctrine provides judges with the analytical tools to approach federalism problems in a legal manner. Doctrine narrows the compass of political or policy decision. Thus, doctrine should be important to political scientists not for the particular principles that it enacts, or the particular philosophy of federalism it envisions, but for the account of federalism it can help to create. To discount doctrine because it is unprincipled or obfuscates real decision-making misses the point. The effort expended on judicial reasoning is real. Doctrines and consistency matter to those who fill high courts, and they matter to the results. To ignore them is to construct an impoverished account of federalism.

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[3] Hon. Beverly McLachlin, "Courts, Legislatures and Executives in the Post-Charter Era," *Policy Options* , no. June (1999), 46.

7.4 Future Considerations

Current developments and cases looming on the horizon indicate the continuing relevance of doctrine to the way that federalism is interpreted by high courts. Doctrine still appears to hold limited but real influence in the way that decisions are made on jurisdictional disputes.

The American Supreme Court has continued to rule on federalism cases, right up to the day of writing. On the last day of its 1999 term, the court brought down three federalism decisions. The most important of the three is *Alden v Maine*,[4] which extended state sovereignty to bar state employees from using state courts to enforce the federal *Fair Labour Standards Act*. Again, the court was closely divided and Justice Kennedy sided with the states' rights faction.[5] Earlier in the month, Justice O'Connor joined with the traditionally nationalist judges in the majority of *Davis v Monroe County School*

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[4] The case is as yet unpublished. It is available online at http://laws.findlaw.com/US/000/98-436.html The other two federalism cases decided that same day were *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank* (98-531) and *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board* (98-149).

[5] Linda Greenhouse describes the case as "the most powerful indication yet of a narrow majority's determination to reconfigure the balance between state and Federal authority in favour of the states." Linda Greenhouse, "States Are Given New Legal Shield by Supreme Court," *The New York Times*, June 24 1999. Indeed the tension on the court seems to be increasing, at least if the rhetoric employed by the contending sides is any indication. Justice Souter claimed that the majority's current infatuation with state sovereignty, and particularly with state immunity from federal law was on par with the regressive constitutionalism of the early New Deal court. He wrote, "I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting." *Alden v Maine*, electronic version, 41.

Board[6] which upheld the use of federal anti-discrimination law to hold school districts accountable for systemic student-on-student sexual harassment.

These recent cases confirm two things said here about the current court's federalism jurisprudence. First, the sovereignty doctrines of both sides remain front and centre to the way that the court decides federalism cases. The *Maine* case in particular demonstrates that those essential positions do not appear to have weakened. Both sides vehemently defend their interpretation of constitutional history. The second point reinforced by these recent decisions and specifically by the *Davis* case is that doctrine does remain a factor that can shape results in a manner that seems contrary to the stated preferences of the judges. Justice O'Connor appeared quite comfortable defending a federal law that on the surface appears to contradict her greater preference for state solutions and for reining in the federal government. However, when one looks at her record and her reasons for the decision, one is reminded that Justice O'Connor has been a proponent of the explicit use of the federal spending power. When incentives have been clear to the states, she has defended Congress' right to impose conditions on the receipt of federal funds. This was exactly the issue disputed in the *Davis* case. Unlike her fellow states' rights colleagues, Justice O'Connor determined that the tests designed to curb abuse of the spending power had been met in the *Davis* case and federal law could apply to those who received federal funds. Since state sovereignty is not threatened by a state knowingly accepting conditions, she could not agree with the minority that the 'federal balance' had to be considered.

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[6] Again the case is yet to be published. It is available on-line at:

Justice O'Connor's position in the *Davis* case has been explained as a product of her feminism as opposed to her long held views on federalism.[7] However, the argument she makes in the majority opinion does not really contradict her federalism jurisprudence. It shows instead that there are shades of difference between the ideological position that some of the judges have staked on federalism and a position consistent with the court's federalism jurisprudence. For O'Connor, the federal legislation upheld in *Davis* was consistent with conditions she endorsed in the past and state sovereignty could not defeat that understanding. The *Maine* case suggests that the conservative majority on the court may hold greater sway, but the case is not a radical development. It continues a line of reasoning started by the court in the *Seminole Tribe* decision in 1996.[8]

The Australian High Court is not likely to be called upon soon to referee the types of conflicts which it has typically settled between State and Commonwealth governments in the past. There seems to be a great deal of co-operation going on in Australian

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http://laws.findlaw.com/US/000/97-843.html

[7] Linda Greenhouse, "A Conservative Voice, but Clearly a Woman's," *The New York Times*, May 26, 1999.

[8] That case dealt with the validity of the *Indian Gaming Regulatory Act* of 1988, passed by Congress under the auspices of the Indian commerce clause. In order for Indian tribes to undertake gaming activities, they had to enter into compacts with the appropriate State government. To ensure that States would not avoid negotiations, the act allowed tribes to sue States in federal court if they failed to negotiate in good faith. The Seminole Tribe of Florida sued the state for not negotiating a compact. Florida, in turn, challenged the tribe's right to sue, citing its sovereign immunity from suits in federal court granted by the Eleventh Amendment. A 5-4 court agreed that states could not be sued in federal court without their consent. *Seminole Tribe of Florida v Florida* 116 S.Ct. 1114 (1996).

federalism at the moment and court intervention seems unlikely.[9] The Liberal coalition government has recently passed legislation for a new goods and services tax, the revenue from which, while collected by the Commonwealth, will go directly to the states. The new tax replaces a variety of indirect taxes presently collected by the states, but will give the states a greater source of revenue than they have had in the past. In addition, the Senate has also passed new environmental legislation which appears to hand over greater power for the environment to the states. The legislation does list a number of issues which automatically trigger national action. Developments affecting world heritage properties or endangered species, for example, will automatically require Commonwealth involvement. Otherwise, states will be able to assess and approve projects on their own. Some environmentalists have opposed the legislation, calling it a big step backward for a generation of activists who sought greater Commonwealth power to deal with environmental matters.[10] Two of the most contentious issues in Commonwealth-State relations to appear before the court in the last thirty years have been the environment and taxation. These recent initiatives suggest that more is being done extra-judicially to sort out these fields, thus they do not look likely to erupt in federal-state conflict anytime soon.

The High Court's continuing dilemma, if the critics are to be believed, is its interpretive approach. While it remains quite formal and restrictive in its approach to

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[9] The High Court has very recently signalled that it too is wary of co-operative federalism. Specifically, it does not wish to see the Commonwealth and state governments making *de facto* changes in the constitution through the use of co-operative agreements. See the judgement in *Re Wakim; Ex parte McNally* HCA 27 (1999).

federalism cases, the court is increasingly activist in its rights jurisprudence. It may be thought especially activist if one considers the fact that there is actually no bill of rights. The court has had to read various civil rights into the constitution. This practice obviously departs from the strict literalist technique of the court's generally formalist approach. This is a fact that High Court judges have acknowledged.[11] The more the court wishes to endorse civil liberties, the more it will have to abandon its formal approach to constitutional interpretation. Will this result in a more overtly political federalism jurisprudence? Indications are that the court stands by its legalistic approach to the division-of-powers and will continue to moderate its past centralism through new or revised doctrines such as implied immunity.

The most important federalism case on the horizon for the Supreme Court of Canada is the *Reference Re: Firearms*. Decided in the Alberta Court of Appeal in October of 1998, the case will raise issues at the heart of recent rulings on federalism.[12] The government of Alberta and several other provinces challenged the new federal gun control legislation as *ultra vires* the federal government. The provinces argued that some classes of firearms, in particular long guns, are simple property and possession of them should not be a matter of criminal law. The constitutional regulation of such property would have to come from the provinces' power over property and civil rights. The Supreme Court's decision in *Hydro-Québec* established a wider scope for the criminal

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[10] Janine MacDonald, "Senate set to OK green shake-up," *The Age* (Melbourne) June 23, 1999.
[11] Galligan, *A Federal Republic*, 182-188.
[12] *Reference Re: Firearms Act* 164 D.L.R. (4th) 513 (1998).

law power and the majority of the Alberta court followed its lead, thereby confirming the constitutional legitimacy of the legislation.

A minority of the Alberta court took a different approach to the case. Writing for the dissent, Justice Conrad argued that the proper question before the court was to what degree the federal criminal law power can be used to invade provincial jurisdiction. The majority upheld federal jurisdiction as a matter of 'double aspect'[13] and on the basis of the broad definitions of criminal law found in *Hydro Québec* and *RJR-Macdonald*. Justice Conrad argued that 'federal balance' should be a consideration for the court.

By abandoning doctrine for 'principles' of federalism, Justice Conrad does a disservice to federalism jurisprudence. The Supreme Court is likely to pay little heed to her comments on this issue. The impassioned argument of Justice Conrad may stir a few minds on the matter of how federalism cases are decided, but ultimately hers is a political position. Her politics are made no more objective by appealing to principle. Far more reliable are the patiently constructed and finely altered doctrines that reflect the collective judgement of the court rather than any single principle.

7.5 Conclusion

[13] The 'double aspect' doctrine is used when a general subject matter can fit more than one jurisdictional heading. One aspect of firearms regulation is the control of criminal activity, another aspect is the regulation of property. Both are permissible and are competent to both Parliament and provincial legislatures according to the Alberta Court of Appeal. For a general discussion of the doctrine see Hogg, *Constitutional Law of Canada*, 333-334.

What does this study add to our understanding of federalism? Quite simply, if one pays heed to the doctrine of the courts, a fuller account of what is happening in a federal system can be constructed. The disfavour into which the study of judicial review has fallen has bred an ignorance of developments. This ignorance is an ironic counterweight to the over-reliance once placed on judicial review as an all-encompassing explanatory variable in the study of federalism. Judicial review does not explain everything one needs to know in order to understand a federal system. By the same count, it is not irrelevant. Doctrine is clearly a variable in the way that courts grapple with federalism problems and it is clearly a useful tool for ensuring the baseline guarantees of a federal legal structure are maintained.

One definitely should not expect policy wisdom from the courts. Neither should the courts 'stand up' for abstract and ultimately contentious principles. The tendency of the courts to try and do the latter may be what convinced governments to avoid judicial review wherever possible. But formal institutions, the courts among them, are not as easily avoided as co-operative federalists might have once thought. The division-of-powers will continue to be adjudicated by the courts. If, in the process of doing so, judges insist upon advocating an interpretation of federalism, let them use doctrine. Doctrines can be amended much easier than constitutions and much easier than dramatically stated principles. All federations must deal with the disparity between rules and needs or between existing structures and societal changes. Given the proven difficulty of constitutional amendment in all three of the countries surveyed here, other mechanisms to solve the problem of adjustment are certainly needed. Judicial review can serve that

purpose and it need not do it in a deceptively political way. The continued use of doctrine in federal high courts is a healthy sign for federalism as a system of governance.

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D.L.R. Dominion Law Reports (Canada)
S.Ct. Supreme Court Reporter (U.S.)
U.S. United States Reports
A.L.J.R. Australian Law Journal Reports (Australia)
A.C. Appeals Cases (Judicial Committee of the Privy Council)
S.C.R. Supreme Court Reports (Canada)

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