U.S. & CANADIAN FEDERALISM: A STUDY IN CONTRAST

Harvey Wingo*

INTRODUCTION

Justice Blackmun's opinion for the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*[1] is a sharp reminder of just how far this nation has strayed from a true federal system. Because the result in *Garcia* could have been reached by another route,[2] the Court's decision to overrule *National League of Cities v. Usery*[3] is particularly significant, and the tone of the opinion appears to confirm the bold assertion of a leading Canadian scholar more than twenty years ago that "the federal system in the United States exists only on Congressional suffer-

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* B.A., Birmingham-Southern College; M.A., J.D., Vanderbilt University. Professor of Law & Associate Dean for Academic Affairs, Southern Methodist University. The author wishes to express appreciation to the following persons who provided valuable consultation time in the education of the author in Canadian constitutional law: the Honourable Mr. Justice B. L. Strayer; Professors W. R. Lederman, Noel Lyon, Joseph Magnet, J. R. Mallory, Stephen A. Scott, D. A. Soberman, and John D. Whyte; Mr. Mario Bouchard, Mr. Peter M. Leslie, and Mr. Alan Reid. A special debt is owed to Professor Lederman, who most profoundly influenced the author's thinking on the nature and soundness of the Canadian federal system. Finally, a general reference must be made to Professor Peter W. Hogg's treatise, Constitutional Law of Canada (2d ed. 1985), which was heavily relied upon in the development of the author's knowledge and perceptions of Canadian federalism.

1. 469 U.S. 528 (1985).

2. *Garcia* involved the issue of whether the San Antonio Metropolitan Transit Authority (SAMTA) was entitled to governmental immunity from the wages and hours provisions of the Federal Fair Labor Standards Act. Under National League of Cities v. Usery, 426 U.S. 833 (1976), such immunity was to be recognized if imposition of the federal requirements would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." *Id.* at 852. In *Garcia*, operation of a mass transit system could have been considered to fall outside of traditional governmental functions. In United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), the Supreme Court held that operation of the Long Island Rail Road by the State of New York was not such a function. On the basis of that decision, an earlier appeal from the district court's judgment in favor of SAMTA in *Garcia* had been vacated and the cause remanded for further consideration. Garcia v. San Antonio Metro. Transit Auth., 457 U.S. 1102 (1982). On remand, however, the district court distinguished the Long Island case and adhered to its original ruling in favor of SAMTA. San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983), *rev'd sub nom Garcia*, 469 U.S. 528.

3. 426 U.S. 833 (1976). *National League of Cities* held that Congress could not dictate wages and hours of employment for state and local government employees such as policemen and firemen. The case also overruled Maryland v. Wirtz, 392 U.S. 183 (1968), in which the Fair Labor Standards Act had been upheld as applied to employees in state-owned hospitals and schools.

ance."[4] Judicial abdication to Congress is expressed in *Garcia* as follows:

> State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.
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> . . . [T]he principal and basic limit on the federal commerce power is . . . [the limit] inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.[5]

Thanks to Congress that the states retain any sovereign power at all! For the United States Supreme Court has abandoned its role as the guardian of fundamental principles of federalism under the Constitution and, for years now, has been wholly unwilling to deal candidly with asserted congressional objectives and to strike down congressional attempts to disguise unconstitutional power in constitutional garb. In fact, the real problem with the *Garcia* decision is not so much its rejection of the principle of state immunity from federal regulations that are otherwise valid as regulations of private activity, but the idea that Congress can regulate the activity at issue in *Garcia* at all. Legislation dictating minimum wages and maximum hours for employees is simply not a regulation of interstate commerce, and no provision of the Constitution other than the commerce clause has been cited as possible support for such congressional action.[6]

In Canada, acceptance of the principle of judicial review as the essential means of safeguarding federalism and molding its proper contours has produced a real federal system.[7] Ironically, this has

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4. A. SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES 371 (1963).

5. 469 U.S. at 552, 556. For a recent discussion of this aspect of *Garcia*, *see* Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

6. A different case would be presented if temporary measures were to be adopted in time of war. *See, e.g.*, Case v. Bowles, 327 U.S. 92 (1946). That case did not, however, involve wages and hours legislation but emergency price controls.

7. Professor Lederman states, "[I]t is fair to point out that nearly all of [Canada's] constitutional jurisprudence in the courts for 100 years has concentrated on issues of the distribution of powers." Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597, 597 (1975).

occurred under a document[8] which appears to create a considerably stronger central government than does our own Constitution. The purpose of this article is to reconsider the importance of judicial review as the essential means of retaining a balanced federal system, to review some of the crucial cases on federalism in the United States and Canada, and to fantasize a bit about how judicial refusal in this country to permit radical deviations from the Constitution's federal plan might have produced a federalism more like that found in Canada today.

I. The Supreme Court's Broken Promise

A. *The Promise of McCulloch*

On first reflection, the United States Supreme Court's decision in *McCulloch v. Maryland*[9] might be viewed as the single most significant example of that Court's recognition of potentially unlimited power in Congress. The Court's endorsement of the doctrine of implied powers[10] and its dubious reading of the necessary and proper clause[11] undergirds every subsequent judicial affirmation of congressional authority, including the Court's acceptance of virtually unlimited congressional power under the commerce clause.

Even *McCulloch*, however, recognized that the necessary and proper clause supports only a congressional choice of appropriate means to a legitimate end. A legitimate end is one which the federal government is permitted to achieve under a specifically enumerated power in the Constitution. The necessary and proper clause adds nothing to the subjects over which Congress has regulatory authority. Indeed, the Supreme Court has emphasized that the necessary and proper clause "is not itself a grant or power, but a *caveat*"[12] that Congress may select the means for carrying out those specific powers which are granted. It is the content and scope of those specific grants which have become crucial to the shaping of American federalism, for the tenth amendment reserves to the states only those "powers not delegated to the United States by

8. Constitution Act, 1867, formerly The British North America Act, 1867, 30 & 31 Vict., ch. 3.

9. 17 U.S. (4 Wheat.) 316 (1819).

10. *Id.* at 406-07.

11. *Id.* at 411-21.

12. Kinsella v. United States *ex. rel.* Singleton, 361 U.S. 234, 247 (1960).

the Constitution. . . ."[13]

The importance of the opinion in *McCulloch* on this critical constitutional issue cannot be overemphasized. It is ultimately the duty of the Court to pass on the validity of congressional enactments.[14] That duty requires the Court to consider, among other things, the possibility that Congress has used specific grants of power as a "pretext" for exercising authority which was intended, under the Constitution, to be left to the states. In *McCulloch*, Chief Justice Marshall promised:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[15]

The Supreme Court's unwillingness, after 1936, to employ this pretext analysis is by far the most significant factor in the collapse of true federalism in the United States.

B. An Era of Pretext Analysis

For a time prior to 1937, the Court accepted its responsibility under the Constitution to define and mold the contours of our federal system. Even in cases where great temptation to yield to congressional power undoubtedly existed, a majority of the Court held firm. Thus, in *Hammer v. Dagenhart*,[16] congressional denial of the use of interstate commerce to certain employers who failed to comply with congressional restrictions on child labor was struck down.[17] Applying the pretext analysis, the Court concluded that this was not a regulation of commerce at all but a regulation of production: "Over interstate transportation," said the Court, "the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."[18]

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13. U.S. CONST. amend. X.
14. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
15. 17 U.S. (4 Wheat.) at 423.
16. 247 U.S. 251 (1918).
17. *Id.* at 277.
18. *Id.* at 272.

Congress attempted to circumvent the *Dagenhart* decision by enacting the Child Labor Tax Law,[19] imposing on certain employers a tax of ten percent of net profits for any year in which they failed to comply with congressional restrictions on child labor.[20] This legislation was declared unconstitutional by the Supreme Court in *Bailey v. Drexel Furniture Company*.[21] After quoting Marshall's pretext statement in *McCulloch*, the Court concluded that "the *so-called* tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution."[22]

Undoubtedly, the Court's best known, and most criticized, decisions utilizing the pretext analysis were those which invalidated President Franklin D. Roosevelt's early New Deal legislation. The Agricultural Adjustment Act of 1933 provided for benefit payments to farmers who agreed to reduce acreage in agricultural commodities as determined by the Secretary of Agriculture.[23] As one means of providing the revenue for making the benefit payments, Congress levied a processing tax with respect to the commodities involved.[24] Just as the commerce power and the taxing power had been used as a pretext to regulate local production of goods in *Dagenhart* and *Drexel Furniture*, respectively, the Court in *United States v. Butler*[25] determined that the taxing and spending powers together had been used as a pretext to regulate agricultural production. This was a matter left to the states for regulation:

> Congress had no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ig-

19. Tax on Employment of Child Labor, ch. 18, § 1200, 40 Stat. 1138 (1919).
20. *Id.* at 1139.
21. 259 U.S. 20 (1922) (also styled *Child Labor Tax Case*).
22. *Id.* at 39 (emphasis added).
23. Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933).
24. *Id.*
25. 297 U.S. 1 (1936).

> nore constitutional limitations upon its own powers and usurp those reserved to the states.[26]

Another 1936 case striking down New Deal legislation was *Carter v. Carter Coal Company*.[27] In that case, the Supreme Court concluded that Congress had no constitutional authority to enact the labor provisions of the Bituminous Coal Conservation Act of 1935,[28] which included regulations regarding such matters as minimum wages, wage agreements, and collective bargaining in the bituminous coal industry.[29] Production of coal, said the Court, "is a purely local activity."[30] Accordingly, it was beyond the regulatory power of Congress. The Court recognized that "[w]ithout local production somewhere, interstate commerce . . . would practically disappear."[31] Still, the Court insisted, "the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products."[32] Even assuming that local activities directly affecting interstate commerce might be regulated in some particulars by Congress, any effect of local labor relations in the coal industry on interstate commerce must be viewed as indirect.

C. Abandoning the Promise

1. NLRB v. Jones & Laughlin Steel Corp.

After his landslide victory in November, 1936, President Roosevelt was determined that his efforts to achieve national economic recovery would not be thwarted by the Supreme Court. His campaign to "pack" the Court with judges who would share his views on federal power was unsuccessful.[33] By April 12, 1937, however, a majority of the Court was ready to recognize power in Congress to deal with local production and conditions of employment, at least where such activities "have such a close and substantial relation to interstate commerce that their control is essential or

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26. *Id.* at 74-75.
27. 298 U.S. 238 (1936).
28. *Id.* at 311.
29. *Id.* at 282-84.
30. *Id.* at 304.
31. *Id.*
32. *Id.*
33. *See* S. Rep. No. 711, 75th Cong., 1st Sess. (1937). For a full account of the events and politics surrounding the court-packing plan, see L. Baker, BACK TO BACK—THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967).

appropriate to protect that commerce from burdens and obstructions . . . ."[34] Just such a relation was found in the case of *NLRB v. Jones & Laughlin Steel Corp.*,[35] testing the constitutionality of the National Labor Relations Act of 1935.[36] The Court employed an effect theory. If steel industry operations were shut down by labor strife, the Court observed, the effect on interstate commerce "would be immediate and might be catastrophic."[37] Accordingly, it was "idle to say that the effect would be indirect or remote."[38] Thus, the Court upheld application of the National Labor Relations Act to Jones & Laughlin Steel Corporation.[39] The *Carter* case was simply dismissed as "not controlling here."[40]

The "far-flung activities"[41] of Jones & Laughlin Steel made that company's case an appealing one for the Court's effect theory. In two companion cases, however, the Court also upheld application of the Act to two considerably smaller operations.[42] The impact of the three cases, taken together, and the broadly stated effect theory applied therein, was not lost on the four dissenters:

> The three respondents happen to be manufacturing concerns—one large, two relatively small. The Act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private enterprises—mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board [the National Labor Relations Board] power of control over purely local industry beyond anything heretofore deemed permissible.
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> It is gravely stated that experience teachers that if an employer discourages membership in 'any organization of any

34. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
35. *Id.*
36. *Id.* at 25.
37. *Id.* at 41.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937) (corporation with "31 branch sales offices in 12 different States." *Id.* at 53); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (clothing manufacturer purchased 99.57 percent of its raw materials in interstate commerce and sold over 80 percent of its finished garments to stores in other states.) *Id.* at 72.

> kind in which employees participate, and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work,' discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything—marriage, birth, death—may in some fashion affect commerce.[43]

The opinion in *Jones & Laughlin* did not in any way limit congressional authority under the effect theory to times of national emergency or economic crisis, although such circumstances could easily be considered a factor—perhaps the decisive factor—in determining the substantiality of the effect of labor relations on interstate commerce. As additional cases would prove, however, the existence of a substantial effect on interstate commerce would be a matter primarily for congressional determination with great judicial deference accorded to that determination.

2. *Regulation of Labor and Production after 1937*

By 1941, none of the dissenters in *Jones & Laughlin* remained on the Court. Consequently, when the Fair Labor Standards Act (FLSA)[44] was before the Court in *United States v. Darby*,[45] it was upheld in a unanimous opinion. The FLSA prescribes minimum wages and maximum hours for certain employees, and it prohibits shipment in interstate commerce of goods produced by employees whose wages and hours have not complied with the federal requirements.[46]

Overruling *Dagenhart*, the Supreme Court upheld the commerce prohibition. It apparently was enough that the regulation was "nominally a regulation of the [interstate] commerce."[47] Assuming Congress' "motive and purpose"[48] was regulation of a mat-

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43. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 78, 99 (1937) (McReynolds, J., dissenting).

44. 29 U.S.C. §§ 201-219 (1982).

45. 312 U.S. 100 (1941).

46. 29 U.S.C. §§ 201-219 (1982).

47. 312 U.S. 100, 113 (1941).

48. *Id.* at 115.

ter reserved to the states, these were "matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[49] Congress could prevent the use of interstate commerce as a means for furthering or advancing anything viewed by it as "injurious to the public health, morals or welfare. . . ."[50] This latter phrase is generally associated with the scope of the all-encompassing police power, a power not delegated to Congress in the Constitution but reserved to the states under the tenth amendment.[51]

Congress, however, had gone beyond the commerce prohibition when it enacted the FLSA. It had regulated the "evil" directly. The Court relied on two separate theories in upholding the direct regulation of wages and hours. First, Congress could control wages and hours directly as a necessary and proper means of enforcing the prohibition.[52] Second, Congress could regulate wages and hours in employment because of the "substantial effect"[53] of that matter on interstate commerce. The Court cited *Jones & Laughlin* and the effect of strikes on interstate commerce.[54] It also noted that competition by employers engaged in substandard labor practices is "made effective through interstate commerce"[55] and causes a "dislocation"[56] thereof by directing commerce which would otherwise flow to and from states with wage and hours laws to those states which have none. The Court recognized that the effect on interstate commerce of a single manufacturer, such as the Georgia lumber mill in *Darby*, might be insignificant. Nevertheless, the court emphasized it was "the total effect of the competition of many small producers"[57] that should be considered in determining whether the legislation adopted by Congress was "reasonably adapted"[58] to the legitimate end.

The Supreme Court in *Darby* did consider the relevance of the tenth amendment and made a statement that has restricted the use of that amendment as a limitation on congressional power:

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49. *Id.*
50. *Id.* at 114.
51. *Id.* at 110.
52. *Id.* at 121.
53. *Id.* at 119-20.
54. *Id.* at 119.
55. *Id.* at 122.
56. *Id.*
57. *Id.* at 123.
58. *Id.* at 121.

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[59]

Nothing in this statement precludes the judiciary from using the tenth amendment argument to support a holding that Congress has invaded areas reserved for the states. That amendment was, indeed, intended as a textually demonstrable constitutional recognition of the limited nature of the powers of the new central government. In *Darby*, the tenth amendment was that among the limited powers of the federal government there is nowhere to be found the power to regulate wages and hours of employment or any other conditions of employment contracts.[60] Accordingly, Congress was exceeding its constitutional powers and preventing the states from exercising fully their reserved powers over local production and employment. However, the "truism" label applied to the tenth amendment in *Darby* seemed designed to reduce the amendment to a constitutional provision lacking any substance. And until *National League of Cities* in 1976,[61] no Supreme Court decision again relied on the tenth amendment for a constitutional ruling.[62] That case, of course, has now been overruled by *Garcia*.[63]

In *Wickard v. Filburn*,[64] the scene shifted to agricultural production. Even wheat grown for consumption on the farm was held subject to the Agricultural Adjustment Act of 1938[65]—the succes-

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59. *Id.* at 124.

60. *Id.* at 123-34.

61. *See supra* note 3.

62. A year before the *National League* decision, Justice Marshall had commented by way of dictum in his opinion for the Court in *Fry v. United States*: "While the Tenth Amendment has been characterized as a 'truism', . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. 542, 547 n.7 (1975).

63. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See supra* notes 1-6 and accompanying text.

64. 317 U.S. 111 (1942).

65. *Id.* at 127-28.

sor to the legislation struck down in *United States v. Butler*.[66] The problems of a surplus in wheat, which included congestion in the market, the railroad's tying up of railroad cars, and embargoes to cut down on congestion, had been aggravated by wheat grown for use on the farm:

> The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production.
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> . . . . [B]eing in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.[67]

Moreover, it did not matter that the farmer who had exceeded his wheat acreage allotment in *Filburn* had done so by only 11.9 acres. "[H]is contribution," said the Court, "taken together with that of many others similarly situated, is far from trivial."[68] Agricultural production, no matter how local the operation, was now a matter for Congress to control.

3. *Protecting Civil Rights Under the Commerce Clause*

The Civil Rights Act of 1964 forbids racial discrimination in certain places of public accommodation which affect interstate commerce.[69] These places include almost all inns, hotels, motels, and other places providing lodging for transient guests.[70] The Act also covers restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.[71] The lodging provisions were upheld in *Heart of At-*

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66. *See supra* notes 25-26 and accompanying text.

67. 317 U.S. at 127-28.

68. *Id.* at 128.

69. The Civil Rights Act of 1964, § 201, 42 U.S.C. § 2000a (1982).

70. *Id.* § 2000a(b)(1). Excluded are such places containing no more than five rooms for rent and actually occupied by the proprietor as a residence. *Id.*

71. *Id.* § 2000a(b)(2) and (c)(2).

lanta Motel, Inc. v. United States,[72] in which the Court emphasized that racial discrimination in hotels and motels significantly discouraged interstate travel by black persons.[73] Therefore, Congress could foster interstate travel by prohibiting such discrimination.

A similar principle was applied to racial discrimination in restaurants. In *Katzenbach v. McClung*,[74] the owners of Ollie's Barbecue in Birmingham, Alabama, argued that they did not serve nor offer to serve interstate travelers, and that requiring them to serve black persons would hurt their business and, thus, *reduce* their purchases in interstate commerce.[75] The Court concluded that this was of no consequence. It was the cumulative effect on interstate commerce, not just the effect from the operations of Ollie's Barbecue, that was crucial.[76] Perhaps more important, it was not just the effect on interstate shipment of food that concerned Congress. Congress was also attempting to eliminate the discouraging impact which racial discrimination had on interstate travel and on businesses which might otherwise relocate into areas where racial discrimination in places of public accommodation was practiced.[77] The facts and testimony before Congress showed that these burdens on interstate commerce resulted from racial discrimination in restaurants. The Court emphasized "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[78]

It is submitted that what began in *Jones & Laughlin* was effectively completed in the civil rights cases. The Court had permitted Congress to use the commerce power to alter irreparably the United States federal system. *Heart of Atlanta* and *McClung* illustrated that Congress could attack virtually any problem, including moral issues, under the commerce clause. The dissenters in *Jones & Laughlin*[79] were proven correct on one point. Few activities, if any, lack the requisite effect on interstate commerce, particularly if the Court accords Congress the great deference that is reflected in

72. 379 U.S. 241 (1964).
73. *Id.* at 257.
74. 379 U.S. 294 (1964).
75. *Id.* at 297.
76. *Id.* at 300-01.
77. *Id.* at 300.
78. *Id.* at 303-04.
79. *See supra* note 43 and accompanying text.

the rational basis analysis used in conjunction with the cumulative effect theory.

Accepting the great need for eradication of racial discrimination in places of public accommodation, another basis for the decision was available to the Court. Use of the commerce power in *Heart of Atlanta* and *McClung* could be viewed as an affront to those whose rights the Civil Rights Act was designed to guarantee. Their plight appeared almost incidental to the entire controversy and it was acknowledged simply as a means for assuring that interstate movement of persons and goods went unhindered. Reliance on a constitutional source protective of human rights would have better served the Court and the people. Subsequent decisions have made it clear that the thirteenth amendment[80] could have been cited in support of the congressional authority exercised in the Civil Rights Act of 1964.[81]

II. Canadian Federalism

A. *The Constitution Act, 1867*

The Constitution Act, 1867,[82] accomplishes the distribution of legislative powers in Canada by means of two separate lists, section 91 delegating powers to the Parliament of Canada, and section 92 delegating powers to the provincial legislatures. Perhaps the most striking language of section 91 is the introductory language indicating that the Parliament of Canada is to have the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[83] Certainly an American's inclination is to read such a provision as the reverse of our tenth amendment and to interpret it as a reservation to Parliament of all legislative power not constitu-

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80. *See, e.g.*, Jones v. Alfred H. Mayer Co., 391 U.S. 409 (1968), where the Court upheld congressional prohibitions against private racial discrimination in the sale or rental of property. Under the thirteenth amendment, said the Court, Congress has power to outlaw whatever it "rationally" determines to be "the badges and the incidents of slavery . . . ." *Id.* at 440.

81. It is doubtful whether section 5 of the fourteenth amendment would also provide a constitutional basis for such legislation, since the fourteenth amendment, by its terms, applies only to state action. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

82. 30 & 31 Vict., ch. 3. For the convenience of both writer and reader, references to and quotations from this statute will generally specify textually, rather than by footnote, the section and/or subsection referred to or quoted.

83. Constitution Act, 1867, 30 & 31 Vict., ch. 3.

tionally granted to the Provinces. If anything, the provision is broader than that, because it is couched specifically in terms of an affirmative grant of power and could even be viewed as a grant of the broad police power to legislate generally for the public health, safety, welfare and morals.

Following this broad peace, order, and good government clause (p.o.g.g.), section 91 proceeds to enumerate a number of specific powers "for greater Certainty," but it specifically emphasizes that this enumeration is not to be understood as restricting in any way "the Generality of [the p.o.g.g. clause]." Accordingly, the subjects with respect to which power is specifically granted to the central government would appear to be merely examples of the kinds of matters which the p.o.g.g. clause covers. Illustrative of these subjects are "Trade and Commerce" (s. 91(2)); "Navigation and Shipping" (s. 91(10)); "Currency and Coinage" (s. 91(14)); "Banking, Incorporation of Banks, and the Issue of Paper Money" (s. 91(15)); "Marriage and Divorce" (s. 91(26)); and "Criminal Law" (s. 91(27)). Lest it be thought, as it certainly might,[84] that some of these specifically enumerated matters could be viewed as being of local concern and falling within the powers of the Provinces, section 91 concludes with the statement that:

> any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[85]

Note particularly the application of this concluding clause of section 91 to the broadly worded commerce power granted to Parliament in section 91(2). That power appears to cover all trade and commerce no matter how local. Furthermore, we would expect application and interpretation of the provision to be without reference to whether the trade or commerce being regulated is a part of or pertains in any way to international or interprovincial commerce.

The provincial legislatures, under section 92, are authorized to make laws regarding such matters as "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of

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84. Matters such as local crime and marriage and divorce, for example, have long been considered primarily of state concern in the United States.

85. Constitution Act, 1867, 30 & 31 Vict., ch. 3.

Provincial Officers" (s. 92(4)); "Local Works and Undertakings" (s. 92(10)); "Property and Civil Rights in the Province" (s. 92(13)); and "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)). While the last two powers mentioned are particularly subject to rather sweeping interpretations, the concluding clause of section 91 would seem to dictate a very strict and narrow application. Although the operation of a business involving trade in eggs, for example, might be viewed as property, a civil right, and of a local and even a private nature, section 91 still gives Parliament the power to regulate trade and commerce. Since this power is among those enumerated in section 91, no aspect of it should be considered as falling within the enumerated powers in section 92, even if one or more of those enumerations might otherwise be clearly applicable to the trade or commerce in question.

B. Judicial Interpretations

A significant feature of the Constitution Act, 1867, is the inclusion of the two lists of delegated powers. One reason that the grants of power to the United States Congress have lent themselves to such broad application is that their only constitutional competition comes from what the United States Supreme Court once called "invisible radiation[s] from the general terms of the Tenth Amendment."[86] With no specific constitutional grants of power, the states have only those powers not granted to the federal government. Thus, the scope of legislative authority remaining in the states depends entirely on the interpretation given to the provisions granting federal power. Under the Canadian Constitution Act, 1867, the legislative authority of the Provinces depends upon the interpretation given their own specific grants of power as well as the grants of federal power. Some real substance is more likely to be accorded provisions that specifically grant power than a provision, like the tenth amendment, which is passively worded merely to recognize that whatever power has not been given away may still be exercised.

Prior to 1949, decisions in Canadian cases were appealable to

86. Missouri v. Holland, 252 U.S. 416, 434 (1920). The tenth amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

the Judicial Committee of the British Privy Council.[87] The Privy Council decisions established a strong body of precedent characterized chiefly by a very broad construction of the provincial power over property and civil rights and a narrow construction of two of Parliament's most broadly worded powers, the p.o.g.g. power and the power to regulate trade and commerce. A few decisions of the Supreme Court of Canada, since abolition of Privy Council appeals, have been perceived as expanding Parliament's authority.[88] For the most part, however, the federal system fashioned by the Privy Council, featuring strong provincial governments, has remained intact.[89]

1. *The Trade and Commerce Power*

One of the earliest indications of the course that Canadian federalism would take came in 1881 in *Citizens Insurance Co. v. Parsons*.[90] A statute of the Province of Ontario, designed to secure uniformity in the conditions of fire insurance policies, was challenged as being beyond the constitutional power of the Province and as interfering with Parliament's power to regulate trade and commerce.[91] The Privy Council disagreed with both assertions. The Act, according to the Council, was within Ontario's legislative authority over property and civil rights in the Province. In addition, it did not "conflict or compete"[92] with any power of Parliament because Parliament was powerless "to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province . . . ."[93] On the first point, the Privy Council found that common usage under Canadian law dictated that the terms "property" and "civil rights" be interpreted "in their largest sense."[94] This apparently encompassed "the full range of civil law, as opposed to criminal law."[95] In *Par-*

87. For a brief statement of events leading to establishment of the Supreme Court of Canada as the court of last resort in Canadian cases, *see* J. R. MALLORY, THE STRUCTURE OF CANADIAN GOVERNMENT 338-39 (1971).

88. For a good discussion of these cases, see Hogg, *Is the Supreme Court of Canada Biased in Constitutional Cases?*, 57 CAN. B. REV. 721 (1979).

89. Professor Hogg concludes "that the Supreme Court of Canada has generally adhered to the doctrine laid down by the Privy Council precedents . . . ." *Id.* at 739.

90. 7 App. Cas. 96 (1881).

91. *Id.*

92. *Id.* at 113.

93. *Id.*

94. *Id.* at 111.

95. Lysyk, *Constitutional Reform and the Introductory Clause of Section 91: Residual*

sons, the Privy Council had no trouble concluding that the terms included "contracts and the rights arising from them."[96]

Turning to the issue of Parliament's authority to deal with the subject in question under the trade and commerce power, the Privy Council confined its holding to a denial of power in Parliament to regulate the *contracts* of a particular trade or business.[97] In frequently cited dicta, however, the Privy Council strongly suggested that Parliament's power over trade and commerce extended only to international and interprovincial trade and commerce[98] and possibly to "trade affecting the whole dominion."[99]

Let us look briefly at each of these categories of trade and commerce to which the power of Parliament may apply. First, what, if any, local activities are subject to parliamentary control by virtue of its power to regulate international and interprovincial trade and commerce? The answer lies primarily in cases involving the regulation of marketing activities. In this area, the cases have drawn a line between intraprovincial marketing activities, which the Provinces regulate, and interprovincial and international marketing activities, which are subject only to regulation by Parliament.[100] One of the leading marketing cases[101] involved the Natural Products Marketing Act of 1934,[102] which was one of the statutes enacted as a part of Parliament's response to the Great Depression, namely, the Bennett New Deal.[103] The Act established a marketing plan for natural products where the "*principal* market . . . is outside the Province of production, or . . . *some part of the product produced may be exported.*"[104] The Privy Council held the statute *ultra vires* because it covered some transactions "which

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and Emergency Law-Making Authority, 57 CAN. B. REV. 531, 544 (1979). *See also* P. HOGG, CONSTITUTIONAL LAW OF CANADA 455-56 (2d ed. 1985) (distinguishing "civil rights" in Section 92(13) from civil liberties) [hereinafter HOGG].

96. 7 App. Cas. at 110.

97. *Id.* at 113.

98. *Id.* at 112-13.

99. *Id.* at 113.

100. *See, e.g.*, W. Lederman, *The Constitution: A Basis for Bargaining*, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 366, 368 (1981), reprinted from NATIONAL RESOURCE REVENUES: A TEST OF FEDERALISM 52 (Scott ed. 1976).

101. A.-G. B.C. v. A.-G. Can., [1937] A.C. 377, generally referred to as the *National Products Marketing Reference.*

102. *Id.*

103. For a discussion of Canada's New Deal legislation generally, *see* Scott, *The Privy Council and Mr. Bennett's 'New Deal' Legislation*, in ESSAYS ON THE CONSTITUTION 90 (1977).

104. [1937] A.C. at 386 (emphasis added).

are completed within the Province, and have no connection with interprovincial or export trade."[105] Such transactions were subject only to provincial regulation of property and civil rights in the Province.[106]

Some federal regulation of intraprovincial marketing transactions may be permissible as merely incidental to the control of international and interprovincial trade and commerce.[107] Thus, in *Caloil Inc. v. Attorney-General of Canada*,[108] the Supreme Court of Canada unanimously upheld federal legislation barring the transportation and sale of imported oil west of the Ottawa Valley.[109] Whatever regulation of wholly intrastate transactions occurred as a result of this legislation was "an integral part of the control of imports in the furtherance of an extra-provincial trade policy."[110] This case is quite different from the *Natural Products Marketing Act* case, because even the intraprovincial transactions in oil regulated in *Caloil* involved imported oil. In the *Natural Products* case, the regulations governed some trade in natural products that were never beyond the Province's territory. *Caloil* may be read, however, as a rejection of the proposition that under no circumstances may a transaction occurring wholly within a province be regulated by Parliament.

In the United States, Congress has been able to reach wholly intrastate activities primarily by finding that the activity in question has a substantial effect on interstate commerce. The suggestion in *Parsons* that Parliament might have authority to regulate "trade affecting the whole dominion" could have led to adoption of the same theory in Canada.[111] This was not to be the case. The so-called " 'general' category of trade and commerce"[112] has occasionally been cited with approval by individual members of the Supreme Court of Canada.[113] Nonetheless, Professor Peter Hogg finds only one "unequivocal example of a valid exercise"[114] of this power

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105. *Id.*
106. *Id.*
107. *See* HOGG, *supra* note 95, at 443-44.
108. 20 D.L.R.3d 472 (1971).
109. *Id.*
110. *Id.* at 478.
111. *See supra* note 99, at 113.
112. HOGG, *supra* note 95, at 447.
113. *See, e.g.*, the opinion by Chief Justice Laskin in Reference Re Anti-Inflation Act, 68 D.L.R. 3d 452, 498-99 (1976).
114. HOGG, *supra* note 95, at 448. Professor Hogg cites A.-G. Ont. v. A.-G. Can. (Can-

and notes that this one case is now of at least "doubtful"[115] validity as precedent. Without reviewing the relevant Canadian cases in detail, it may be safely asserted that matters covered by the effect theory in the United States, including such subjects as labor relations generally, wages and hours of employees, general operations of particular trades and businesses, and industrial and agricultural production, have remained mostly within provincial control. All of these fall within the power of the provinces over local property and civil rights.[116] There are exceptions with regard to businesses, such as banking and shipping, over which Parliament has specific legislative authority under provisions of the Constitution Act, 1867, other than the trade and commerce clause.[117] The critical point, however, is that the trade and commerce power has not in Canada become a source of unlimited power in Parliament of the sort the United States Congress enjoys under the commerce clause.[118]

2. *The P.O.G.G. Power*

The broad interpretation given to the property and civil rights clause of section 92 has been as effective in restricting application of Parliament's p.o.g.g. power as in limiting the commerce power.[119] For purposes of this study, the most important features

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ada Standard Trade Mark case), [1937] A.C. 405.

115. HOGG, *supra* note 95, at 448.

116. *See supra* text accompanying notes 94-96. *See also* HOGG, *supra* note 95 at 452, 453-81; and Hogg, *Is the Supreme Court of Canada Biased In Constitutional Cases?*, 57 CAN. B. REV. 721, 733 (1979).

117. *See* Constitutional Act, 1867, Sec. 91(10) ("Navigation and Shipping"), Sec. 91(15) ("Banking, Incorporation of Banks, and the Issue of Paper Money"), and Sec. 91(16) ("Savings Banks").

118. Justice Laskin stated:

> No such theory as the flow of commerce or of activity affecting commerce has obtained in Canada as it has in the United States. There is no *NLRB v. Jones & Laughlin Steel Corp.* principle in Canada respecting federal regulatory control over labor relations; . . . no *United States v. Darby* doctrine to justify general federal fair labor standards legislation; no such constitutional support for an agricultural policy covering both the interstate and interrelated local market as was supplied for the United States by such cases as . . . *Wickard v. Filburn.* In short, we are in Canada very far from the conception of a commerce power which the late Justice Murphy said was 'as broad as the economic needs of the nation.'

Laskin, *The Constitutional Systems of Canada and the United States: Some Comparisons*, 16 BUFFALO L. REV. 591, 598-99 (1967) (footnotes omitted). The statement by Justice Murphy is quoted from his opinion in Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 104 (1946).

119. For the text and a general discussion of the p.o.g.g. power, see *supra* text accompanying notes 82-85.

of the p.o.g.g. power have been its uses in dealing with national emergencies and in legislating with regard to matters of national concern. The potential sweep of a "national concern" theory under the p.o.g.g. clause would appear to be particularly broad. In application, however, this concept has been limited to matters which are not specifically or by judicial interpretation subject to provincial authority under section 92, are permanently of national concern, and have "an identity and unity that is quite limited and particular in its extent."[120] Thus, such matters as aeronautics,[121] atomic energy,[122] and development of a national capital region[123] have been held to be within the legislative power of Parliament under the p.o.g.g. clause. On the other hand, matters such as labor relations traditionally have been regulated primarily by the Provinces under the judicial interpretation given to the property and civil rights clause.[124] Furthermore, as Professor Lederman has emphasized, a subject like labor relations is not a "limited subject or theme."[125] Rather, it "is a sweeping subject or theme virtually all-pervasive in its legislative implications."[126] If Parliament had the power to deal with the matter of labor relations on a permanent basis, "provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce."[127]

In the *Reference Re Anti-Inflation Act*,[128] the Supreme Court of Canada was called upon to determine the validity of federal anti-inflation legislation. The legislation established "supervision,

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120. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597, 606 (1975). Professor Lederman's approach was apparently approved by a majority of the Supreme Court of Canada, albeit through a dissenting opinion, in Reference Re Anti-Inflation Act, 68 D.L.R. 3d 452, 512-25 (1976) (Beetz, J., dissenting). This case is discussed *infra*, text accompanying notes 128-36. *See also* HOGG, *supra* note 95, at 392-95, discussing both Professor Lederman's thesis and the *Reference Re Anti-Inflation Act*; LeDain, *Sir Lyman Duff and the Constitution*, 12 OSGOODE HALL L. J. 261, 293 (1974); and Lederman, *Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975*, in Continuing Canadian Constitutional Dilemmas 305 (1981), reprinted from 84 QUEEN'S Q. 90 (1977).

121. Johannesson v. Rural Municipality of West St. Paul, 4 D.L.R. 609 (1951).

122. Pronto Uranium Mines v. Ont. Labour Relations Bd., 5 D.L.R. 2d 342 (Ont. H.C. 1956).

123. Munro v. Nat'l Capital Comm'n, 57 D.L.R. 2d 753 (1966).

124. HOGG, *supra* note 95, at 461-62 (citing as the leading case Toronto Elec. Comm'rs v. Snider [1925] A.C. 396).

125. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597, 610 (1975).

126. *Id.*

127. *Id.*

128. 68 D.L.R. 3d 452 (1976).

control and regulation of prices, profits, wages, salaries, fees and dividends by way of monitoring and limiting increases in order to combat inflation."[129] A majority of 7-2 upheld the Act under an emergency theory of p.o.g.g. power.[130] It is of considerable significance, however, that three members of the majority agreed with the two dissenting justices that the Act could not have been upheld under the national concern theory.[131] If the problem of inflation had become of such national concern as to justify sweeping federal intervention into areas traditionally regulated by the provinces, then what other subjects might follow into federal control? Justice Beetz, dissenting, could see the potential sweep:

> It could equally be argued that older subjects such as the business of insurance or labour relations, which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever the business of insurance or labour have become national in scope. It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.[132]

Application of the emergency theory of p.o.g.g. power in the *Anti-Inflation Reference* is, to be sure, of great significance. After all, even the Great Depression had not been deemed sufficient to invoke the emergency doctrine as a means of upholding the Bennett New Deal legislation, including wages and hours provisions.[133] Furthermore, in enacting the Anti-Inflation Act, Parliament had not formally proclaimed an emergency.[134] The legislation was, how-

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129. *Id.* at 464.

130. Four members of the Court, speaking through Chief Justice Laskin, saw no reason to address the question of the Act's validity under a national concern theory of p.o.g.g. power if it could be upheld as "crisis legislation". *Id.* at 492-93.

131. *Id.* at 507 (Ritchie, J., concurring). Justices Martland and Pigeon concurred with Justice Ritchie. *Id.* at 506, 510. Thus, a majority of the Court specifically rejected the availability of a national dimensions or national concern theory to legislation of this sort. (See the views of the two dissenters; *see infra* note 132, and accompanying text.)

132. *Id.* at 514 (Beetz, J., dissenting). The dissent was joined by Justice de Grandpre on this issue. *Id.* at 536. The opinion includes a further enumeration of areas that would be subject to Parliament's control under a national concern theory. *Id.* at 513-14.

133. *A.-G. Can. v. A.-G. Ont.* [1937] A.C. 326. *See* discussion by LeDain, *Sir Lyman Duff and the Constitution*, 12 OSGOODE HALL L.J. 261, 287-88 (1974).

134. 68 D.L.R. 3d 452, 495 (1976).

ever, specifically enacted as a temporary measure, although it provided for extension.[135] In his opinion for four members of the Supreme Court, Chief Justice Laskin found:

> [T]his Court would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a *rational basis* for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole.[136]

Citing the deferential "rational basis" test employed in this case, Professor Hogg concluded that "the federal Parliament can use its emergency power almost at will."[137] He immediately reminded us, however, that any legislation under the emergency power must be a "*temporary* measure."[138] A serious flaw in the New Deal legislation was that it amounted to *permanent* federal intervention into areas primarily within provincial control.[139] Still, even with the temporary measure requirement, there is the possibility of parliamentary extensions beyond the initially stated statutory period.

The emergency theory of p.o.g.g. power had been used to support a number of statutes during both world wars. When challenged during temporary continuation of the legislation after cessation of hostilities, neither the Privy Council[140] nor the Supreme Court of Canada[141] was willing to invalidate the extensions.[142] An interesting question arises, then, regarding just how long the Supreme Court of Canada might permit extensions of legislation such as the Anti-Inflation Act.

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135. *Id.* at 463, 493.

136. *Id.* at 498 (first emphasis added).

137. HOGG, *supra* note 95, at 390.

138. *Id.* at 391 (emphasis added).

139. *Id.* (emphasis added).

140. *See* Fort Frances Pulp and Power Co. Ltd. v. Man. Free Press Co. Ltd. [1923] A.C. 695.

141. *See* Reference Re Validity of the Wartime Leasehold Regulations, 2 D.L.R. 1 (1950).

142. In the *Fort Frances* case, the Judicial Committee of the Privy Council indicated that "very clear evidence that the crisis had wholly passed away would be required to justify" judicial rejection of "the decision of the Government that exceptional measures were still requisite." [1923] A.C. 695, 706.

In determining what grant or grants of power in sections 91 and 92 apply to particular subjects, the Supreme Court of Canada, following the Privy Council's lead, has employed what has often been referred to as the doctrine of "pith and substance."[143] What is the "pith and substance" of the legislation under consideration? Professors Lederman and Hogg explain this concept as requiring the Court to decide what is the "important"[144] or "dominant"[145] characteristic of the legislation. In making this inquiry, the Court will consider not only the subject matter asserted on the face of the statute but also the purpose or objective and the effect of the legislation. This is a difficult, and sometimes quite subjective, task for the Court.

In *Carnation Co. Ltd. v. Quebec Agricultural Marketing Bd.*, for example, the Court upheld Quebec's regulation of milk producers, including price fixing, emphasizing that the regulations' "impact" on interprovincial trade "may be relevant in determining their true aim and purpose, but it is not conclusive."[146] The important feature of the law was the regulation of production. The effect on interprovincial trade was deemed incidental even though a major portion of milk bought in Quebec was transported out of that Province.[147] On the other hand, Saskatchewan regulations limiting the production of potash in Saskatchewan and establishing minimum prices for Saskatchewan potash were struck down.[148] It had been established that almost all potash produced in Saskatchewan was exported. "[T]here was," said the Court, "hardly any Saskatchewan market for the mineral."[149] Furthermore, there was evidence that the legislation was not a conservation measure.[150] In finding the regulations invalid, the Court stated:

> The present case reduces itself therefore to a consideration of 'the true nature and character' of the prorationing and

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143. *See, e.g.*, Carnation Co. Ltd. v. Que. Agricultural Marketing Bd., 67 D.L.R. 2d 1, 13 (1968), citing the Privy Council's reliance on the doctrine in Shannon v. Lower Mainland Dairy Prods. Bd. [1938] A.C. 708.

144. W. Lederman, *Classification of Laws and the British North America Act*, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS, 229, 246 (1981), reprinted from LEGAL ESSAYS IN HONOUR OF ARTHUR MOXON 183 (Corry, Cronkite & Whitmore ed. 1953).

145. HOGG, *supra* note 95, at 313-14.

146. 67 D.L.R. 2d 1, 14 (1968).

147. *Id.* at 4.

148. Central Can. Potash Co. Ltd. v. Gov't of Sask., 88 D.L.R. 3d 609 (1978).

149. *Id.* at 629.

150. *Id.* at 613.

> price stabilization schemes which are before us. This Court cannot ignore the circumstances under which the *Potash Conservation Regulations, 1969*, came into being, nor the market to which they were applied and in which they had their substantial operation.[151]

The difficulties inherent in determining "pith and substance" have not deterred the Canadian judiciary from examining the true nature of both federal and provincial legislation. While the phrase "pith and substance" is not always used, the principle of judicial review reflected in that phrase may be viewed as underlying virtually all decisions involving the allocation of legislative power in Canada. That principle recognizes the duty of the judiciary to *say what a particular law really is.*[152] Regulation of local production and local labor relations may masquerade as regulations of interprovincial trade and commerce. The courts must be willing to see that and say so. Such judicial honesty has characterized numerous decisions of the Privy Council and the Supreme Court of Canada.

Sometimes a particular enumerated power has been blatantly used as a pretext to regulate an unauthorized matter. Such legislation has generally been characterized as "colourable,"[153] and "pretence" language has occasionally been used.[154] But surely even the good faith use of specifically granted powers as a means of attempting to regulate matters beyond the legislative jurisdiction of the government in question may properly be characterized as a pretext.

In that sense, the "pith and substance" analysis in Canadian law is analogous to the pretext analysis announced by Chief Justice Marshall in *McCulloch v. Maryland*[155] but later abandoned by the United States Supreme Court. Interestingly, application of a ra-

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151. *Id.* at 631.

152. This is, of course, a paraphrase of an often-quoted American statement of the judicial function, *i.e.*: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1903).

153. *See, e.g.*, HOGG, *supra* note 95, at 322, citing, *inter alia*, A.-G. Alta. v. A.-G. Can. [1939] A.C. 117.

154. In *A.-G. Alta v. A.-G. Can.*, the Privy Council stated:

> It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other . . . .

[1939] A.C. at 130.

155. 17 U.S. (4 Wheat.) 316 (1819), *see supra* text accompanying notes 9-15.

tional basis test in commerce power cases contributed significantly to abandonment of the judicial role in maintaining a balanced federal system in the United States. Does the use of that same deferential test in applying the emergency p.o.g.g. power in the *Anti-Inflation Reference* signal a similar development in Canada? That is highly unlikely. The fact that the emergency p.o.g.g. power is limited to enactment of temporary legislation is of great significance. The Anti-Inflation Act of 1975 was legitimately considered to be, in "pith and substance," a measure to deal temporarily with an economic crisis. Neither use of the rational basis test there nor judicial reluctance to override short-term extensions of emergency measures in the wartime cases suggests in any way that the Supreme Court of Canada would be unwilling to strike down an extension of emergency legislation—over matters generally within the power of the Provinces—beyond any real period of crisis. Such an extension should be considered, in "pith and substance", an attempt to gain permanent regulatory control over matters within the legislative jurisdiction of the Provinces. Furthermore, "cooperative federalism"[156] appears too firmly established in Canada now for judicial abandonment of the "pith and substance" doctrine.

C. *Cooperative Federalism*

In the United States almost any problem—and virtually any economic problem—can be dealt with on a nationwide basis through federal legislation. This is clearly not so in Canada. The marketing cases,[157] for example, established that legislative power over intraprovincial marketing lies almost exclusively in the provinces and that power to develop interprovincial and international marketing programs remains with Parliament. Obviously, then, to achieve national uniformity in the marketing of a particular commodity, federal-provincial cooperation is essential. This cooperation has come about in the form of delegation by both provincial and federal governments to the same marketing board or agency. The Court approved such a device in *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.*[158] Pursuant to provincial legislation, the government of Prince Edward Island had created a

156. The term has been frequently used in describing the federal system in Canada. *See, e.g.*, Lederman, *Some Forms and Limitations of Co-Operative Federalism*, 45 CAN. B. REV. 409 (1967).

157. See *supra* text accompanying notes 158-165.

158. 4 D.L.R. 146 (1952).

five-member board which was empowered to administer a plan for the marketing of potatoes within the province. The provincial legislation also authorized the marketing board to exercise any power delegated to it by the federal government.[159] Under the Agricultural Production Act of 1949, Parliament had authorized the federal government to grant to provincial boards regulating certain agricultural products within the province the authority to regulate the marketing of that same product "outside the province in interprovincial and export trade."[160] For this purpose, the boards were to be free "to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province."[161] The power to regulate the interprovincial and international marketing of Prince Edward Island potatoes had been granted to the Prince Edward Island Potato Marketing Board under this federal statute. The Supreme Court of Canada upheld the delegation of power by the federal government to the provincial board.[162] Parliament could select officers of its own choosing to administer legislation enacted pursuant to its constitutional authority.[163] Accordingly, it was perfectly proper to permit the appointment of an "agency already authorized under the law of a Province"[164] to administer similar provincial legislation. The Court went on to point out:

> [I]n doing so Parliament was following the advice of the Judicial Committee [of the Privy Council] . . . that the proper way to carry out [national marketing legislation] in Canada, in view of the distribution of legislative powers under the B.N.A. Act, was for Parliament and the Legislatures to act by co-operation.[165]

How is federal-provincial agreement on a marketing plan or any other matter of nationwide concern achieved? "The essence of cooperative federalism," says Professor Hogg, "is a network of relationships between the executives of the central and regional governments."[166] This network includes "several important standing

159. *Id.* at 149.
160. *Id.*
161. *Id.*
162. *Id.* at 149-50.
163. *Id.* at 149.
164. *Id.*
165. *Id.* at 150.
166. HOGG, *supra* note 95, at 107.

federal-provincial committees of ministers,"[167] and, more significantly, regular conferences attended by the Premiers of each Province and the Canadian Prime Minister.[168] While some have characterized this as "executive federalism,"[169] it appears to be working[170] and has produced a brand of federalism which is, in Professor Lederman's words, "more sensitive and responsive to cultural duality and regionalism, than is the case with the modern federalism of the United States."[171]

III. An American Fantasy

Perhaps cooperative federalism in Canada was the only way to assure an acceptable degree of autonomy in Quebec and, thus, the best way to discourage Quebec's separation from Canada.[172] Certainly, the small number of regional governments in Canada has made consultation and cooperation immeasurably easier to attain there than in the United States.[173] Still, it is submitted, cooperative federalism might well have succeeded even in the United States.

Prior to the United States Supreme Court's turnaround on President Franklin Roosevelt's New Deal legislation, there was still ample room for the development of cooperative federalism. It is true that broadly worded dicta marked some of the Marshall

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167. *Id.* at 108.

168. *Id.* at 107.

169. Smiley, Canada in Question 91 (1980), discussed in Hogg, *supra* note 95, at 108-09.

170. This has proved to be true even in areas, such as energy, where "cooperative" federalism has been marked by confrontation. *See* Moull, *Pricing Alberta's Gas— Cooperative Federalism and the Resource Amendment*, 22 Alta. L. Rev. 348 (1984).

171. W. Lederman, *The British Parliamentary System and Canadian Federalism*, in Continuing Canadian Constitutional Dilemmas 47, 48 (1981), reprinted from One Country or Two? (R.M. Burns ed. 1971). A striking example of this responsiveness to "cultural duality and regionalism" is found in the amending procedures of Part V of the Constitution Act, 1982, which permit any province to exclude itself from coverage of any amendment to the Constitution which "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province." Constitution Act, 1982, § 38(2), (3). Compensation is even provided to provinces which reject application of an amendment which "transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament." Constitution Act, 1982, § 40. For a discussion of these provisions, see Hogg, *supra* note 95, at 59-62.

172. *See* W. Lederman, *Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975*, in Continuing Canadian Constitutional Dilemmas 305, 310-11 (1981), reprinted from 84 Queen's Q. 90 (1977).

173. This observation has been made by numerous persons. *See, e.g.*, Hogg, *supra* note 95, at 130.

Court's decisions interpreting the commerce power of Congress.[174] Moreover, there were a few cases prior to 1937 that indicated that local activities were subject to congressional regulation under the commerce clause due to their effect on interstate commerce.[175] Interstate rail carriers, for example, could be prohibited from adopting a rail rate structure which discriminated in favor of intrastate traffic and against interstate traffic.[176] "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce," the Court said, "does not derogate from the complete and paramount authority of Congress over the latter . . . ."[177] Such a decision, then, is merely consistent with the concept, followed in the Canadian cases,[178] that federal control of an intrastate matter may be an essential and merely incidental means of controlling interstate or foreign commerce. With much of the New Deal legislation, however, federal concern with interstate commerce became merely incidental to the control of wholly intrastate activities such as production of goods and local labor relations. Matters such as these may, indeed, be best handled through the development of policy on a national scale. But should those involved in state government not play a key role in that decision making process?

One possible vehicle for achieving cooperative federalism on such issues would be the use of regional or multistate agreements or compacts. This could be done with or without congressional approval. In *Virginia v. Tennessee*,[179] the United States Supreme Court indicated that such agreements require the approval of Congress under the compact clause of article I, section 10,[180] only if they are "directed to the formulation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[181] This view of the compact clause was recently reaffirmed

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174. For example, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), the Court defined "commerce among the States" as "that commerce which *concerns* more States than one" or "those internal concerns which *affect* the States generally . . . ." *Id.* at 194-95 (emphasis added).

175. *See infra* note 176.

176. *The Shreveport Rate Case* (Houston E. & W. Texas Ry. Co. v. United States), 234 U.S. 342, 360 (1914).

177. *Id.* at 351.

178. *See supra* text accompanying notes 107-10.

179. 148 U.S. 503 (1893).

180. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I § 10, cl. 3.

181. 148 U.S. at 519.

in *United States Steel Corp. v. Multistate Tax Commission*,[182] in which the Court made it clear that an agreement or pact which "does not purport to authorize the member States to exercise any powers they could not exercise in its absence"[183] is valid without congressional approval. The Court further asserted that "[t]he relevant inquiry must be one of impact on our federal structure."[184] Following this approach to the compact clause, agreements regarding legislation on matters considered reserved for the states under the tenth amendment would seem clearly to fall outside the congressional approval requirement. If cooperative federalism were the goal, however, some federal participation in the decision making process would be essential.

Imagine then—faced with a Supreme Court resolutely set against federal encroachment into matters reserved for state regulation under the tenth amendment, and having been sharply rebuked by Congress for proposing the infamous Court-Packing Plan, the Roosevelt Administration calls on the states to pursue economic recovery from the Great Depression regionally through multistate agreements or compacts. In an emergency meeting called by the President and attended by the Governors of all forty-eight states, key White House advisors, and congressional leaders, a concensus is reached on the formation of eight groups of states for purposes of implementing the regional compact plan. The participants also approve procedures for selecting representatives from each of the eight regions to meet together after each region has adopted a tentative economic recovery plan. Meetings of the regional representatives are to be attended also by appropriate federal executive officials and congressional leaders.

At these meetings, the desirability of national uniformity versus regional diversity regarding the major ingredients of the plans is of paramount concern. It is understood, however, that the goal of economic recovery may very well be accomplished by different means in different regions. Ultimately, the states in each region approve an agreement for that region. These agreements may or may not be submitted as compacts for congressional approval, depending largely on whether actual interstate transactions are involved or whether there is otherwise a need for federal as well as

182. 434 U.S. 452 (1978). *See also*, Northeast Bancorp, Inc. v. Bd. of Governors, ___ U.S. ___, 105 S.Ct. 2545, 2554-55 (1985).

183. 434 U.S. at 473.

184. *Id.* at 471.

state legislation. Federal legislation would be required, of course, if federal funds are believed necessary for implementation of the regional programs. Ultimately, the use of Congress' spending power for such a purpose is approved by the United States Supreme Court in a decision in which *United States v. Butler*[185] is distinguished.[186] From this time forward, cooperative federalism continues in the United States through regular regional meetings followed by federal-regional meetings similar to Canada's federal-provincial meetings.[187]

Is it the worst sort of fantasy to suppose that this kind of federal-state cooperation could ever have been accomplished? After fifty years of federal dominance, it may appear so. But 1936-37 was the turning point for American federalism, and who can say that true federal-state cooperation might not have been attempted if the Supreme Court at that time had steadfastly rejected the federal government's efforts to impose its rigid, uniform policies nationwide? The point is that there may, indeed, be feasible constitutional alternatives to over-centralization of power in this country, and not all of them involve the absence of nationwide action to deal with problems of true nationwide concern.

CONCLUSION

Federalism has survived in the United States only because Congress has wisely failed to exercise to the fullest extent the expansive regulatory authority which Supreme Court decisions would permit. Perhaps this is attributable to the kind of state-imposed restraints which Justice Blackmun's *Garcia*[188] opinion suggested are intrinsic in all congressional deliberations and actions. While such restraints may produce the appearance of federalism, the

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185. 297 U.S. 1 (1936), discussed at *supra* text accompanying notes 25-26. For a recent discussion of congressional use of the spending power to coerce state action, *see* Note, *The Surface Transportation Assistance Act: Federalism's Last Stand?*, 11 VT. L. REV. 203 (1986).

186. In *Butler*, the states were neither consulted nor did they participate in any way in the scheme for reducing agricultural production. Federal legislation designed to assist the states in implementing a regional compact or interstate agreement would be secondary and only incidental to the direct legislative action of the states. Any coercion of private conduct would come from the states, where such authority properly resides.

187. Problems vary from one region of the country to another, so that solutions also may vary greatly. A tradition of regional cooperation in solving regional problems might be of great value today for states in the southwest as they work toward recovery from the current economic slump in that area.

188. 469 U.S. 528 (1985).

states remain ever subject to congressional domination and control and may, at any moment, be preempted from dealing with virtually any matter that is legitimately the subject of governmental regulation. This is centralism, not federalism.

Under the watchful eye of a vigilant judiciary, federalism has flourished in Canada. The legislative halls of a central government may be filled with regional representatives. Nevertheless, local and regional needs and interests are much more likely to be addressed and protected by preserving in regional governments a large measure of regulatory power that is constitutionally insulated from the preemptive power of the central government. This has occurred in Canada, and the result has been a healthy, vital and ongoing interchange of views among those involved in both central and provincial government. Indeed, national interests may well have been best served in Canada by recognizing the necessity for greater participation by the Provinces in the formulation of national, as well as regional, policy.

For the United States now to attempt the rebuilding of a true federal system might be the very height of folly. Still, with some envy, many Americans may look to the north and conclude that the hope voiced by Professor W. R. Lederman in 1971 has been realized. Cooperative federalism in Canada has succeeded and, thus, has become "a useful example and prototype"—a distinctive federal "model to the world."[189]

189. W. Lederman, *The British Parliamentary System and Canadian Federalism*, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 47, 62 (1981), reprinted from ONE COUNTRY OR TWO? (Burns ed. 1971).