ARTICLES

INSIGHTS FROM CANADA FOR AMERICAN CONSTITUTIONAL FEDERALISM

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INTRODUCTION

National Federation of Independent Business v. Sebelius\(^1\) has again focused widespread public attention on the role of the United States Supreme Court as an active arbiter of the balance of power between the federal government and the states. This has been an important and controversial topic throughout American as well as Canadian constitutional history, raising related questions of constitutional theory for a federalist republic: What justifies unelected judges interfering with the ordinary political process with regard to federalism questions? Can courts create judicially manageable doctrines to police federalism, with anything more than the raw policy preferences of five justices as to whether a particular legislative issue is best resolved at the federal or state/provincial/local level? Do doctrines that limit the ability of a national political majority to enact into law policy preferences that are not shared by national political minorities who constitute a majority in one or more states or provinces reflect a country’s constitutional values?

On three occasions since 1995, five-to-four majorities have held that Congress’s constitutional authority to “regulate Commerce with foreign Nations, and among the several States\(^2\) did not authorize statutes that a majority of federally elected representatives believed

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reflected sound policy and necessitated national legislation. The reasoning in these cases was largely based on the majority’s perceived need to create some judicially-enforceable limit on federal initiatives, to prevent Congress from “effectually obliterate[ing] the distinction between what is national and what is local and creat[ing] a completely centralized government.”

These three recent decisions are somewhat inconsistent with a series of cases beginning in 1937 expansively interpreting the Commerce Clause to sustain much of President Franklin D. Roosevelt’s New Deal legislation. Federalism precedents from 1937 to 1995 (and arguably the foundational interpretation of the Commerce Clause by Chief Justice John Marshall in Gibbons v. Ogden) rejected the need to restrict the scope of Congress’s enumerated powers in order to preserve states’ rights. Doctrinally, these New Deal decisions established the principle that the Commerce Clause empowered Congress to regulate intrastate activities with “a close and substantial relation to interstate commerce.” They were summarized, in a 1964 decision upholding the use of the Commerce Clause to enact antidiscrimination legislation, as holding that “the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest.”

Citing Chief Justice Marshall, these later decisions employ what I call “one-box federalism” reasoning:

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4 Lopez, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
5 See infra notes 184-86 and accompanying text.
6 22 U.S. (9 Wheat.) 1, 197 (1824) (“If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . is vested in Congress as absolutely as it would be in a single government . . . .”).
7 In upholding national minimum labor standards, the Court observed that Gibbons clearly authorized such legislation, but the contrary Lochner decision in Hammer v. Dagenhart, 247 U.S. 251, 272 (1918), that labor relations was a local matter, was an anomaly that needed to be overruled. United States v. Darby, 312 U.S. 100, 115-16 (1941). Of course, those who support an active role for the federal judiciary in narrowing Congress’s power do not accept this interpretation of Gibbons. See, e.g., Lopez, 514 U.S. at 593-99 (Thomas, J., concurring).
8 Jones & Laughlin, 301 U.S. at 37.
9 Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964); see also Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423 (1946) (holding that the Commerce Clause authorizes Congress to regulate in “respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make congressional regulation necessary or appropriate”).
the Justices look to see if an activity substantially affects interstate commerce, and, if it does, then Congress’s power is as plenary as if the country was a unitary state. To answer a question posed in the opening paragraph, national majorities may impose their will over contrary views of regional majorities that prevail in one or more state legislatures, as long as the regulated activity has any significant effect beyond state lines.

In today’s integrated national economy, however, there is virtually nothing left of what was, at the Founding, a major area of state legislative competence: in the words of Chief Justice Marshall, “commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.” Reconsideration of the reality of modern interstate economic integration has led Professor Donald Regan to observe that Americans “still do not have an adequate theory of the commerce power.” Chief Justice Marshall’s doctrinal formulation no longer coheres with the current majority’s stated desire to develop a doctrine of judicially manageable standards that can maintain a distinction between what is national and what is local. But the majority’s modification of Marshall’s doctrine—preserving congressional power to regulate activity that substantially affects interstate commerce as long as the interstate effect can be meaningfully distinguished from some area of activity preserved for the states—leads to somewhat bizarre results. After Lopez, Morrison, and Sebelius, intrastate activities with a relatively modest economic effect on interstate commerce—such as a restaurant serving a local customer base that uses some ingredients purchased interstate—can be regulated, presumably because these restaurants can be distinguished from non-commercial activity or local businesses that use purely local ingredients. However, the decision by millions of Americans not to purchase health insurance, with a staggering effect on the

14 See, e.g., Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (holding that racial discrimination in private restaurants significantly burdens interstate commerce, thereby bringing some activities within private, local restaurants into Congress’s regulatory ambit). Chief Justice Roberts favorably distinguished the Civil Rights Act’s bar on discrimination by restaurant owners in McClung from Obamacare. Sebelius 132 S. Ct. at 2590.
cost of insurance premiums for others, cannot be regulated under the Commerce Clause, because the majority of Justices could see no principled way to distinguish this “non-activity” from any other non-commercial decision by individual citizens.\(^{15}\)

In contrast to the checkered history of active judicial arbitration of federalism disputes in the United States, Canadians seeking to challenge overreaching by the federal Parliament or provincial legislatures have always had recourse to a judicial umpire. Broadly worded constitutional text, allocating power to the federal Parliament to “make Laws for the Peace, Order, and good Government of Canada” and with regard to the “Regulation of Trade and Commerce,”\(^{16}\) has been explicitly modified to protect provincial prerogatives. In contrast to the American doctrine allowing Congress to regulate intrastate activities that substantially affect interstate commerce, these broad grants of federal authority in the Canadian Constitution have been narrowed to permit legislation only where Canadian justices are satisfied that provincial legislatures cannot solve the problem and a national solution is necessary.\(^{17}\) The process by which a court narrows a grant of power to the national government in order to ensure that its exercise does not intrude on the legislative jurisdiction of a subnational legislature is what I call “two-box federalism.” Complementing this approach, Canadian courts inquire into the object and purpose of legislation (its “pith and substance”) to ensure that the claimed anchor in an enumerated federal power is not pretextual.\(^{18}\)

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15 **Sebelius**, 132 S. Ct. at 2587; id. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

16 British North America Act, 1867, 30 & 31 Vict., c. 3, section 91 (U.K.). It was renamed the Constitution Act, 1867, by the Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C. 1985, app. II, no. 44 (Can.). As part of the repatriation of Canada’s constitutional documents, this statute was renamed the Constitution Act, 1867, by the Constitution Act, 1982, an act of the Canadian Parliament incorporated into Schedule B of the Canada Act, c. 11 (U.K.). With respect to Canadian sensibilities, for the avoidance of confusion for American readers, I continue to refer to the 1867 statute by its original name.

17 **See Gen. Motors of Can. Ltd. v. City Nat’l Leasing, [1989] 1 S.C.R. 641, 643 (Can.)** (allowing the federal government to legislate under the trade and commerce power of section 91(2) only where “the provinces jointly or severally would be constitutionally incapable” of legislating, and “the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country”). For the purposes of this article, which primarily discusses the Canadian Supreme Court, the Canadian Constitution, and its Framers, the Author has capitalized Canadian Constitution, Supreme Court, and Framers.

These doctrines remain vibrant not only because current judges tend to follow long-established doctrine, but also because they are consistent with Canadian constitutional politics that views federalism strategically: it is better to allow divergent provinces to adopt different policies than to risk a national policy that may be substantively objectionable. In short, Canadians want to maintain a clear line between “what is national and what is local” because so many Canadians perceive themselves as part of a national minority that is a regional majority: lacking confidence that national majorities share their values, Canadians prefer a more decentralized system of governance. Because the Westminster system of responsible government enforced by party discipline provides an insufficient check on federal legislators to preserve this distinction, Canadians turn to the Supreme Court to arbitrate federal-provincial issues of power allocation.

This Article summarizes the salient aspects of Canadian federalism jurisprudence relevant to a comparative analysis, and draws insights from the Canadian experience to shed light on current American controversies. Part I offers some brief thoughts on the current state of American constitutional doctrine, suggesting that it fails to achieve the goal of a coherent and meaningful line between what is national and what is local. Part II discusses the origins of Canadian constitutional federalism and the significantly greater restraints that Canadian judges impose on Parliament than American judges impose on Congress. This reflects a consistent goal of protecting regional majorities that will always be national minorities, particularly French-Canadians in Quebec. Part III traces significant differences between Canada and the United States relevant to the question of judicial arbitration of federalism disputes. Two key differences emerge. Unlike the United States’ demography, Canadian demography features a large linguistic community that is a national minority but a clear majority in a large province. In addition, a number of institutional factors render Parliament less responsive to regional interests than Congress. As a result, Canadians value provincial autonomy over the long-run. In contrast, throughout the history of the United States, the cause of “states’ rights” has primarily been advocated by those who happen to currently find themselves in a minority in Washington, without any long-term view that they will remain a national political

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20 See infra notes 142-57 and accompanying text.
minority. Americans confident that their views can prevail in Washington are not willing to strategically forego implementation of favored policies in deference to states’ rights. Part IV analyzes two important aspects of Canadian constitutional doctrine that limit much federal legislation to situations where provinces are unable to act, suggesting that these doctrines reflect both historical and contemporary Canadian constitutional values. Next, the Article questions whether current American doctrine similarly reflects historical and contemporary American federalism values. The Article suggests that this comparative analysis presents American Justices with a clear opportunity to enhance the judicial manageability of federalism standards by borrowing two doctrines from north of the border. These doctrines would significantly limit the ability of national majorities to adopt legislation preventing national minorities that control one or more state legislatures from enacting policies that, in the majority’s view, harm the welfare of the entire nation. The Article concludes by questioning whether this importation reflects American constitutional values, and, if not, whether the search for a judicial standard to distinguish what is national and what is local should be abandoned.

I. SOME BRIEF OBSERVATIONS ON AMERICAN CONSTITUTIONAL FEDERALISM AFTER SEBELIUS

Federalism issues are hugely significant in their own right, but also arise in the context of broader questions of constitutional politics in each country. Perhaps the guiding project of recent American constitutional history is the development of doctrines designed to limit judicial discretion so as to inhibit results based on policy preferences. The concept of “judicially manageable standards,” it would seem, derives in large part from the Supreme Court’s desire to create doctrines that can be applied by American judges without regard to their own personal policy preferences, based on principles greater than the ideology of five men and women currently on the Supreme Court.

22 See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962) (arguing that judicial review “thwarts the will of representatives of the actual people of the here and now”); DAVID A. STRAUSS, THE LIVING CONSTITUTION 2 (2010) (describing the problem of constitutional law as to create doctrines that are “living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation”); id. at 31 (observing originalist objections that “the living Constitution is infinitely flexible and has no content other than the views of the person who is doing the interpreting”).
A judicially manageable standard for the scope of Congress’s power to regulate interstate commerce, initially set forth by Chief Justice Marshall, was a doctrine dividing the topics of legislation between those with a substantial effect on other states and those activities wholly internal to a single state. However, in the modern economy, this division of legislative authority no longer provides any meaningful distinction between matters that are national or local in scope. As Justice Clarence Thomas has consistently observed, in modern times the test permitting Congress to regulate activity that has a substantial effect on interstate commerce is a “malleable standard” with “virtually no limits.”

Another doctrinal standard that has seemed to find favor with regard to the broad interpretation of the Equal Protection Clause of the Fourteenth Amendment focuses on the political process. Close judicial scrutiny of legislation, with the attendant risks of judicial policymaking, is reserved in those cases for claims that state actors have applied legislation differentially in a manner that, in the Court’s view, warrants “extraordinary protection from the majoritarian political process.” Otherwise, the Court will find a violation of the equal protection guarantee only when the differential treatment of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational. This is because, in the Court’s view, the “Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

In the trilogy of recent five-to-four decisions limiting congressional power to regulate interstate commerce, the dissenters appear to embrace this view. Justice David Souter forcefully argued in Morrison that the majority’s standard was not only incoherent but was also

26 Id. (footnote omitted).
fundamentally flawed because the majority rejected “the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.” Justice Ruth Bader Ginsburg noted that in addition to the doctrinal restraints imposed by *Lopez* and *Morrison*, there “is a formidable check on congressional power: the democratic process.”

The current majority, however, rejects that view. This was best articulated in *Lopez*, where Justice Anthony Kennedy opined that the political process lacked “structural mechanisms” to require federal officials to observe an appropriate federal-state balance, adding that “the momentary political convenience often attendant upon their failure to do so [argues] against a complete renunciation of the judicial role.” Based on the Supreme Court’s role as final constitutional arbiter and the *Sebelius* majority’s view of the original understanding of the Framers, the majority sought to retain the Court’s role as a meaningful arbiter of constitutional politics—when it is not appropriate for a national majority to impose its policy preferences on a regional majority. However, with the exception of Justice Thomas, the Justices have eschewed rejection of the substantial effects test. Rather, the test is retained, with the following additional exceptions: (1) Congress’s regulatory authority is limited to prohibitions or limits on individuals’ affirmative conduct (hence *Sebelius* held that Congress cannot require a person to affirmatively purchase health insurance); (2) the regulated conduct or activity must be commercial (hence, *Lopez* held that Congress cannot directly proscribe gun possession near a school and *Morrison* rejects congressional regulation of violence against women); and (3) the government’s justification for national control must contain a limit that would preserve some matters to local control.

28 *Morrison*, 529 U.S. at 647 (Souter, J., dissenting).
29 Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part and dissenting in part) (citing *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (“[E]ffective restraints on [the commerce power’s] exercise must proceed from political rather than judicial processes.”)). She further observed that the precedents reaffirmed in *Sebelius* would permit Congress to outlaw both the purchase and home production of any meat, fish, or dairy products, but that the prospect of a vegetarian state would not justify limiting congressional power over the sale of goods in an integrated economy. *Id.* at 2625.
31 *Morrison*, 529 U.S. at 616–17 n.7.
32 *Sebelius*, 132 S. Ct. at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
Jesse Choper, a critic of the heightened role of the Supreme Court as a federalism umpire, has identified problems with the current majority’s efforts to achieve “an analytically sound and workable standard” to delineate what is national and what is local.\(^3\) Choper rightly observes that *Lopez* and *Morrison* sought to distinguish economic/commercial activity and noneconomic/non-commercial matters,\(^3\) but that this is not much of a limit (Congress could criminally punish or create federal tort actions for any wrongs that had any economic component, including theft), and the standard is analytically challenging in light of the law and economics movement’s successful effort to re-characterize many activities as having economic components.\(^3\) One of Choper’s colleagues and one of his former students, Robert Cooter and Neil Siegel, subsequently argued that Article I, Section 8 permits Congress to solve what economists call “collective action problems,” and that many economic activities that have some effect on interstate commerce can be adequately regulated by each state without affecting the general welfare, while regulation of some noneconomic activity can generate significant collective action problems.\(^6\)

Likewise, an effort to distinguish national and local matters by preserving for states those areas of legislative policy that have traditionally been exercised by the states is neither analytically sound nor workable.\(^7\) As Choper notes, previous efforts to define “areas of traditional state concern” with regard to immunity from federal taxation or Tenth Amendment protection from federal regulation were abandoned in failure.\(^8\) Indeed, accepting a basic precept of constitutional federalism that the central government may legislate in areas where sub-national governments are incompetent to do so, changing cir-

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\(^3\) Id.

\(^3\) Id. at 737–38.


\(^7\) Indeed, even in the context of well-established “two-box federalism” that consciously seeks to preserve areas of local control that have been specifically granted to subnational bodies by the Constitution, as in Canada, the claim that federal powers ought to be limited in this way has been harshly criticized. See 1 Peter W. Hogg, *Constitutional Law of Canada* § 17.3(d) (5th ed. 2007) (looseleaf) (discussing the now-overruled decision in *The Queen v. Hauser*, [1979] 1 *S.C.R.* 984 (Can.), suggesting that Parliament’s authority to legislate under the peace, order, and good government (POGG) power was restricted to “new” matters that had not been traditionally regulated by the provinces or the federal government). Throughout this Article, citations of this source refer to Peter Hogg’s 2007 two-volume edition, which is the most up-to-date edition available.

\(^8\) Choper, *supra* note 33, at 754 (internal quotation marks omitted).
cumstances may require national legislation in areas traditionally left to states. For example, federal legislation regulating industrial air pollution is uncontroversial, but arguably state common-law-based nuisance rules make even this area one of “traditional state regulation” in the pre-industrial era.

Although the currently prevailing five-Justice majority that supports active judicial policing of federalism has insisted on standards that draw distinctions between “what is truly national and what is truly local,”40 they have not articulated a clear basis for judges to draw that distinction. To be sure, the divisions within their ranks on the question of whether Congress has the constitutional authority to outlaw home-grown marijuana for medical purposes suggests that Justices are not pursuing short-term tactical political goals.41 However, it is difficult to identify the strategic constitutional politics, much less a coherent and judicially manageable standard, in any of the Court’s tests for determining when national majorities may not impose their will on national minorities who are majorities in one or more states.

The doctrine currently embraced by five of the Justices holds that Congress may regulate almost all economic activity that has a substantial effect on interstate commerce, but not economic “inactivity” that has a similar economic effect.42 Whatever its merits or demerits, this doctrine utterly fails to serve the goal of distinguishing what is national from what is local. As Chief Justice John Roberts and Justice Ginsburg both noted, the effect on interstate commerce that justifies regulating inactivity lies in the harm caused by “free riding” by those who do not engage in some desired economic activity.43 Congress can, according to a shifting five-Justice majority, eliminate this problem by imposing a tax on free riders.44 The key question for federalism—when can a national majority impose its will on a national minority that may be a majority in one or more states—is not implicated here.

40 See Gonzales v. Raich, 545 U.S. 1 (2005). Of the current five-four majority on federalism issues, Justice Kennedy joined the Court’s liberals in upholding a complete ban on marijuana possession and manufacture, deferring to Congress’s judgment that deregulating home-grown medical marijuana would affect the national marijuana market; Justice Antonin Scalia concurred because barring home-grown marijuana was necessary and proper to accomplish the national ban on marijuana; Justice Thomas (joined by Rehnquist, C.J., and O’Connor, J.) dissented. Id. at 3–4.
42 Id. at 2594 (Roberts, C.J.); id. at 2611 (Ginsburg, J., concurring in part and dissenting in part).
43 Id. at 2594 (Roberts, C.J.).
The chosen doctrine—preserving Congress’s ability to regulate intrastate activity that has a substantial effect on interstate commerce, but only if the effect on interstate commerce that justifies federal legislation contains a limiting principle—is neither a meaningful nor a coherent limit on what is national and what is local. Advocates of “two-box federalism” would do well to look elsewhere. Canada provides an insightful alternative.

II. CANADIAN CONSTITUTIONAL FEDERALISM: ORIGINS AND CURRENT DOCTRINE

The origins of Canadian federalism can be traced back to 1774. As a revolutionary spirit was arising in the thirteen colonies that would come to form the United States, the British Parliament enacted the Quebec Act. Among its key provisions, the Act permitted Catholics to participate in government, and permitted the Province of Quebec to use French civil law to govern “Property and Civil Rights” in the colony. (This term covers what English common law-

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44 Another aspect of Sebelius that raises coherency problems is Chief Justice Roberts’s treatment of the political process. The adverse effect on interstate commerce of economic inactivity is the potential for inactive individuals to free ride, which is precisely why Congress enacted the individual mandate in Obamacare. Id. at 2620 (Ginsburg, J., concurring in part and dissenting in part). The Chief Justice makes the activity-inactivity distinction workable, if not entirely coherent, by recognizing that Congress can address the free rider problem by taxing inactive individuals. Id. at 2599 (Roberts, C.J.). The conservative dissenters claim was not that taxing free riding noninsured was beyond the taxing power, but that Congress had not in fact intended the individual mandate to be a tax; they noted the significant political costs that would have arisen if Congress had explicitly invoked the taxing power, and they concluded that this sort of explicit invocation ought to be required. Id. at 2650-56 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting). The Chief Justice dismissed this argument with the general canon that statutes should be interpreted to save their constitutionality. Id. at 2594 (Roberts, C.J.). On the other hand, when it came to the spending power, the majority held that Congress could not threaten to withhold all federal funding for Medicaid to states that chose not to accept an expansion of that program to cover median-income uninsured residents. Id. at 2606. Dissenting, Justice Ginsburg correctly observed that, under the Court’s precedents, Congress could have constitutionally repealed Medicaid, adopted a new statute (I’ll call it “Obamacare”), and imposed as a condition of acceptance of any Obamacare funds that states expand the their previous coverage. Id. at 2635–36 (Ginsburg, J., concurring in part and dissenting in part). In apparent contradiction to his earlier reasoning, however, the Chief Justice dismissed Justice Ginsburg’s observation in a footnote, noting that the process of repealing Medicaid and reenacting an entirely new statute would entail significant political costs, and implying that the judiciary properly imposes these costs on Congress to ensure that conditional spending programs are not unduly coercive. Id. at 2605 n.12 (Roberts, C.J.).

45 R.S.C. 1985, app. II, no. 2 (Can.).

46 Id. section 8. The perception that the Act’s strategic purpose was to facilitate the continuing loyalty of French settlers to the British Crown upset Americans to the point that
yers know as private law concerning contract, property, torts, wills, and trusts.)

In the 1860s, various arrangements to accommodate the Francophone and Anglophone communities in the now-renamed Province of Canada (roughly modern-day Ontario and Quebec) had proven unsatisfactory, and there was growing sentiment for a union with the then-separately administered colonies in modern-day Atlantic Canada. Federalism provided the solution: an imperial statute, amendable only by the British Parliament, would allocate responsibilities between the federal and provincial governments. While the American confederation was an aggregation of existing states, the major part of the creation of the Canadian confederation was devolution: the division of the unitary Province of Canada into two new provinces, Anglo-dominated Ontario and Franco-dominated Quebec, with the addition of two additional maritime provinces. As described by the leading Quebecois newspaper, a complete union with a legislature apportioned by population to reflect the Anglophone majority “cannot and will not be accepted by the French Canadian population.” Such a concept would put at risk the Quebecois’ cherished civil law and religious institutions. However, the genius of what would become the British North America Act of 1867 (“BNA Act”) was to a Francophone-majority province that put “under the exclusive control of [Quebec] those questions which [the Quebecois] did not want the fanatical partisans of [George Brown, the Liberal Party leader in On-

Thomas Jefferson included its passage as a grievance against King George III in the Declaration of Independence. The Declaration of Independence para. 3 (U.S. 1776) (expounding that George III combined with the British Parliament to enact “pretended legislation” for “abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.”).

47 1 HOGG, supra note 37, §21.2.
48 See, e.g., Canada’s Founding Debates (Janet Ajzenstat et al. eds., 1999), and specifically Sir John A. MacDonald’s February 1865 speech, id. at 277-84. The Province of Quebec had been divided by the Constitutional Act, 1791 (U.K.), R.S.C. 1985, app. II, no. 3 (Can.), into Upper Canada and Lower Canada, separated by the present Ontario/Quebec border. These two provinces were then fused into a single Province of Canada by the Union Act, 1840 (U.K.), R.S.C. 1985, app. II, no. 4 (Can.); see 1 HOGG, supra note 37, §2.3(b).
tario] to deal with.\footnote{Silver, supra note 50, at 40 (quoting Réponses aux Censeurs de la Confédération 47–49 (1867)). Although not as authoritative as the American Federalist Papers, this primary source material seems roughly analogous, reflecting a widely dispersed response by pro-confederation advocates to critics.}

Another “father of Confederation,” Hector Langevin, explained that all questions affecting Francophones as such would be considered in Quebec City. Historian A.I. Silver summarized these views: controversies assigned to the federal Parliament in Ottawa would divide Canadians as liberals or conservatives but not by nationality.\footnote{Silver, supra note 50, at 40. It is important to emphasize that Langevin’s focus was on how issues divided the Canadian people, not politicians. The notion that issues dividing Canadians as “liberals or conservatives” were assigned to the national government assumes that at any given time provincial officials might disagree. An issue would not divide Canadians in these terms unless a clear majority in one or more provinces systematically and continuously favored one set of policies contrary to the national majority. The historic example was the need to preserve the linguistic vibrancy of the Francophone community; the modern example might be control of natural resources. In contrast with this approach, the modern-day constitutional debates between Ottawa politicians who are “nationbuilders” and provincial politicians who are “province-builders” may be useful in reshaping constitutional politics, but are not directly relevant to the question of the judicial role in preserving areas of provincial autonomy. Cf. Richard E. Simeon, Criteria for Choice in Federal Systems 8 Queen’s L.J. 131, 137–38 (1981). Indeed Professor Simeon concedes that modern constitutional debates may be seen as bureaucratic competition rather than struggles among the citizenry. Id. at 141.}

Canada’s founding document thus assigned to provinces, among other things, exclusive power over “Property and Civil Rights” and control of education subject to limited federal oversight.\footnote{British North America Act, 1867, 50 & 31 Vict., c. 3, Sections 92(13), 93 (U.K.). For a discussion of a critical moment of Canadian constitutional politics involving Parliament’s authority to override provincial legislative choices regarding education, see infra notes 146–59 and accompanying text.}

Consistent with Langevin’s explanation, the document assigns a broad range of economic matters to the federal Parliament.\footnote{Section 91 of the BNA Act grants Parliament the authority over regulation of trade and commerce (subsection 2), navigation and shipping (subsection 10), seacoast and inland fisheries (subsection 12), inter-provincial or international ferries (subsection 13), currency (subsection 14), banking, paper money, and legal tender (subsections 15-16, 20), weights and measures (subsection 17), bills of exchange and promissory notes (subsection 18), interest (subsection 19), bankruptcy and insolvency (subsection 21), and intellectual property (subsections 22-23). British North America Act, 1867, 30 & 31 Vict., c. 3, section 92 (U.K.). Section 92(10) exempts from provincial control, and grants to Parliament, authority over steamship lines, railways, canals, telegraphs, and other inter-provincial “Works and Undertakings,” international steamships, and other works that are declared by Parliament to be “for the general Advantage of Canada.” Id. at section 92(10).}

When we consider the views of the Quebecois supporters of confederation in conjunction with the much more centralizing vision of the leader of confederation and Canada’s first prime minister, Sir John A. MacDonald, it is reasonably clear that the Fathers of Confed-
eration envisioned a federal government stronger than that which existed in the United States prior to the enactment of the Civil War Amendments.\footnote{See \textbf{Garth Stevenson}, \textit{Unfulfilled Union: Canadian Federalism and National Unity} 28 (5th ed. 2004) (discussing how MacDonald was convinced that the American Civil War might have been avoided if state power had not been unlimited by the U.S. Constitution).} However, until 1949, the final judicial arbiter of the BNA Act was not the Supreme Court of Canada (“SCC”) but a body formally known as the Judicial Committee of the Privy Council, informally the “Law Lords,” British judges appointed to that high office to interpret the common law, domestic and imperial statutes enacted by the British parliament, as well as “local” legislation enacted by the parliaments of the Dominions and Colonies.\footnote{For an overview, see \textbf{Hogg}, supra note 37, §8.2.}

The Law Lords narrowly construed the scope of federal powers. The drafters of the BNA Act were of course well aware of the language of the United States Constitution, so the choice of words in assigning to the federal Parliament authority over “Trade and Commerce”\footnote{British North America Act, 1867, 30 & 31 Vict., c. 3, section 91(2) (U.K.).} must have reflected a considered decision to give Parliament broader authority than Congress, whose economic regulatory power only covered “Commerce with foreign Nations, and among the several States.”\footnote{U.S. \textsc{Const.} art. I, §8.} The Law Lords, however, explicitly held that the federal power had to be narrowly construed so as to protect provincial power over property and civil rights. Their Lordships (in a method of reasoning echoed over a century later by Justice Clarence Thomas\footnote{United States v. Lopez, 514 U.S. 549, 588–89 (1995) (Thomas, J., concurring).}) noted that the BNA Act explicitly assigned a variety of commercially related matters to the Parliament, including shipping, banking, bills of exchange, and bankruptcy, and thus reasoned that these provisions would be superfluous if the words “Trade and Commerce” were given their ordinary meaning.\footnote{\textit{Cf.} Citizens Ins. Co. of Can. v Parsons, [1881] 7 A.C. 96, 112 (U.K.P.C.).} More importantly, to protect provincial prerogatives, their Lordships held that federal and provincial powers “must be read together, and the language of one interpreted, and, \textit{where necessary, modified, by that of the other}.”\footnote{\textit{Id.} at 109 (emphasis added).} As a venerated Canadian Supreme Court Justice, Lyman Duff, later explained,

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from seri-
ous curtailment, if not from virtual extinction, the degree of autonomy which...the provinces were intended to possess.

This classic exemplar of what I call “two-box federalism” was illustrated in the judgment of Viscount Richard Haldane in In re Board of Commerce Act, 1919, & the Combines & Fair Prices Act. Parliament had extended price control legislation, initially enacted to respond to the shortages created by World War I, to respond to concerns about post-war price gouging. Notwithstanding the broad wording of section 91(2) authorizing Parliament to legislate with regard to “Trade and Commerce,” and the lack of any serious suggestion that price gouging was one of the matters that Cartier, Langevin, and other Quebecois Framers feared subjecting to “fanatical partisans” in Ontario, Haldane wrote that “[i]t is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided.”

The Law Lords were so vigilant in protecting provincial prerogatives from federal encroachment that a prominent Canadian constitutional commentator labeled them as the “[W]icked Stepfathers of Confederation.” The SCC has explicitly noted that in the years following the end of British appeals from their decisions, the trade and commerce power has “enjoyed an enhanced importance.” However, the Canadian judiciary has adhered to some lasting principles their Lordships articulated about respecting the diverse views of Canadi-

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65 The federal Parliament has traditionally been authorized to enact emergency measures in wartime under the general authority of section 91 to enact measures relating to “peace, order, and good government.” British North America Act, 1867, 30 & 31 Vict., c. 3, section 91 (U.K.). This is described in Hogg, supra note 37, §17.4(b).
66 For a discussion of the massive economic changes wrought in the post-war period that led to widespread concern that judicial resolution of private economic disputes was inadequate, see Bernard J. Hibbins, A Bride for Leviathan: The Supreme Court and the Board of Commerce, 21 OTTAWAL. REV. 65, 67–72 (1989).
67 In Canadian English, “civil rights” refers to private rights in dealing with others: the topics of property, torts, contracts, etc. What Americans call “civil rights”—freedom from discrimination, as reflected, for example, in the pathbreaking Civil Rights Act of 1964, is called “human rights” in Canada. See, e.g., M. v. H., [1999] 2 S.C.R. 3, 168 (Can.) (describing prohibitions on employment discrimination based on sexual orientation in the Canadian Human Rights Act and the human rights acts of each province).
68 Ibid. of Commerce [1922] 1 A.C. at 197 (footnote added).
ans. Principally, Canadian judges continue to adhere to an important concept enunciated by the Law Lords:

In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity... has been reached... 71

Thus, the invigorated federal authority over trade and commerce still features significant limitations. Current doctrine acknowledges that judicial interpretation (1) does not correspond with the literal meaning of the text, (2) includes international and interprovincial commerce (but does not include the authority to regulate intraprovincial transactions that substantially affect such commerce72), and (3) creates a category called “general regulation of trade affecting the whole dominion.”73 The final category permits a general regulatory scheme that was overseen by a federal agency aimed at regulating trade as a whole, but not any “particular business or trade.”74 Moreover, federal legislation in the third category is only permissible if the SCC is persuaded that the legislation is “of a nature that the provinces jointly or severally would be constitutionally incapable” of legislating, and “the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.”75

Indeed, in 2011 the SCC unanimously held that the trade and commerce power did not authorize the federal Parliament to enact a statute providing comprehensive regulation of the Canadian securi-

71 Bel. of Commerce [1922] 1 A.C. at 200-01 (emphasis added).
72 Professor Hogg describes the Privy Council decision in Toronto Electric Commissioners v. Snider [1925] A.C. 596 (U.K.P.C.), as rejecting the federal government’s claim that general aspects of the economy such as labor “were governed by economic forces that ignored provincial boundaries” and thus intra viresthe federal authority to regulate interprovincial commerce. "Hogg, supra note 37, at §20.2(a). Hogg observes that “the pervasiveness and interdependence of the legislations’ subject matters was not sufficient to carry them... into the federal fold.” Id. A notable illustration of the Canadian refusal to allow federal regulation of intraprovincial operations with substantial interprovincial effects is The King v. Eastern Terminal Elevator Co. [1925] S.C.R. 434, 435-36 (Can.), where the SCC invalidated a federal statute regulating grain elevators, despite the fact that almost all grain stored in elevators is exported beyond provincial boundaries.
ties industry (akin to the powers delegated by Congress to the Securities and Exchange Commission, which has been upheld in the United States because all aspects of the registration, sale, and trading of securities have a substantial effect on interstate commerce). In the Securities Act Reference, the SCC acknowledged that some aspects of the securities market are “national in scope and affect the country as a whole.” The court emphasized that the existing doctrinal tests “share a common theme—namely ‘that the scheme of regulation [must be] national in scope and that local regulation would be inadequate.’” The legislation must “invok[e] Parliament’s unique ability to effectively deal with economic issues in this category.”

The SCC rejected the argument that comprehensive national regulation of securities was essential. The court acknowledged that there might be a need for federal regulation to protect the economy against “systemic risks” posed by a domino effect of default by one market participant, and also that national data collection might be essential to effective regulation of securities markets. However, the Act’s comprehensive scope also entailed detailed regulation of registration of corporations and brokers; these matters have been traditionally regulated by provinces, and the court found no reason why the national economy depended on uniformity in that regard.

76 In upholding legislation granting the federal Securities and Exchange Commission broad powers with regard to regulating business relating to securities, the U.S. Supreme Court wrote,

This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress deems inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

We need not attempt here to draw the outer limits of this plenary power. It is sufficient to reiterate the wellsettled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.


78 Id. at 874 (quoting City Nat’l Leasing [1989] 1 S.C.R. at 678).

79 Id. at 875–76.

80 Id. at 888. The court had previously applied a flexible approach, reaffirming that provinces retained jurisdiction over the investor-protection aspects of securities regulation, while also allowing the federal government to regulate insider training of federally chartered corporations, and refusing to interpret the federal statute as preempting provincial regulation. Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 (Can.). Here, the court found that the proposed federal statute “overreaches the legislative interest of the federal government” by going beyond genuine national goals “such as management of
nificantly, the fact that Parliament conditioned the application of the act in any province on each province’s choice to opt in to the program (ostensibly for political reasons) was evidence that national uniformity was not essential.81

The SCC distinguished the federal Competition Act (Canada’s equivalent of the United States’s Sherman Antitrust Act), which it had previously upheld under the trade and commerce power, reasoning that “[a]nti-competitive behaviour subjected to weak standards in one province could distort the fairness of the entire Canadian market” and the failure “by one province to legislate or the absence of a uniform set of rules applicable throughout the country would render the market vulnerable.” 82 The court emphasized that legislation is not constitutional simply because justices conclude “it may be the best option from the point of view of policy.” 83 It suggested that Parliament’s goals regarding securities regulation could be accommodated by “co-operative federalism” with an agreed-upon package of legislation to be adopted by federal and provincial legislatures. 84 Finally, the recent decision would appear to significantly narrow, if not foreclose, the hope for nationalists in language from City National Leasing that the absence of any criterion was not necessarily determinative. 85 Thus, for Parliament to exercise regulatory power over general trade and commerce, it must persuade a majority of the justices either that provinces lack jurisdiction to regulate (either individually or cooperatively), or that national uniformity is essential. Clearly, Parsons 86 lives; the fact that Parliament might perceive that a particular policy is important to implement throughout Canada and that one or more provincial legislatures might not share this view is insufficient to justify federal regulation.

81 Id. at 891; see Jean Leclair, “Please, Draw Me a Field of Jurisdiction”: Regulating Securities, Securing Federalism 51 SUP. CT. L. REV. (2d) 555, 573 (2010) (calling this political move “constitutional harakiri”).
82 Sec. Act, [2011] 3 S.C.R. at 876-77. Although the support for the conclusion that provinces are unable to enact competition laws has been strongly criticized, see, e.g., Nousra Karazivan & Jean-François Gaudreault-DesBiens, On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation, 49 CAN. BUS. L.J. 1, 16-17 (2010), the more recent decision belies the authors’ prediction that the provincial inability test sets a “very low” threshold for provincial inability. Id. at 22.
84 Id. at 867 (internal quotation marks omitted).
Other broadly worded grants of federal power in the BNA Act have likewise been interpreted narrowly with a key focus on what leading Canadian scholar Peter Hogg calls “provincial inability.” 87 Most prominently, courts have narrowed the POGG power (section 91’s preamble contains a broad grant of power to the federal government to legislate with regard to the “Peace, Order, and good Government of Canada”) 88 to three discrete situations. Parliament may legislate even in areas of clear provincial authority during times of national emergency.89 Federal legislation is also appropriate with regard to matters that do not seem to fall within any of the specific matters listed for the federal Parliament or provincial legislatures in the BNA Act.90 Finally, the courts have over time created and expanded an authority under the POGG power for Parliament to legislate with regard to matters of “national concern.” Although language in a variety of opinions provide mixed messages about what constitutes “national concern,” Professor Hogg notes that the one coherent theme is the inability of provinces to act, rather than the perceived desirability or preference for a national solution.91 Thus, the SCC has upheld federal legislation regulating aeronautics,92 national capital regional planning,93 marine pollution,94 and nuclear power.95 Justice Gerald Le Dain expressly relied on the provincial inability test, which, in a way, dates back to two older Privy Council decisions, one of which generally suggested that “some matters, in their origin local and provincial, might attain such dimensions as to effect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for

87 1 HOGG, supra note 37, §17.3(b) (internal quotation marks omitted).
90 Examples include the power to enter into treaties with foreign nations (at confederation, Canada was still part of the British Empire and did not enter into treaties on its own behalf), regulation of offshore material beyond provincial jurisdiction, and the use of languages in dealings with the federal government. 1 HOGG, supra note 37, §17.2. Because section 92(11) only empowers provinces to legislate in regard to “The Incorporation of Companies with Provincial Objects,” the POGG power is the source of federal authority to incorporate corporations. British North America Act, 1867, 30 & 31 Vict., c. 3, section 92(11) (U.K.); Citizens Ins. Co. of Can. v. Parsons, [1881] 7 A.C. 96 (U.K.P.C.).
91 1 HOGG, supra note 37, §17.3(b).
their regulation,\textsuperscript{96} and a more recent declaration that the POGG power would include a matter that “goes beyond local or provincial concern or interests and must, from its inherent nature, be a concern of the Dominion as a whole.”\textsuperscript{97} This reflects classic “two-box” federalism reasoning: the Privy Council noted that if the POGG power were not “strictly confined” to “such matters as are unquestionably of Canadian interest and importance, . . . there is hardly a subject enumerated in s. 92 upon which [the federal Parliament] might not legislate.”\textsuperscript{98}

The view that the federal legislature has authority to legislate where the public policy objective can only be achieved through federal legislation is an essential one for any modern state. At the same time, the requirement of a showing of provincial inability provides an important limit on the scope of federal regulatory power, with significant actual effects reflecting legislative policymaking. A prime illustration is labor relations. The narrower scope of Parliament’s trade and commerce power, in contrast to the broader scope of Congress’s authority to regulate interstate commerce, means that the regulation of management-labor relations is largely a matter of federal regulation in the United States,\textsuperscript{99} whilst in Canada labor relations are largely governed provincially.\textsuperscript{100} Although the rights of employers and workers with regard to organization and collective bargaining obviously have a national economic impact, the Canadian experience shows that provinces providing greater protection for workers can co-exist with neighbors providing more freedom for employers (although a significant reality is that the spectrum of labor relations policies among Canada’s ten provinces is not that varied, and no province has


\textsuperscript{97} Attorney Gen. for Ont. v. Can. Temperance Fed’n, [1946] A.C. 193, 193 (U.K.P.C.). As a further practical limit on judicial expansion of the POGG power, the court has held that if a matter qualifies as one of national concern, then provinces lack the power to legislate in that area. Crown Zellerbach, [1988] 1 S.C.R. at 433; cf. Walash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 577 (1886) (providing that railroad rates for interstate shipments were “of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations”).

\textsuperscript{98} Local Prohibition Case [1896] A.C. at 360-61. At the same time, much of the POGG powers relate to the sort of economic regulation generally assigned to Parliament, consistent with Hector Langevin’s view that these issues would tend to divide Canadians ideologically rather than demographically.


openly tried to attract industry by deliberately and significantly slashing worker protection laws).\textsuperscript{101}

Canadian jurisprudence offers a further limiting principle, applicable to both federal and provincial legislation: courts review legislation that superficially appears to fall within the jurisdiction of the enacting legislative body to determine if the legislation’s “pith and substance” relates to the head of power under which authority is asserted. If, instead, the court finds the assertion of authority to be pretextual, the legislation will be found invalid.\textsuperscript{102}

Two prominent cases illustrate this important principle. In the Margarine Reference,\textsuperscript{103} the SCC invalidated a federal criminal statute banning the manufacture of margarine.\textsuperscript{104} Although precedents had broadly construed Parliament’s criminal law power,\textsuperscript{105} the court found that matters in relation to criminal law ordinarily concerned public peace, order, security, health, and morality. In contrast, the court found that, in regard to the margarine ban, the “object... is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter.”\textsuperscript{106} To benefit one group as against competitors was, in the court’s view, “to deal directly with the civil rights of individuals in relation to particular trade within

\begin{footnotes}
\item[101] Applying the doctrinal tests set forth above would suggest the hypothetical possibility that federal labor relations legislation could be justified under the trade and commerce test if in fact one or more provinces so slashed worker protection that the other provinces were forced to join a “race to the bottom.” (However, when I posed this hypothetical to a leading Canadian constitutional law scholar, the fiction of provincial legislatures making this policy choice was too great to allow him to supply an answer!) Earlier work implies that even if provincial inability could be established with regard to labor relations, the topic must remain under provincial control because labor relations is too broad a matter, and has been subject to provincial regulation for too long, to permit federal control. See, e.g., W.R. Lederman, Unity and Diversity in Canadian Federalism: Ideals and Methods of Modernization, 14 ALBERTA L. REV. 34, 46–47 (1976).
\item[102] Canadian judges sometimes use the phrase “colourable” to describe pretextual legislation whose pith and substance is not within the authority of the enacting legislative body, 1 Hydro-Quebec v. Reklaw, supra note 37, §15.5(g), and polite judges are not always explicit in concluding that claimed authority was pretext. The text is intended to include statutes that judges find to primarily concern matters ultra vires the enacting legislative body, even if the legislators intended in good faith to legislate within their powers.
\item[103] Reference re Validity of Section 5(a) of the Dairy Indus. Act (Margarine Reference), [1949] S.C.R. 1 (Can.).
\item[104] Id. at 54, 68. Related provisions banning the importation or interprovincial sale of margarine were upheld under the trade and commerce power.
\item[105] Although the Quebecois eagerly sought British permission to use French law for civil matters, the application of English criminal law was less controversial. Because the Confederation bargain sought to protect provincial autonomy primarily in areas where the Quebecois strongly valued self-governance, criminal law has always been a federal question in Canada.
\end{footnotes}
the provinces. Thus, the legislation was properly characterized as a matter of property and civil rights, rather than a matter of criminal law. *R. v. Morgentaler* involved a Nova Scotia statute making it an offense to perform an abortion outside a hospital. Health care has long been recognized as a provincial matter in Canada, based both on the assignment of matters relating to the establishment, maintenance and managements of hospitals, and regarding the regulation of a particular industry that falls within property and civil rights. Thus, a health care regulation whose pith and substance related to economic or health and safety concerns would be within provincial jurisdiction. To decide the case, the SCC reviewed the legislative history of the statute and accompanying regulations, and found that the purpose was neither economic nor related to health and safety (no one challenged Morgentaler’s claim that an abortion clinic was just as safe and indeed a less expensive way to provide this health care service). Rather, the court found that the purpose was to inhibit abortions because they were morally objectionable to a majority of provincial legislators. This purpose was the proper aim of the Criminal Law, and thus the court held that abortions could only be regulated on moral grounds by the federal Parliament.

To be clear, the Canadian doctrine is not an inquiry into the subjective legislative motivation of the majority of members of Parliament or a provincial legislature. (Indeed, given party discipline, the subjective motivation of most legislators on most issues is simply to follow the party whip!) Rather, using a test somewhat less deferential than the rational basis test often employed by American courts, Ca-

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107 *Id.*


111 *Morgentaler III*, [1993] 3 S.C.R. at 503 (examining the Hansard, equivalent of the Congressional Record, to find significant opposition to abortion clinics per se and virtually little concern with health or economic issues).
nadian judges invoke this doctrine only when it is highly implausible, if not totally irrational, for the legislature’s purpose to have been one within its assigned powers. At the same time, this doctrine would seem essential to judicial arbitration of the national-local distinction. If Parliament could enact legislation dealing with matters falling on the local side of the divide, under the pretext of asserting some federal power, the purposes for judicial policing of federalism would be undermined.

In short, the “[p]reservation of a high degree of provincial autonomy has been a consistent theme of the federalism jurisprudence of both the Judicial Committee of the Privy Council and the Supreme Court of Canada throughout [Canadian] history.” A review of the Canadian experience with constitutional federalism reveals a consistent need to protect French-Canadians, a minority in the country but a majority in the Province of Quebec, with regard to their laws governing private relations as well as religious and educational institutions. In so doing, Canadian courts have always used a “two-box” approach to federalism, interpreting enumerated powers assigned to the federal Parliament or provincial legislatures with regard to preserving an appropriate balance. Although the Canadian Constitution authorizes the federal Parliament to legislate in areas, enumerated or not, where provinces are unable to act, the broad textual authority to Parliament to regulate trade and commerce has been narrowly construed to require a finding of provincial incompetence before federal law can regulate activities taking place within provincial borders. Canadian courts not only limit each legislature to its assigned powers, but inquire further into the pith and substance of legislation to ensure that a legislature is not using a pretextual argument to improperly extend its jurisdiction.

112 Closely related is yet another useful interpretive method adopted by the SCC: the “double aspect doctrine” that recognizes that both Parliament and provincial legislatures can adopt valid laws with respect to a topic. A valid federal law would prevail in the event of inconsistency, but for Parliament to enact legislation that supersedes (Americans would say “preempts”), provincial law would require that the pith and substance of the preempting law fall within federal authority. Thus, the court rejected a claim that a federal banking law allowed federally chartered banks to sell insurance products within a province in a manner contrary to provincial insurance law. Canadian W. Bank v. Alberta, [2007] 2 S.C.R. 3 (Can.).


114 The Canadian experience casts doubt on the conclusion that a “federal constitution ideally gives the central state governments the power to do what each does best,” Cooter & Siegel, supra note 36, at 118, at least if “best” is defined from an efficiency or economic
III. NOTABLE DIFFERENCES BETWEEN THE UNITED STATES AND CANADA

A key value of comparative insights lies in the identification of significant differences in the contexts in which constitutional issues arise in different countries. Such an analysis improves our ability to identify how our nation’s specific context shapes our constitutional doctrine. This Part briefly discusses the significance of difference, and then identifies important differences between Canadian and American demography, current values, and national political processes, all of which affect the way our respective supreme courts interpret broadly worded constitutional texts regarding federalism.

A. The Significance of Difference

The relevance of the Canadian experience for interpretation of the United States Constitution depends, of course, on the interpretive methodology being employed. None of the opinions in Sebelius purport to decide the case primarily on grounds of plain textual meaning or original intent. The opinions seem to reflect a shared desire to adopt constitutional doctrines that are judicially manageable tests to serve the federalism values that each Justice believes is embedded in broadly worded text. Thus, the examination of demography, current values, and political process is not offered for the purpose of advocating that the United States import foreign norms that individual Justices might find to be personally appealing.  

115 perspective. Cooter and Siegel’s general proposition does not answer the constitutional question why the central legislature cannot be trusted to devolve power where subnational governments can do it better, as is true in unitary systems and, to a large extent, by state and provincial legislatures vis-à-vis local governments. More fundamentally, it overlooks the specific historic and contemporary constitutional politics of nations that may lead to arrangements where a suboptimal allocation is preferred. For example, Canadians without major controversy accept the inefficiencies in a system where the private law of contracts/obligations, property, and torts/delict are governed roughly by the English common law in nine provinces with seventy-five percent of the population but by a French-style civil code in Quebec. Americans, conversely, may prefer a suboptimal allocation of power to the extent they believe that the national political process is less subject to special interest capture and more likely to conduct reasoned deliberation than state legislatures, see, e.g., James Madison, The Vices of the Political System of the United States (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345, 356-57 (Robert A. Rutland et al. eds., 1975), and sufficiently protective of state interests to maintain a proper balance. Some advocates of “American exceptionalism” thus reject a study of comparative law as an aid to American judicial reasoning. See, e.g., Steven G. Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law 86 B.U. L. REV. 1335 (2006). But even these advocates ought to recognize the value in using the comparative method to identify precisely how the United States is exceptional; to find
Rather, the Canadian experience is relevant to American constitutional interpretation in several ways. First, comparing Canada and the United States helps to identify salient aspects of precisely which values are served by a constitutional federalism principle that prevents a majority of the American people from imposing their will on a minority of Americans who may comprise a majority in one or more states. It is thus simply another tool to do what judges do, which is to identify underlying principles and then articulate judicially manageable standards. Second, Canadian legal doctrines, which have proved workable in reflecting the values of Canadian federalism embraced by the Supreme Court of Canada, provide useful comparators to evaluate current American doctrines. They assist American judges in considering how current American doctrine serves core American constitutional principles, and how their importation would reflect on American federalism values.

B. Demographic Differences

The focus of this Article is on the judicial enforcement of constitutional federalism. When should courts constrain a national political majority from enacting policy preferences that are not shared by national political minorities who constitute a majority in one or more states when the national majority believes that federal legislation is appropriate? (This is to be distinguished from a federalism of efficient decentralization, when the national government determines that local autonomy is preferred. For example, even in strongly centralized countries such as France, garbage collection is delegated to local governments and not controlled by some Parisian bureaucrat in the Ministry of Waste.) One of the most salient arguments for strong jurisdictional limits on the federal legislature, and one that may justify policing by an independent judiciary, occurs where, in Justice Sandra Day O’Connor’s words, the result is “a decentralized government that will be more sensitive to the diverse needs of a heterogenous society.” This, indeed, is precisely the basis of Canadian federalism: the Fathers of Confederation determined that a heterogenous society (at origin, divided between predominantly Protestant Anglophones and

propriety in learning from the experience of others to the extent that, as to that particular factor, the United States is not exceptional; and to consider how particular aspects of American exceptionalism can be best reflected in constitutional doctrine.


French Catholics) will be best served by a decentralized government where national minorities (the French) are regional majorities (in Quebec). 118 Today, differences in regional attitudes and interests continue throughout Canada, extending beyond the original linguistic-religious divide. 119

Today, there remains a deep sense that the heterogeneous Canadian society is well served by federalism. Of course, this sense remains strong in Quebec, but also in other provinces as well. This is because of another important feature of Canadian politics: many Canadians perceive that their policy values are quite likely to be reflected in provincial governments, but despite that someone sharing their views will be elected Prime Minister. Thus, social democrats who support the New Democratic Party (“NDP”) have historically been able to win provincial elections (particularly in British Columbia, Manitoba, and Saskatchewan, where pioneering social programs such as medicare and legislation protecting human rights were first enacted in North America 120) but until recently have despaired of seriously prevailing in national elections against the Liberals and Conservatives; likewise, various incarnations of right-wing parties have long governed Alberta with a policy perspective unlikely to achieve national success. As of this writing, for example, it is highly unlikely that the premiers of Quebec (Parti Quebecois), Manitoba and Saskatchewan (NDP), or Alberta would consider it even a reasonable possibility that someone who would implement their policy agenda would form a government in Ottawa. As the SCC observed in its landmark decision governing the terms by which Quebec might separate from Canada, the ability of Canada’s diverse citizenry to develop “their societies” by preserving important areas of provincial autonomy is a key aspect of Canadian constitutional federalism. 121 Another key demographic difference lies in the extent to which a single Canadian

118 Silver, supra note 50, at 34 ("Provincial autonomy was to be sought in the proposed constitution as a key safeguard of the interests of French Canada.").
119 See Watts, supra note 49, at 32 (citing widespread differences in the economic bases of provinces, extensive trade with the United States resulting in more “north-south links” than “east-west ties,” and different patterns of immigrant settlement giving Atlantic provinces, Quebec, Ontario, the prairie provinces, and British Columbia each a “distinctive cast”).
province—Ontario—is perceived to dominate national politics in ways that no American state can.122

With regard to the United States, however, national minorities are, in general, regional minorities as well. Most notably, with regard to racial issues, Justice O’Connor’s federalist paean is demonstrably false; state governments (particularly in the South) have in no sense been more sensitive to the needs of their heterogenous citizenry. Thus, the Supreme Court unreservedly upheld the national power to impose a monolithic solution to issues of racial discrimination in employment, public accommodations, housing, and public education. Indeed, Jesse Choper correctly observes that the one area of public policy where regional majorities historically existed concerned economics (policies assisting manufacturing versus agriculture, free trade versus protection, financial industries and those victimized by their practices), and this is the “very subject over which the central government has probably the least disputed authority.”123

Although modern day America reflects deep demographic differences that might support constitutional politics favoring decentralized authority over key social, moral, and cultural issues,124 a major difference in constitutional politics is the absence of despair that each side’s views can prevail nationally. Because of the strong two-party system and a primary election system that often favors ideological activists, “deep blue” Democrats favored by New Yorkers and Californians can and do elect their favored national candidates (e.g., Barack Obama), and the same is true with “deep red” Texans (e.g., George W. Bush). It is likely that most, if not all, of the fifty state governors would, in contrast to their Canadian provincial counterparts, have a reasonable hope that someone of their political ideology could win the 2016 presidential election. Thus, unlike Quebecois, Albertans, Manitobans, and British Columbians, Californians and Texans continue to aspire to preferred national solutions, rather than tolerate disagreeable policies in other states that have some potential to indirectly affect their own welfare.

122 Cf. Jean Leclair, Forging a True Federal Spirit: Refuting the Myth of Quebec’s “Radical Difference,” in RECONQUERING CANADA: QUEBEC FEDERALISTS SPEAK UP FOR CHANGE 29, 66 (André Pratte ed., 2008) (stating that specific interests of citizens of Prince Edward Island, Saskatchewan, and Newfoundland are unlikely to be voiced were Canada a unitary state, and, contrary to what some Quebecois believe, “all AngloCanadians do not desperately aspire to become Ontarians”).

123 CHOPER, supra note 27, at 192.

C. The National Political Process

In interpreting all broadly worded constitutional texts, judges must necessarily decide how closely to scrutinize legislative judgments, and judicial doctrine creation must necessarily reflect a judgment about the ability of the political process to adequately protect the people’s interests. This is explicitly reflected in American constitutional history, as the United States Supreme Court recoiled from the “Lochner era” of close scrutiny of legislation interfering with economic liberty by explicitly tying close scrutiny to its view of the efficacy of ordinary politics. Thus, in United States v. Carolene Products Co., the Court established that it would not invalidate regulatory legislation affecting ordinary commercial transactions under the broadly worded Due Process Clause of the Fifth Amendment “unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators,” but suggested that this approach would not apply to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or where “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”

The same jurisprudential considerations apply to the need for courts to actively review legislation to preserve federalism. Canada’s political process suggests that close judicial policing of what is national and what is local is necessary to preserve a balance reflecting Canadian values. The original understanding of the Canadian confederation was that ordinary national politics would not be sufficient to protect interests of French Canadians who correctly perceived that they would always constitute a national minority, a regional majority, and that they would have distinctive interests with regard to a variety of issues; thus, the BNA Act lists sixteen matters within the exclusive jurisdiction of provincial legislatures with the understanding that attempts by Ottawa to encroach on provincial jurisdiction would be subject to judicial review, ultimately independent review, by the Privy Council in London.

125 304 U.S. 144 (1938).
126 Id. at 152.
127 Id. at 152-53 n.4.
Perhaps the major institutional difference between the United States and Canada is the American entrenchment of the notion of separated legislative and executive power, while Canada adopted the British model that effectively melds political power: party discipline allows the Prime Minister to control the activities of the legislature, and the principle of responsible government continues to vest significant formal power in the Crown, while simultaneously requiring that this power be only exercised on advice of the Prime Minister. The Canadian Senate is not equal, legitimate, or effective in significantly constraining the House of Commons. It consists of political “worthies” appointed by the Prime Minister to serve until they reach the age of seventy-five, and an unwritten convention (that the Senate occasionally breaches) is that the Senate will not defeat legislation passed by the elected House of Commons (and even when it does, it gives way if the government is re-elected).

Another huge difference is that Canada’s House of Commons features strict party discipline on any measure the Prime Minister chooses to deem as a vote of confidence, precluding dissent by those whose regions may not support the federal cabinet on this particular policy issue. There is no room for the “British Columbia delegation” to act independently, or for lobbying groups representing provincial or local governments to be able to influence individual members of the majority party (except in internal debates as interlocutors trying to persuade the Prime Minister). There is no Electoral College: the Prime Minister is the leader of the party with the most seats in the House of Commons, a contest fought riding by riding, and the provincial vote is wholly irrelevant. Nor are there legislative procedures to allow a minority of the House of Commons to significantly inhibit the federal government’s determination to pass a statute that might

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129 The significance of this distinction is highlighted in Watts, supra note 49, at 29-30.
130 ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS 87-98 (1991). Recent analysis by Wade Wright concurs that the Senate is not likely to be an effective protector of provincial autonomy. Wade Wright, The Political Safeguards of Canadian Federalism 55 (unpublished manuscript) (on file with author).
132 ‘Riding’ is the term used by Canadians for the geographic districts in which they elect members of the House of Commons; it is the equivalent to what Americans call a ‘congressional district.’
be inconsistent with federalism principles; a majority of the House of Commons (under the whip of party discipline) can cut off debate, and committee chairmen are equally subject to party discipline. To be sure, a variety of intergovernmental settings provide provincial premiers and others with opportunities to facilitate political opposition to federal initiatives,\textsuperscript{133} and in some cases this political pressure will resonate sufficiently with votes to force the federal government to alter its course.\textsuperscript{134} But none of these seriously preclude the ability of national majorities to impose their will on national minorities that happen to be regional majorities.\textsuperscript{135} In short, it was the division of powers itself, rather than the structure of the national government,

\textsuperscript{133} These are catalogued in Wright, supra note 130. One noted forum of provincial opposition is the First Ministers Meetings. Although frequent in earlier times, the government of Prime Minister Stephen Harper has sharply curtailed them, apparently to prevent the sort of discord that would allow premiers to more effectively oppose federal initiatives. Lawrence Martin, \textit{Can the Influx of Women Change Canadian Politics?}, \textit{GLOBE & MAIL}, Feb. 12, 2013, http://www.theglobeandmail.com/globe-debate/can-the-influx-of-women-change-canadian-politics/article8466809/.

As detailed by Wright, supra note 130, at 102-03, provincial governments may pursue a strategy of testing the limits of federal legislative jurisdiction in court, but when unsuccessful develop cooperative approaches that limit the scope of actual federal intervention. To the extent that federal jurisdiction is based on concerns about the ability to accomplish policies in the face of a wide variation in provincial responses to a common problem, intergovernmental arrangements may assuage concerns about provincial inability, resulting in a mutually acceptable agreement whereby provinces continue to exercise primary jurisdiction while the federal government is assured that sufficient uniformity results in the protection of national interests. (A similar example, from the United States, is that current doctrine would clearly allow Congress to enact a national commercial code, but Congress does not exercise this power because of the success of the Uniform Commercial Code adopted with minimal variation by almost all the states.) This inquiry, however, is not really the focus of this Article.

\textsuperscript{134} It may be true that provincial opposition and political pressure led the federal government to concede that provinces retained primary jurisdiction over labor market training and that new programs would not be launched without a province’s express agreement. \textit{Id.} at 93–98. However, other than restating the political fact that opposition officials can constrain the federal government through political pressure, it is difficult to see how this supports Wright’s claim that intergovernmental safeguards operate to significantly constrain federal overreaching. Rather, other than safeguards facilitating pure politics, this seems to be a retreat from the federal government’s original position that only a national program could effectively identify where workers needed to be trained and to foster mobility in the Canadian labor market. \textit{Id.} at 94. Not even the most fervent “federal imperialism” claim that provincial political opposition is never effective in restraining federal initiatives; moreover, fully consistent with the federalism doctrines established by the Supreme Court of Canada, the case study could also reveal an initial federal perception that provinces were unable to effectively solve job training problems, but that further dialogue with provincial governments resulted in a federal recognition that non-uniform approaches would not hinder the success of the federal goals.

\textsuperscript{135} See Wright, supra note 130, at 111 (stating that intergovernmental safeguards of federalism are neither ideal, “[n]or even adequate, safeguards of provincial jurisdiction”).
which was necessary to ensure that groups (most notably, but not ex-
clusively, Quebecois) could ensure that their essential interests could
be protected from interference by a national majority.\textsuperscript{136}

A foundational prong of the argument against the United States
Supreme Court’s active arbitration of federalism disputes is that the
national political process adequately protects the constitutional struc-
ture and federalism norms designed by the Framers and valued
throughout American history. In his book, *Judicial Review and the Na-
tional Political Process*, Jesse Choper argued that a number of features
of the American political process justify the “[d]ispensability of
[j]udicial [r]eview.”\textsuperscript{137} These include an equal and effective Senate to
protect states’ rights, a House of Representatives where representa-
tives of both political parties often coordinate behavior on matters
directly affecting their states, the effect of the Electoral College on
presidential campaigns because of the need to campaign for state ma-
orities rather than simply a national majority, the natural progress-
ion of many Senators and Representatives from positions in state
and local government, and the effectiveness of lobbying organiza-
tions representing governors, state governments, mayors, cities, and
counties.\textsuperscript{138} Other aspects of the national legislative process inhibit
federal efforts to enact legislation objectionable to state and local
leaders as encroaching on their prerogatives, including the ability of
forty-one senators to filibuster, and the committee system that per-
mits senior legislators to block or significantly inhibit passage of legis-
lation that might well find support among a legislative majority.\textsuperscript{139}

Choper’s analysis of the current process confirms what historians be-
lieve was the Framers’ prediction: delegates representing diverse
state interests can now reach agreements empowering the national
government to address “national ills that none of them denied” once
the structure was established to allow each to “counter threats to its

\textsuperscript{136} In contrast, one Madison scholar concluded that the American Framers’ objective was to
create a central government capable of legislating not only where states were incompe-
tent to act but also where minorities within a state had to be protected from violations of
their rights. Lance Banning, *The Sacred Fire of Liberty: James Madison and the
Founding of the Federal Republic* 166–67 (1995). A more recent Canadian version of
this dispute was a key fault line of disagreement between Canadian Prime Minister Pierre
Trudeau, who believed that a judicially enforced national charter was the best means to
protect local minorities, and the separatist Quebec Premier René Lévesque, who believed
that political accommodations among provincial premiers would best protect individual
rights. See John Trent, *Common Ground and Disputed Territory, in Must Canada Fall?* 139,

\textsuperscript{137} Choper, supra note 27, at 171 (emphasis omitted).

\textsuperscript{138} Id. at 176–81.

\textsuperscript{139} Id. at 185.
essential interests." In addition, Professor Larry Kramer has noted the “unique American system of decentralized national political parties, which linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty.” Kramer concludes that American political parties “fostered a mutual dependency that induced federal lawmakers to defer to the desires of state officials and state parties.”

As noted above, virtually none of these features are present in Canada to protect provincial governments from undue encroachments from Ottawa.

D. The Political Values of Federalism: Strategy and Tactics

The salient aspects of Canadian demography and constitutional structure discussed above lead to a consistent political preference for a federal structure that ensures that many issues are resolved differently by regional majorities; Canadians strategically prefer to forego

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141 Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 276 (2000).

142 Id. at 278; see also BANNING, supra note 136, at 162-63 (quoting Madison’s view that even if, hypothetically, indefinite power were given to the national legislature, these representatives would be politically constrained from taking unwarranted power from state governments).

143 See supra text accompanying notes 129-36. Some important new work by Wade Wright suggests a “middle ground,” acknowledging that the Canadian national political process is insufficient to protect provincial interests but that cooperative federalism resulting from informal negotiation between federal and provincial officials serves both as a check and a desirable goal that judicial review can facilitate. Wright, supra note 130.

144 In this Article, these terms are used in the sense borrowed from industrial organization economics and antitrust law. Business tactics (also often called “best practices”) are designed to maximize short-term profits; strategic behavior involves the deliberate sacrifice of short-term advantage or profits in order to recoup even larger profits in the medium- or long-term. The classic example of strategic behavior is predatory pricing by a dominant firm, using superior access to capital to lower prices to levels that their rivals cannot sustain, driving them out of business and then raising prices later. See, e.g., Patrick Bolton et al., Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L.J. 2259 (2000). But strategic behavior may not be unlawful or contrary to the public interest. See, e.g., In re E.I. DuPont de Nemours & Co., 96 F.T.C. 653 (1980) (discussing a dominant firm that kept prices high, sacrificing short-term profits, in order to raise cash to invest in new efficient plants and thereby gain a long-term advantage over antiquated rivals).
the opportunity to permit the views of a majority of Canadians to prevail throughout the country. In contrast, the history of American constitutional politics is littered with examples of a tactical view of federalism: Americans typically believe that the level of government most appropriate to resolve any particular issue is the level of government most likely to produce desired substantive results. The fidelity of Canadian history to federalism as a strategic principle provides further support for the SCC’s continued role as a judicial arbiter. In contrast, the pervasive tactical use of federalism in American history undercuts the arguments for the U.S. Supreme Court serving a similar role. A leading example from Canadian history, and a thought experiment as to how similar issues would be resolved south of the border, illuminates this point.

One of the most important events in Canadian history was the controversy surrounding the Manitoba Schools Act, originally passed in 1890.145 One of the pivotal bargains of confederation concerned the constitutional entrenchment of “any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union[.]”146 At the time of confederation, the law of the Province of Canada (now Ontario and Quebec) provided public funding for English Protestant schools and for French Catholic schools. section 93 of the BNA Act—which generally delegates educational legislation exclusively to the provinces—provides both a justiciable constraint on the ability of Ontario or Quebec to scale back on the rights of their religious minorities (Catholics in Ontario and Protestants in Quebec), as well as an express authorization for the federal Parliament to override provincial legislation that prej-

145 Public Schools Act, 1890, 53 Vict., c. 38 (Man.).
146 British North America Act, 1867, 30 & 31 Vict., c. 3, section 93(1) (U.K.). The absence of a constitutional ban on established religion, as well as this specific constitutional guarantee, obviously makes this specific Canadian experience much different than that which exists in the United States, where public funding for parochial schools is strictly limited by the First Amendment. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (barring a taxpayer subsidy for teachers of secular subjects in private religious schools). Indeed, the SCC has expressly rejected a challenge to the Ontario legislature’s policy of continuing to fund Catholic and Protestant schools, but not Jewish or Muslim schools, despite the Charter of Rights provision, Constitution Act, 1982, Section 15, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), protecting against discrimination on the basis of religion. Adler v. Ontario, [1996] 3 S.C.R. 609 (Can.) (dismissing plaintiffs’ appeal seeking relief based on non-funding of religious schools attended by their children). Subsequently, Parliament added a new section 93A, repealing its provisions as to Quebec. Constitution Amendment, 1997 (Que.), S.L./97-141, C.Gaz. 1997.II.1. Note that Anglophone Quebeckers’ rights to have their children educated in English is entrenched in the Charter, Constitution Act, 1982, Section 23, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).
udicially affects these entrenched rights.¹⁴⁷ When Manitoba was admitted to the Union in 1872, the Manitoba Act expanded on these rights, providing that the new province’s legislature could not enact legislation that prejudicially affected denominational rights or privileges enjoyed by “[l]aw or practice” prior to union.¹⁴⁸

This became a divisive issue of constitutional law and politics two decades later, when Manitoba’s demographics shifted from approximately sixty-four English-French to a population where Anglophones exceeded eighty percent.¹⁴⁹ Manitoba’s legislature halted public funding for denominational schools, instead providing for a single system of public schools, where instruction would be in English (and where prayers would follow the Protestant rituals). The SCC held that the Manitoba Schools Act violated the denominational rights of Franco-Manitoban Catholics guaranteed in Section 22 of the Manitoba Act.¹⁵⁰ But the Privy Council reversed, reasoning that Catholics were not “prejudicially affected” because they were still free to send their children to English-language schools and it was their own religious views that led them to be “unable to partake of the advantages which the law offers to all alike.”¹⁵¹ So the Franco-Manitobans turned to the Canadian Parliament, and the Conservative Prime Minister, Sir Charles Tupper, introduced legislation to overturn the Manitoba statute. However, the legislation was blocked by the Liberal leader of the opposition, Wilfred Laurier. Laurier maintained his unwilling-

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¹⁴⁷ Brophy v. Attorney Gen., of Man., [1895] A.C. 202 (U.K.P.C.) (“Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1980, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of nonsectarian schools to which they conscientiously objected.”); City of Winnipeg v. Barrett, [1892] A.C. 445 (U.K.P.C.) (holding that the Act of 1890, which abolished the denominational system of public education, did not violate the Act of 1870 authorizing the provincial legislature exclusively to make laws in relation to education).

¹⁴⁸ Manitoba Act, 1870, 33 Vict., c. 3, section 22 (Can.).

¹⁴⁹ This demographic shift was a huge disappointment to Canadian Framer Georges Cartier, who had negotiated with Francophone Métis rebels and crafted the Manitoba Act to create a bilingual province, like Quebec, that would attract surplus Quebecois farmers away from migration to New England. See Michael D. Behiels, Contested Ground: The State and Language Rights in Canada, 1760-2000, 39 SUP. CT. L. REV. (2d) 23, 38–39 (2008). In the event, over 400,000 French Canadians moved to the United States in search of factory work between 1870 and 1900. Id. at 40.

¹⁵⁰ Barrett v. City of Winnipeg, [1891] 19 S.C.R. 374 (Can.).

ness to support federal override legislation upon his election as Canada’s first French-Canadian and Catholic Prime Minister.152

Laurier was so committed to avoiding undermining the principle of provincial autonomy that he was prepared to accept Manitoba legislation that ended French-Canadian dreams of a bilingual and bicultural western Canada.153 His federalism was strategic. For Laurier, the threat of improper intervention into the autonomy of the province of Quebec, by a Parliament where French Canadians would always be a minority, was real. Another provision of the BNA Act gave the federal government a general power to disallow any provincial law.154 Laurier asserted that this power (unused since 1943155) should only be used to bar a provincial law that was unconstitutional or that directly contradicted the national interest.156 Quebecois parliamentarians had previously won a hard-fought battle to persuade Conservative Prime Minister John A. MacDonald not to use the disallowance power to overturn a Quebec statute settling the expropriation of Jesuit estates that included a provision permitting the Pope to approve the allocation of funds among Catholic Church entities.157

The need to adopt a strategic federalism had been already apparent to Laurier when serving as the Liberal opposition leader to Prime Minister MacDonald. Explaining to an old friend, a leading journalist from his hometown, why he had acquiesced in legislation for the Northwest Territories that did not require bilingual government, he wrote,


153 Behiels, supra note 149, at 43. In later years, by then a longstanding Prime Minister, Laurier refused to impose bilingualism on the new provinces of Alberta and Saskatchewan, believing that provincial majorities must determine cultural rights. Silver, supra note 50, at 194.


155 Many leading scholars view future use as improper: if the provincial legislation is objectionable on legal grounds the remedy is judicial challenge; if the legislation is objectionable as unwise, the Canadian view is that this is a question for provincial voters. 1 HOGG, supra note 37, §5.3(e). The SCC has recognized that the power has fallen into “disuse,” The Queen v. Beauregard, [1986] 2 S.C.R. 56, 72 (Can.), and its exercise today would be considered contrary to an unwritten constitutional convention. PIERRE ELLIOT TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS 149 (1968).

156 1 House of Commons Debates, 7th Parliament, 6th Sess. (Mar. 3, 1896), at 2741–42. In these parliamentary remarks, Laurier is perhaps a bit disingenuous in conflating the federal government’s use of the general disallowance power contained in Section 90 with the very specific power to override provincial abuse of denominational rights in section 93, but significantly Laurier seemed to view both as improper intervention into provincial autonomy.

157 SCHULL, supra note 152, at 225–27.
There was no other solution for this question. I wish you would point out the necessity for the people of Quebec province to maintain inviolate the principle of local autonomy. There are circumstances when it may tell against us, but it is the only protection that we have under the constitution, and if we want to apply it in our own behalf we must be careful to apply it also when it is contrary to us[.]\textsuperscript{158}

This landmark event in constitutional politics illustrates how Canadian constitutional values follow from the demographic and structural differences identified above. Many Canadians perceive of themselves as being in a permanent minority in national politics (Quebecois, western social democrats, prairie pro-energy/pro-development conservatives), but with a strong probability of having their views of public policy reflected in legislation passed by their provincial government. Absent judicially policed federalism, these Canadians would not be able to stop national majorities from imposing their will on them. Thus, the notion of strategic federalism remains vibrant in Canada today.\textsuperscript{159}

In contrast, Americans who despair of being part of a winning national coalition are, generally speaking, also unlikely to see themselves as winning locally. Both Americans who form the “progressive base” of the Democratic Party or the “conservative base” of the Republican Party, as well as political moderates, perceive that their aspirations to govern in Washington are realistic. Thus, a states’ rights perspective animated many conservative Republicans during the Washington ascendancy of liberal Democrats beginning with Roosevelt, but changed course when the Reagan and Bush Administrations could implement politically popular conservative policies on a ra-

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\item[158] Id. at 241 (citation omitted) (internal quotation marks omitted).
\item[159] This is not to suggest that all federal politicians channel Wilfred Laurier. However, it is noteworthy that in Wright, supra note 130, the author’s comprehensive review of motivations for federal encroachment on provincial prerogatives cites only the American experience, and no Canadian examples, to support the claim that federal officials overreach even if they believed “that certain issues should generally be pursued at the provincial level, and that their desire to get their way on some public policy issue may trump, because they have more control at the federal level.” Id. at 43. As to the suggestion that federalism issues are too abstract to attract voters’ attention as an explanation for the purely tactical use of states’ rights arguments in the United States, see John O. McGinnis & Ilya Somin, Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System, 99 NW. U. L. Rev. 89 (2004), there is no suggestion that Canadian voters are somehow superior at comprehending “abstract” concepts. The more persuasive explanation of American federalism values is the ongoing preference of politically motivated American voters to have their substantive policy preferences enacted by whichever level of government will enact them. Cf. Neal Devins, The Judicial Safeguards of Federalism, 99 NW. U. L. Rev. 131, 132 (2004) (“[I]nterest groups, voters, and elected officials care more about underlying policy issues than about structural protections . . . .”).
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tional basis.\textsuperscript{160} Partisans of divisive causes typically retain continued optimism that their side will prevail nationally (a strategic approach facilitated by the ability of strong partisans to prevail in each major party’s primary election season). Consider moral questions that Americans today tend to call “social issues.” In most cases, national uniformity is not required, but is a national solution desirable?\textsuperscript{161}

Doctrinally, in the United States, the answer is that Congress may enact legislation to pursue moral or social objectives if the legislation relates to economic activity that has a substantial effect on interstate commerce.\textsuperscript{162} Politically, the answer seems to clearly be tactical. To illustrate, today most observers perceive that a majority of Congress would be unlikely to adopt strict rules limiting the availability of safe abortions to women who want them, and a majority of Congress would also be unlikely to grant official recognition to marriages between same-sex couples. Thus, social liberals are tactical federalists who oppose delegating the abortion issue to the states, while preferring that Congress allow and facilitate states who so choose to permit same-sex marriage;\textsuperscript{163} at the same time, social conservatives favor de-

\textsuperscript{160} See Devins, supra note 149, at 135–36; William N. Eskridge, Jr., Vermont, Chevron, Premption, 83 NOTRE DAME L. REV. 1441, 1483 (2008) (noting that the George W. Bush Administration’s Food and Drug Administration alone sought to preempt more state regulations than the Clinton Administration); see also Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 170 (1982) (upholding the Reagan Administration’s regulation preempting liberal, proconsumer California law with an unusually divided Court).

\textsuperscript{161} For historic reasons, under the Canadian Constitution many of these social issues are indeed to be determined nationally, because the BNA Act authorizes the federal Parliament to enact legislation relating to “Marriage and Divorce” and the “Criminal Law.” British North America Act, 1867, 30 & 31 Vict., c. 3, Sections 91(26)–(27) (U.K.). The principal “Father of Confederation,” Sir John A. MacDonald, strongly believed that a defect in the American system was the disparate treatment for criminal offenses in different states. Mark Carter, Recognizing Original (Non-Delegated) Provincial Jurisdiction to Prosecute Criminal Offences, 38 OTTAWA L. REV. 163, 171 n.24 (2007). The central government’s authority to impose criminal law derives from the original policy of the Quebec Act of 1774 to allow the occupants of the conquered New France to preserve French civil law but to accept English criminal law. J. L. J. Edwards, The Advent of English (Not French) Criminal Law and Procedure into Canada—A Close Call in 1774, 26 CRIM. L.Q. 464 (1984). The centralizing effect is significantly modified by the assignment of provinces of authority to enforce the criminal law, see British North America Act, 1867, 30 & 31 Vict., c. 3, section 92(14) (U.K.); Carter, supra note 160. The Canadian Framers also sought uniform marriage rules to prevent problems that had arisen in the United States with regard to marriages or divorces recognized in one state but not another. See HOOG, supra note 37, at §27.3.

\textsuperscript{162} See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding the constitutionality of provisions in the Civil Rights Act of 1964 outlawing racial discrimination by restaurants and hotels); infra note 189 and accompanying text.

\textsuperscript{163} Obviously, I put to the side the constitutional argument advanced by social liberals that limiting marriage to opposite-sex couples unconstitutionally deprives gay men and lesbians of equal protection under the Fourteenth Amendment. Perry v. Brown, 671 F.3d
centralizing abortion policy, while favoring federal legislation that refuses federal recognition of state-blessed same-sex marriages and exceptions from the normal practice a state’s recognition of lawful marriages from another state.164 How many Americans165 would be confident that Congress and the President would enact their current policy preferences, but would oppose such legislation on the ground that the national minority ought to be able to have their own opposing preferences reflected in the laws of their state, channeling Wilfred Laurier’s observation that there “are circumstances when it may tell against us, but it is the only protection that we have under the constitution, and if we want to apply it in our own behalf we must be careful to apply it also when it is contrary to us.”166

Tactical federalism is so widespread and historically ingrained in the United States that the proposition that federal officials, or the voters that elect them, might find that good policy or good politics calls for federal abstention seems to violate common sense:

First, all national lawmakers wish to effect change in various policies, both because they believe change serves what they view as the best interest of the country and because their reelection is helped when they can tell voters they passed laws that voters favor. Thus, even if some lawmakers believe that certain policies are better adopted and implemented on the state level, they may nonetheless resort to federal lawmaking as a second-best alternative over which they have more influence. In that way, they ensure the reform happens—and they claim credit for it. To put it another way, people seldom seek national office, enduring the difficulties

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1052 (9th Cir. 2012), vacated on other grounds sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
165 I exclude from this category of more than 300 million Americans the discrete category of professors of constitutional law. See, e.g., Nelson & Pushaw, supra note 123, at 12 (“[O]nly states can respond effectively to local concerns on noncommercial subjects like family law and violent crime, which reflect deeply held ideological and cultural norms.”). From the perspective of political strategy, one of the inherent checks on federal power encroaching onto states’ rights is the need for federal officials to persuade a majority of Congress to enact legislation that (a) reflects sound public policy and (b) is an appropriate subject for national legislation. In contrast, opponents can prevail with a coalition of those who oppose the proposed legislation on its merits and those who agree that the legislation is desirable but believe that the matter should be left to the states. However, in order to stake out the latter position, a successful candidate would have to have a credible reputation for preserving states’ rights regardless of the merits of the policy, something virtually no major candidate for national office has recently tried.
166 Schull, supra note 152, at 241 (citation omitted) (internal quotation marks omitted).
of the modern campaign, only to argue that other political actors ought
to be making key decisions while they sit back and watch.\textsuperscript{167}

Canada’s history teaches, however, that this approach is not inherent
in democratic politics but specifically contextual to the American
demographic and historical experience.

Wilfred Laurier’s constitutional politics led him to prefer provin-
cial autonomy, even at the expense of a French-Canadian vision of a
bilingual nation, because he recognized that Francophones will al-
ways be a national minority and a regional majority. In contrast, the
American credited for designing our constitutional federalism, James
Madison, often displayed a tactical approach, alternating between a
desire for a strengthened national government and states’ rights
based on contemporary political circumstances. Prior to the Constitu-
tional Convention, Madison drew upon his unhappy experience in
the special-interest-driven Virginia legislature and his somewhat hap-
pier experience in the Articles of Confederation Congress to favor a
“royal veto” of state laws by the new national legislature, who would
be comprised of a better class of legislator and less likely to be subject
to factional takeover.\textsuperscript{168} This power would allow national majorities to
override national minorities comprising state majorities, not only to
prevent states from thwarting legitimate federal power, but also to
prevent states from “thwarting and molesting each other” and “even
from oppressing the minority within themselves.”\textsuperscript{169} Another justifica-
tion for a congressional veto of state legislation was the “imprecise
and hence arbitrary basis of the nominal distinctions between” state
and federal power.\textsuperscript{170}

As a Representative from Virginia in the Second Congress, Mad-
ison moved into political opposition from the ascendant views of
Treasury Secretary Alexander Hamilton, opposing legislation to cre-
ate a Bank of the United States. A principal argument Madison em-
ployed was that the Constitution did not grant Congress the power to
incorporate private business associations. Specifically, Madison

\textsuperscript{167} Elizabeth Garrett, \textit{Framework Legislation and Federalism}, 83 \textit{Notre Dame L. Rev.} 1495, 1513
(2008).

\textsuperscript{168} \textsc{Jack N. Rakove, \textit{Original Meanings: Politics and Ideas in the Making of the

\textsuperscript{169} Banning, \textit{supra} note 136, at 117 (quoting Letter from James Madison to Thomas Jeffer-
son (Mar. 19, 1787), \textit{in 9 The Papers of James Madison, supra} note 114, at 318) (internal quotation marks
omitted). This proposal was rejected by the convention, and even Jeffer-
son opposed it as an overly broad encroachment on state powers, because in the latter’s
view only one percent of state laws would affect the nation as a whole. Banning, \textit{supra}
note 136, at 118.

\textsuperscript{170} Rakove, \textit{supra} note 168, at 52–53.
voiced concern that such a broad reading of the Necessary and Proper Clause would give Congress unlimited power.\textsuperscript{171}

Returning to power as President Thomas Jefferson’s Secretary of State, Madison assuaged Jefferson’s concerns that the Constitution did not authorize the government to execute the Louisiana Purchase, by arguing that the government’s power to make treaties provided a constitutional basis.\textsuperscript{172} During the final two years of Jefferson’s presidency, Madison included in his program to build the post-war economy his support for the creation of the Second Bank of the United States.\textsuperscript{173}

Perhaps the best known American example of the tactical use of constitutional politics to preserve state autonomy was the resistance of southern states to the Civil Rights movement. A notable and then-controversial act was President Dwight D. Eisenhower’s dispatch of federal troops to Little Rock, Arkansas, to enforce the constitutional rights of African American schoolchildren to attend desegregated schools.\textsuperscript{174} Yet just over a century earlier, the roles were reversed; faced with popular and official resistance in northern states to the return of fugitive slaves—a “right” guaranteed to slave-holders in the Constitution—Congress provided that federal marshals would be employed to capture and return escaped slaves.\textsuperscript{175} Presidents Millard Fillmore and Franklin Pierce had to order federal troops to enforce the constitutional rights of slave owners.\textsuperscript{176} And just as the United

\textsuperscript{171} Jack N. Rakove, James Madison and the Creation of the American Republic 114 (3d ed. 2007).

\textsuperscript{172} Id. at 164. This view was upheld by the U.S. Supreme Court in Missouri v. Holland, 252 U.S. 416 (1920) (upholding an environmental protection statute passed by Congress prior to expansion of federal legislative authority under the Commerce Clause as nonetheless valid to implement a treaty with Great Britain); cf. AttorneyGen. for Can. v. AttorneyGen. for Ont., [1937] A.C. 326 (U.K.P.C.) (invalidating a statute passed by the Parliament of Canada concerning labor relations—a matter generally under provincial jurisdiction—despite enactment to implement international labor treaty).

\textsuperscript{173} Rakove, supra note 168, at 206; see also Devins, supra note 159, at 134 (describing how northern Federalist proponents of centralized power and Jeffersonian advocates of states’ rights reversed positions when debating President Jefferson’s proposed Louisiana Purchase).


\textsuperscript{175} U.S. Const. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

\textsuperscript{176} Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. My thanks to Berkeley historian Robin Einhorn for pointing out this parallel.

State Supreme Court affirmed the primacy of federal law over states’ rights claims in the Little Rock incident, the antebellum Court reversed efforts by state courts to frustrate the return of fugitive slaves.

A strong and judicially policed federalism ought to have a foundation in constitutional politics where citizens prefer that different public policies will prevail in different regions, based on the views of regional majorities. The fundamental point of constitutional federalism is "to allow normative disagreement amongst subordinate units so that different units can subscribe to different value systems." Whether based on a tolerance for diversity, or despair that certain views likely to prevail at the sub-national level will ever prevail nationally, there is little evidence in American history or contemporary politics that, with regard to strongly held views of importance to them, Americans share this view. My claim is not that those who currently comprise the national minority do not favor decentralization. It is true that Americans today who are "small government conservatives" favor decentralization because programs to reduce taxes and limit redistribution are currently unlikely to prevail nationally, but the point is that Texan secessionists would be likely to cease their efforts if another Reagan Revolution occurred and would be unlikely at that point to favor policies that permit California and New York to continue their own big government policies. The Canadian experience focuses our attention on how most Americans do not really care about federalism in any principled way.

This does not, of course, suggest that the United States Supreme Court must interpret our Constitution to reflect current values about federalism, any more than current values about police practices ought to determine the interpretation of the Fourth Amendment. However, the senior member of the current majority crafting new federalism principles, Justice Antonin Scalia, has written that judicial doctrines “cannot displace longstanding national traditions as the primary determinant of what the Constitution means.” Comparative analysis sharpens the realization that the American national tradition is to complain about federal intervention into state prerogatives as a tactical matter to impede undesirable substantive policies. Crafting judicial federalism doctrines is particularly problematic if

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178 Cooper v. Aaron, 358 U.S. 1, 4 (1958) (holding that the State of Arkansas was bound by the Court’s decision in Brown v. Board of Education).
180 Rubin & Feeley, supra note 116, at 912.
they cannot meet the aspiration of judicially manageable standards that the Court has traditionally used to measure justiciability and constitutional doctrine.

IV. CANADIAN IMPORTS OR AMERICAN EXCEPTIONALISM

Two Canadian constitutional doctrines would significantly facilitate judicial arbitrage of national-state legislative boundaries in the United States, using methods of judicial reasoning that are not unfamiliar to American judges. The first, variations of which have long been suggested by American scholars,\footnote{See, e.g., Regan, supra note 12; Robert L. Stern, That Commerce Which Concerns More States Than One 47 HARV. L. REV. 1335 (1934).} is the “national concern” requirement that would limit congressional use of the Commerce Clause to situations when individual state legislatures are unable to secure a desired public policy outcome for their own citizens because of lack of jurisdiction or a disagreement with other states. The second would police the first, by restricting congressional power under the Commerce Clause to legislation whose “pith and substance” is the regulation of interstate commerce; where courts determine that the legislative purpose relates to policies not assigned by the Constitution to the federal government, the legislation would be invalid.

A. National Concern

The authorization for Congress to regulate interstate commerce was a specific illustration of the Constitutional Convention’s general view that the national legislature should be authorized to act in relation to “Cases to which the states are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”\footnote{The Records of the Federal Convention of 1787, at 131–32 (Max Farrand ed., rev. ed. 1966). The Lochner era courts expressly rejected an interpretation of the Commerce Clause as effectuating that general authorization. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 291–92 (1936). The majority also noted the “many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment” as an essential aspect of their outmoded view of federalism. Id. at 292. Carter Coal was effectively overruled in United States v. Darby, 312 U.S. 100, 123 (1941).} Since the New Deal, it is clear and generally undisputed that Congress has the power to enact national legislation under the Commerce Clause in two scenarios. Scenario (1) is that states lack the jurisdiction to remedy problems affecting their own citizens; scenario (2) occurs when state legislators are
deterred from enacting social policies deemed beneficial to their own residents for fear of a competitive “race to the bottom” resulting from weaker policies by other states.\footnote{See Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 281–82 (1981) (upholding a federal statute limiting environmental effects from coal mining based on a congressional finding that nationwide “surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders” (citation omitted) (internal quotation marks omitted)); Dolby, 312 U.S. at 199–100, 123 (upholding minimum labor standards for goods produced for interstate commerce in order to prevent competition between producers on the basis of a failure to provide minimum standards of living necessary for health and well-being).} If these two scenarios exhaust national legislative power in the United States, then the Court may well improve current jurisprudence by substituting the tests required by the Supreme Court of Canada to secure judicial approval of national legislation under Parliament’s power over peace, order, and good government or trade and commerce.\footnote{See supra Part II.}

Something like the Canadian national concern test would be consistent in result with much, but not all, of the U.S. Supreme Court’s landmark federalism jurisprudence. The early New Deal cases included judicial reasoning suggesting that race-to-the-bottom concerns (scenario (2)) were serious problems that justified national legislation.\footnote{Cooter & Siegel, supra note 36, at 160. In addition to state legislatures being deterred from protecting their own state’s workers by fear of “unfair” competition from weak-regulating states, the Dormant Commerce Clause itself would render states with significant purchasing power jurisdictionally incompetent by invalidating a state statute that} No individual state could regulate wheat production to ac-

\footnotesize{\textsuperscript{184} See Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 281–82 (1981) (upholding a federal statute limiting environmental effects from coal mining based on a congressional finding that nationwide “surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders” (citation omitted) (internal quotation marks omitted)); Dolby, 312 U.S. at 199–100, 123 (upholding minimum labor standards for goods produced for interstate commerce in order to prevent competition between producers on the basis of a failure to provide minimum standards of living necessary for health and well-being).}
complish macroeconomic goals.\textsuperscript{187} \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{188} upholding the Civil Rights Act of 1964’s ban on racial discrimination in public accommodations, could have invoked jurisdictional concerns (scenario (1)) and applied the congressional findings—that discrimination significantly deterred interstate travel by African Americans\textsuperscript{189}—to infer that states like California or Illinois could not effectuate their desire to welcome black Alabama visitors who could not get there because of a lack of accommodations in Mississippi or Tennessee.

Adopting the Canadian national concern test would be familiar to American judges, because of its similarity to a test now used to determine whether state legislation imposes an undue burden on interstate commerce such that it violates the Dormant Commerce Clause. When a state enacts what purports to be a legitimate, non-discriminatory regulation to promote health, safety, or public welfare, the American judges seek to determine whether the challenged law either dominantly targets out-of-state persons or entities, or, instead, whether the law’s principal burdens and costs fall upon residents of the state who have a voice in the local democratic process.\textsuperscript{190}

As Robert Cooter and Neil Siegel correctly observe, the Court’s more restrictive decisions in \textit{Lopez} and \textit{Morrison} are also consistent with a national concern test.\textsuperscript{191} Although, as with virtually any significant intrastate activity in our modern, integrated economy, gun violence near schools and violence directed toward women have a significant effect on the entire national economy, in neither case did congressional findings or Justice Department briefs demonstrate that states were incompetent to criminalize gun use or provide tort law remedies for victims of violence, nor was there evidence that states were deterred from enacting these laws for fear that tough legislation would harm the state by causing gun-toting individuals or domestic batterers to relocate to a weak-regulation state.\textsuperscript{192}

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\item harred the sale of goods within the state if made out of state under substandard labor conditions. Robert L. Stern, \textit{The Commerce Clause and the National Economy, 1933–1946, 50 HAY. L. REV. 645, 647 (1946).}
\item Wickard v. Filburn, 317 U.S. 111 (1942).
\item 379 U.S. 241 (1964).
\item \textit{Id.} at 252.
\item \textit{John E. Nowak & Ronald D. Rotunda, Constitutional Law} §8 (8th ed. 2010); see, \textit{e.g.}, S. Pac. Co. v. Arizona, 325 U.S. 761, 767–68 n.2 (1945) (noting that burdens on out-of-state interests are “unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected”).
\item Cooter & Siegel, supra note 36, at 163.
\item United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Inadequate state law protection for gender-related violence may be the result of
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Consistent with the argument set forth in Part IV that American constitutional politics focuses on federalism tactically, a significant aspect of the political and legal controversy surrounding Obamacare was the lack of discussion as to precisely why national legislation was required. The challengers maintained that mandating the purchase of a service was unprecedented and improper. The government did not dispute the general argument, but asserted that health insurance was unique because the standard way that Congress could regulate—by barring the provision of services to those without insurance—was not realistic: it is socially unacceptable to deny essential health care to the uninsured when they need it. Justice Ginsburg’s dissent alone, in two paragraphs, expressly addressed the argument that nationwide imposition of Obamacare was necessary to prevent collective action problems arising from individual state legislation. In contrast, in upholding federal competition law under a national concern

discrimination rather than the sort of collective action problems that underlie something like the national concern test. Although beyond the scope of this Article, the more analytically sound approach to the specific issue in Morrison—a determination that hostility or insensitivity to victims of gender-based violence led to inadequate protection under state tort law—would be to uphold federal legislation under Section 5 of the Fourteenth Amendment. See, e.g., Stephen F. Ross, Legislative Enforcement of Equal Protection, 72 MINN. L. REV. 311 (1987).


Id. at 2590–91.

Id. at 2612 (Ginsburg, J., concurring in part and dissenting in part) (“States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal healthcare system, if adopted by an individual State, would be ‘bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.’” (quoting Helvering v. Davis, 301 U.S. 619, 644 (1937))); see also Brief of Commonwealth of Massachusetts as Amicus Curiae Supporting Petitioners at 15, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398) (noting that, in 2009, Massachusetts’s emergency rooms served thousands of uninsured, out-of-state residents). An influx of unhealthy individuals into a state with universal health care would result in increased spending on medical services. To cover the increased costs, a state would have to raise taxes, and private health insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the state. States that undertake healthcare reforms on their own thus risk “plac[ing] themselves in a position of economic disadvantage as compared with neighbors or competitors.” Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937); see also Brief of Health Care for All, Inc. et al. as Amici Curiae Supporting Petitioners at 4, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398) (“[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State’s efforts to improve its health care system through the elimination of uncompensated care.”). Facing that risk, individual states are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all states’ best interests. Congress’s intervention was needed to overcome this collective action impasse.
prong of the trade and commerce power, the SCC explicitly inquired into whether “the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.”

The adoption of the national concern test along with a highly deferential standard of judicial review, however, would not be consistent with the current majority’s desire to place a meaningful judicial limit on the exercise of congressional power. If the demonstrated effect on the national economy of gun violence near schools or violence against women is insufficient—because unlimited—to justify federal legislation, then surely a test that upholds legislation as long as Congress merely has a rational basis for concluding that there is some risk of a collective action problem would not suffice either.

On the other hand, if the U.S. Supreme Court were to adopt the less deferential approach of the SCC, the result would be a significant limitation on congressional power. This is perhaps best illustrated by comparing American and Canadian approaches to labor and employment law and securities regulation. American courts have upheld the Fair Labor Standards Act, the Occupational Safety and Health Act, the National Labor Relations Act, the Securities Act of


198 In helpful comments on an earlier draft, Professor Robin Elliot contrasts the “very activist” posture of the British Law Lords in policing federalism with what he labels as the “much more restrained approach” of the SCC, under “modern federalism.” Whatever the merits of the characterization of the SCC relative to the British Law Lords, and despite some eyebrow-raising examples of modern deference, see, e.g., Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, 425 (Can.) (upholding price controls under POGG’s emergency power because Parliament had “a rational basis for regarding the [Act] as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis”), Canadian justices continue to scrutinize claims for needed federal legislation much more closely than their American counterparts. See, e.g., Reference re Sec. Act, [2011] 3 S.C.R. 837 (Can.); supra text accompanying notes 82-84.


200 Occupational Safety & Health Act, 29 U.S.C. ch. 15 (2006). Commerce Clause jurisprudence is apparently sufficiently settled that the Supreme Court has not had the occasion to consider an explicit challenge to OSHA as beyond congressional power. The Supreme Court explicitly presumed that Congress had the power to enact the Act under the Commerce Clause in New York v. United States, 505 U.S. 144, 167-68 (1992) (listing a number of statutes, including OSHA, as legislation enacted pursuant to the Commerce Clause where Congress varied the extent to which it preempted state law).

1933,\textsuperscript{202} and the Securities and Exchange Act of 1934\textsuperscript{203} because labor standards, labor relations, and almost all aspects of the issuance and trading of corporate securities have a substantial effect on interstate commerce. In contrast, the SCC has recently reaffirmed its longstanding view that these matters are generally left to provincial regulation, with federal regulation strictly limited to demonstrable areas of provincial inability.\textsuperscript{204}

The Canadian experience clearly demonstrates that American states are competent to regulate in these areas, and that national uniformity is not a practical necessity.\textsuperscript{205} Thus, if the national concern test were to be imported, Congress’s power must be justified by race-to-the-bottom concerns. But, these concerns are only present where (a) there is a realistic opportunity for employers to relocate their operations to business-friendly states, or (b) the goods or services produced are actually sold interstate in competition with goods or services from states that would prefer tougher regulation but whose

\textsuperscript{202} Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2006). The U.S. Supreme Court upheld federal securities regulation under the Commerce Clause in Electric Bond & Share Co. v. SEC, 302 U.S. 419, 442 (1938) (“When Congress lays down a valid rule to govern those engaged in transactions in interstate commerce, Congress may deny to those who violate the rule the right to engage in such transactions.”) Lower courts applied this to uphold the Securities Act in Coplin v. United States, 88 F.2d 652 (9th Cir. 1937), Bog v. United States, 96 F.2d 734 (6th Cir. 1938), and Oklahoma-Texas Trust v. SEC, 100 F.2d 888 (10th Cir. 1939).


\textsuperscript{204} In addition to narrowly construing the trade and commerce power, the SCC has also narrowly construed the exception to provincial regulation contained in section 92(10)(a), which permits federal regulation of “Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.” British North America Act, 1867, 30 & 31 Vict., c. 3, section 92(10)(a) (U.K.). Note here, there is an interesting and broader textual provision allowing Parliament to declare that other in-traprovincial “Works” can be regulated if Parliament declares them to be “for the general Advantage of Canada.” Id. Section 92(10)(c) (emphasis omitted). Even with regard to this unique federal power to intervene and take over a legislative matter specifically assigned to the provinces, the SCC actively polices the exercise of that power, permitting federal regulation over only those aspects of a “Work” declared to be for the general advantage of Canada that are “integral to the exercise of federal jurisdiction.” Ont. Hydro v. Ont. Labour Relations Bd., [1993] 3 S.C.R. 327, 420-22 (Can.) (rejecting federal labor regulation of provincially-owned nuclear power plants).

\textsuperscript{205} In contrast to limitations on federal POGG, trade and commerce, or general advantage powers, the SCC has broadly construed the federal power over maritime law, see British North America Act, 1867, 30 & 31 Vict., c. 3, section 91(10) (U.K.) (assigning “Navigation and Shipping” to Parliament), because the court determined that uniform laws were a “practical necessity.” Whitbread v. Walley, [1990] 3 S.C.R. 1273, 1294 (Can.).
businesses would be put at a competitive disadvantage, or (c) where differential labor laws could significantly affect the mobility of labor.

There are many localized markets in the United States where none of these scenarios is present, but where federal regulations enacted under the Commerce Clause currently apply. Consider the case of Ollie’s Barbecue, the Birmingham, Alabama restaurant that unsuccessfully challenged the application of the Civil Rights Act.\textsuperscript{206} The basis for asserting federal jurisdiction was that Ollie’s had purchased $70,000 in meat from interstate sources over the past year.\textsuperscript{207} Unlike the companion case involving a downtown Atlanta motel, there was no evidence that interstate travelers frequented Ollie’s establishment, or that restaurants in states where racial discrimination in public accommodations was outlawed would be at any competitive disadvantage.\textsuperscript{208} Nor was there a showing that regulating Ollie’s was necessary to allow nearby restaurants that did serve interstate travelers to compete.\textsuperscript{209} In short, neither scenario (1) nor scenario (2) was present. As the Supreme Court observed, the precedential decision in \textit{Darby} upheld national minimum labor standards despite the lack


\textsuperscript{207} Id. at 298.

\textsuperscript{208} It is true that, “while a Mom and Pop produce store may not participate in the national market, many such businesses compete with the interstate grocery chain located nearby,” Choper, supra note 33, at 744. Although this fact supports the conclusion that almost any commercial activity “might reasonably viewed as affecting interstate commerce,” Nelson & Pushaw, supra note 124, at 111 n.518, it does not support legislation motivated solely by the need to solve collective action problems. For legislation’s pith and substance to be the maintenance of national goals not achievable without uniformity, Congress would have to conclude that the Mom and Pop produce store’s rivalry with chain stores is such that failure to apply federal labor or discrimination laws to the Mom and Pop would harm the ability of the chain store to compete. For purposes of antitrust analysis, courts have held that Mom and Pop stores do not significantly compete with chain stores, suggesting this finding would be difficult for Congress to make. See, e.g., \textit{California v. Am. Stores Co.}, 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (holding that “mom and pop” grocery stores do not compete with supermarkets for grocery shopping needs), \textit{aff’d in part and rev’d in part on other grounds}, 872 F.2d 837 (9th Cir. 1989), \textit{rev’d on other grounds}, 495 U.S. 271 (1990). Collective action problems could inhibit a state from ending workplace discrimination because employers might relocate to less restrictive states, and can harm other states by impeding the free flow of labor and capital. But the application of federal antidiscrimination law to Ollie’s Barbecue upheld in \textit{Katzenbach v. McClung} cannot be justified on these grounds.

Robert Stern, who first articulated a version of the national concern test in 1934, accepts that barbers in different states do not compete, but, at least in the context of economic downturns, would justify national minimum labor standards to fulfill the macroeconomic goal of boosting purchasing power. Stern, supra note 186, at 1365. While accurate as a matter of economics, this argument, like the ones about macroeconomic effects of gun violence near schools and violence against women that have been recently rejected, fails to meaningfully limit federal power.

\textsuperscript{209} Cooter & Siegel, supra note 36, at 161 n.160.
of showing that substandard wages or working conditions actually affected interstate commerce.\textsuperscript{210} Aside from those cases where problems of proof made it impossible to distinguish between intrastate activities that caused collective actions problems and intrastate activities that did not,\textsuperscript{211} a meaningful national concern test would limit the scope of federal legislation substantially. Retail businesses serving almost exclusively local customers would not be subject to federal discrimination, labor, or consumer protection laws unless they directly competed with rivals whose customer base subjected them to federal regulation.

Moreover, as Cooter and Siegel allude, state legislatures are not incompetent, nor would individual legislation disrupt American harmony, when two or more states can solve problems through interstate cooperation.\textsuperscript{212} A collective action problem justifying federal intervention only occurs when State One suffers the external effects of activities within State Two and cannot easily persuade State Two to enact legislation to remedy the problem. Suppose a business in Kennewick, Washington discharges mildly polluting effluents into the Columbia River; under a meaningful national concern test, federal legislation would only be appropriate if the Washington and Oregon legislatures could not agree on a solution.\textsuperscript{213} Under federalism principles of the sort practiced in Canada, Congress should defer to the majority of Washingtonians and Oregonians if it believes, contrary to a national majority, that the costs of barring the discharge exceeds the environmental benefits. Under current doctrine, of course, Congress has plenary authority over any navigable river,\textsuperscript{214} and would also have authority if the Washington polluter made any significant pur-

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\item\textsuperscript{210} McChong 379 U.S. at 308 (citing United States v. Darby, 312 U.S. 100, 120-21 (1941)).
\item\textsuperscript{211} Cf. Darby, 312 U.S. at 118 (noting that most manufacturing businesses do not differentiate between goods intended for interstate and intrastate commerce during the manufacturing process).
\item\textsuperscript{212} Cooter & Siegel, supra note 36, at 140.
\item\textsuperscript{213} Cf. Munro v. Nat’l Capital Comm’n, [1966] S.C.R. 663 (Can.) (upholding federal legislation under the national concern test, noting failed attempts by Ontario and Quebec to cooperate on regional planning for the bipartisan Ottawa metropolitan area). Collective action problems are not always insuperable: sometimes parties can overcome bargaining and information costs and reach desired solutions. If Ontario and Quebec had been able to cooperate, presumably federal planning legislation would not have been upheld if initiated simply because Parliament disagreed with the policy choices agreed to by the provincial governments.
\item\textsuperscript{214} See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190, 196-97 (1824) (holding that Congress’s commerce power extended to regulation over navigable waterways); see also United States v. Rands, 389 U.S. 121, 122-23 (1967) (asserting Congress’s power to control navigable waterways in denying Fifth Amendment compensation to riparian owners).
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chases from out-of-state sellers, so that the national majority can impose its will.

Nor would a meaningful national concern test permit federal legislation whenever regulatory economies of scale support uniform national regulation; otherwise, like the justifications rejected in Lopez/Morrison, there would be no meaningful limit to congressional power. Thus, as discussed above, the SCC rejected national securities regulation in Canada, because provinces clearly could regulate securities (as they had for many years) and there was no evidence of a race-to-the-bottom with regard to detailed regulations.\(^{215}\)

The importation of the Canadian national concern test would permit Congress to continue to adopt national policies where states are incompetent to act, as well as where “individual legislation” by American states would “interrupt” the “harmony” of the United States because of collective action problems. Adoption of the Canadian approach reflects the view that serious collective action problems exhaust this category.\(^{216}\) However, many federal laws go much further. A realpolitik explanation for much national legislation in the United States is neither scenario (1), state jurisdictional incompetence, nor scenario (2), collective action problems. Rather, many aspects of federal law in the United States are best explained as scenario (3): a

\(^{215}\) The SCC noted that the federal government’s defense of national legislation lacked “evidentiary support,” in particular because “the structure and terms of the proposed Act largely replicate the existing provincial schemes.” Reference re Sec. Act, [2011] 3 S.C.R. 837, 887 (Can.). This suggests a modest but significant tightening of the provincial inactivity requirement from that applied in City National Leasing. Historically, because competition law had been enacted in 1889 by the federal legislature under the criminal law power, there was (in contrast to securities regulation) no blanket of provincial laws designed to deter anticompetitive practices (although modest constraints were imposed by the common law of restraint of trade and Quebec Civil Code provisions outlawing agreements contrary to the public order). See generally Stephen F. Ross, The Evolving Tort of Conspiracy to Restrain Trade Under Canadian Common Law, 75 Canadian Bar Rev. 193 (1996). In any case, the relative consensus of regulatory approaches among the provinces precluded a finding of national concern: arguably, the situation would have been different if one or more provinces decided to wreak havoc with nationwide markets by adopting radically different approaches to securities regulation. The court explicitly set forth, as an alternative to federal regulation, cooperative intergovernmental efforts as a means to solve problems of overlapping jurisdiction. Sec. Act, [2011] 3 S.C.R. at 866 (citing with approval Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 S.C.R. 292 (Can.) (upholding a comprehensive scheme for chicken production and marketing created by agreement between the federal and provincial governments)).

\(^{216}\) For federal legislation to properly address a subject of “national concern,” it must possess an “indivisibility” that distinguishes it from matters of provincial concern; this property can be established by determining the effect on extra-provincial interests of a provincial failure to regulate the intra-provincial aspects of the matter effectively.” Sujit Choudhry, Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy, 52 U. Toronto L.J. 163, 228-29 (2002).
national majority and its federal representatives believe that state legislatures are insufficiently sensitive to solving widespread problems that affect Americans throughout the country, because of hostility to regional minorities, special-interest capture, or basic philosophical disagreement with the national majority. It is this third scenario, rather than the first two, that explains the application of the Civil Rights Act to employers or retailers unlikely to relocate to another state that permits discrimination on the basis of race or gender,\textsuperscript{217} or the Federal Trade Commission Act to unfair and deceptive anti-consumer practices in intrastate transactions of specific industries (such as abusive practices in the funeral industry),\textsuperscript{218} again by sellers unlikely to relocate on the basis of the regulatory environment. In contrast, these issues are all dealt with provincially in Canada. Canadians do not believe that the sincere perception by a national majority of a widespread problem that needs fixing in a particular way is a sufficient justification for federal intervention, just because some provincial governments do not share this view.

\textbf{B. Pith and Substance}

Judicially policed constitutional federalism requires courts to prevent the national government from enacting legislation simply because they believe that “some such policy as that adopted...should be made general throughout” the nation.\textsuperscript{219} Indeed, this view was shared by Chief Justice Marshall, despite his expansive definition of

\textsuperscript{217} Several American advocates for something like the national concern test seek to cabin private racial discrimination of the sort that was prohibited, in the exercise of the commerce power, by the Civil Rights Act and upheld in \textit{McClung}. Katzenbach v. McClung, 379 U.S. 294, 305 (1964); \textit{see e.g.,} Cooter & Siegel, \textit{supra} note 36, at 161; Regan, \textit{supra} note 12, at 595-602. This is true enough, if one believes that a federal ban on Ollie’s Barbecue’s racist practices is an exception because Alabama’s tolerance of segregated restaurants was itself a failure to provide the equal protection of the common law. \textit{Id.} Or somewhat more broadly, that racial discrimination is a singular exception to the national concern principle (in which case, Congress could properly legislate against private conduct as a badge or incident of slavery in enforcing the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968)). The assertion here, however, is that a national majority is just as concerned about protecting economically powerless workers, women, Americans with disabilities, and senior citizens, as they are with protecting African Americans, while only the latter can be protected under legislation enforcing the Thirteenth Amendment.


\textsuperscript{219} \textit{Cf. In re Bd. of Commerce Act, 1919, & the Combines & Fair Prices Act, 1919, [1922]} 1 A.C. 191, 200-01 (U.K.P.C.) (explicitly rejecting this justification for parliamentary legislation in Canada); \textit{see also} Regan, \textit{supra} note 12, at 571 (explaining that the general interests of union do not include “just anything Congress thinks would be desirable for the people of the United States as a whole”).
the scope of federal legislative power. 220 In the shadow of judicial policing of constitutional federalism, federal legislators motivated by a desire to set policies for the entire nation in areas that the Constitution assigns to sub-national governments will enact legislation that formally relates to a matter within its enumerated authority. As described above, 221 Canadian courts use the pith and substance doctrine to police this problem; since the New Deal, American courts have not.

The recent American decisions limiting the scope of congressional power under the Commerce Clause all concerned legislation that was justified under precedents that allowed Congress to regulate intrastate activities that substantially affected interstate commerce. 222 The national concern test, however, would also require a reconsideration of even longer-standing precedents that allowed Congress to exercise plenary authority to regulate instrumentalities of interstate commerce, even when the regulation did nothing to secure any legitimate purposes related to the instrumentality, but was intended instead to accomplish the regulation of public morals. The original and revised Mann Act illustrates the effect of a meaningful national concern test policed with the pith and substance doctrine. The original act, prohibiting the transportation of women across state lines for immoral purposes, was upheld under the view that the pith and substance of a federal statute regulating interstate transportation did not need to be the protection of interstate commercial instrumentality or the facilitation of interstate commerce. 223 The revised statute bars the interstate transportation of a person for the purposes of engaging in sexual conduct that is otherwise illegal. 224 The latter statute’s pith and substance is to solve a collective action problem: how State X can

220 Although the Court rejected the claim that Congress could only legislate under the Necessary and Proper Clause when the challenged law was, in the opinion of the Justices, demonstrably necessary, M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), the Chief Justice cautioned that were Congress “under the pretext of executing its powers, [to] pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal” to invalidate the law. Id. at 423; see also Thomas W. Merrill, Toward a Principled Interpretation of the Commerce Clause, 22 HARV. J.L. & PUB. POL’Y 31, 39 (1998).

221 See supra text accompanying notes 103–13.


223 Caminetti v. United States, 242 U.S. 470 (1917). The foundational precedent was Champion v. Ames (Lottery Case), 188 U.S. 321, 363–64 (1903) (upholding the ban on interstate transportation of lottery tickets).

enforce morality laws on its citizens when they can travel to State Y to engage in immoral activity? Without the pith and substance doctrine, there are few legislative matters beyond Congress’s reach,225 and the current majority’s desire for a workable doctrine that meaningfully distinguishes between national and local legislation will fail.

The absence of the equivalent of the Canadian pith and substance doctrine in the United States reflects the different constitutional politics north and south of the largest undefended border in the world. The broad application of many federal statutes to situations in which collective action problems would not preclude individual state legislation reflects a persistent, bipartisan, and longstanding political preference to establish national policy because of a concern that one or more states will adopt policies that ill-serve their own constituents (scenario (3)). With popular support from national majorities, Congress has passed legislation to protect workers and racial minorities across the country from exploitation and discrimination, not solely or even primarily because of concerns about the effects in their own states; rather, national majorities believe that a policy of nondiscrimination is desirable and should be enforced in states where regional majorities disagree. A significant motivation for maintaining the federal criminalization of marijuana is not the concern that marijuana grown for medical use in California or for general use in Washington or Colorado will flood other states, but rather because a national majority still thinks marijuana legalization is a bad idea.226 These illustrations reflect a widespread view that federal legislation should not be limited to scenario (1), state jurisdictional incompetence, or scenario (2), collective action problems that would result in

225 Choper, supra note 33, at 760. Professors Grant Nelson and Robert Pushaw argue that modern-day federal politicians frequently controvert the Framers’ intent that “national uniformity is good in commerce but bad in political, social, cultural, and moral matters.” See Nelson & Pushaw, supra note 124, at 113. Thus, they believe that the Supreme Court should “strike down attempts to invoke the Commerce Clause to legislate social or cultural norms based upon Congress’s disagreement with the states’ treatment of particular problems.” Id. at 118. Yet they conclude that “so long as Congress is regulating a commercial transaction, it is immaterial whether there is some other legislative purpose (even an overriding one).” Id. at 125. The Canadian experience suggests that this does not provide the limitation that the current majority seeks. To provide a workable means to preserve this divide, American Justices need to adopt something like the Canadian test of pith and substance.

226 Justice Benjamin Cardozo upheld federal pensions for senior citizens by noting that states were reluctant to tax and spend for their own pension schemes for fear of competitive harm to local industries, rather than “owing . . . to the lack of sympathetic interest.” Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937). Often, however, state legislatures fail to act in the way that a national majority prefers precisely because of a “lack of sympathetic interest.” Id.
a race-to-the-bottom. Rather, persistent American national majorities seem to believe that if individuals wish to use instrumentalities of interstate commerce (like rivers or highways), or engage in interstate commerce (buy buying some out-of-state products), then national legislation is justifiable. This was, indeed, one of the rationales of child labor legislation struck down in *Hammer v. Dagenhart*. If the U.S. Supreme Court is to intervene to overrule this political judgment, it not only needs to adopt a meaningful and workable standard, like the national concern test, but it also must ensure that the test is not evaded on pretext.

To ensure a workable and analytically sound judicial policing of American federalism, the U.S. Supreme Court could also borrow the Canadian technique of limiting federal intervention under the Commerce Clause to legislation intended to resolve scenarios (1) and (2), but not (3). Adoption of this technique would modify the Court’s traditional deferential inquiry as to whether Congress could rationally find jurisdictional incompetence or collective action problems. Application of the doctrine would likely require that the National Labor Relations Act and Fair Labor Standards Act be read narrowly, so that the statutory requirement that regulates businesses would be engaged in activities “affecting commerce” would be construed to mean that state regulation would result in a race to the bottom. A similar narrowing approach would be required for many other federal statutes.

C. Would Meaningful Judicial Arbitration Give American Judges Too Much Discretion?

An overriding concern for American constitutional law is with doctrinal standards that allow unelected judges to make policy. There seems to be widespread evidence that Canada’s standards for judicial arbitration of federalism disputes afford justices a significant amount of unconstrained discretion. The SCC has acknowledged

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227 247 U.S. 251, 271–73 (1918). The other rationale was to solve the collective action problem caused by unfair interstate competition between products manufactured in states with limits on child labor and those without them. *Hammer’s* conclusion that the Commerce Clause did not give Congress the power to prevent this unfair competition was overruled in *United States v. Darby*, 312 U.S. 100, 116 (1941).

228 United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (complaining about judicially created equal protection doctrines that require closer scrutiny to certain classifications “when it seems like a good idea to load the dice”); see H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1470 (2005) (asking whether a judicial standard is “sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways”).
that courts “apply considerations of policy along with legal principle” in determining whether a law is a matter within the jurisdiction of the government that enacted it. 229 Even when applying legal principles, some are stated at such a broad level of generalization as to scarcely limit judicial discretion; thus, the process of characterizing a statute as falling within or without a particular power allocated to the federal or provincial governments under the BNA Act requires the courts to “inquire into the social or economic purposes which the statute was enacted to achieve.” 230 Although eschewing the use of discretion to uphold or reject a statute based on the substantive policy goals contained therein, Professor Hogg suggests that the “policy” comes down to a judicial determination of whether the challenged statute is “the kind of law that should be enacted at the federal or the provincial level.” 231 In making this determination, Professor William R. Lederman wrote that courts need to consider multiple criteria, including the value of uniformity versus diversity, the relative merits of local or central administration, and the justice of minority claims. 232 More recently, Justice Marie Deschamps wrote for a unanimous bench in observing that “the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions.” 233 The lack of standards led Paul Weiler to analogize the SCC’s role to that of a labor interest arbitrator. 234 Indeed, the breadth of the role Canadians assume for their judges is illustrated in Professor Hogg’s analysis that the reserved powers of the Governor General (the formal representative of the Queen), to be exercised in

230 Id., at 483 (citation omitted) (internal quotation marks omitted); 1 HOGG, supra note 37, § 15.5(d).
231 1 HOGG, supra note 37, § 15.5(h) (citing W.R. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMNAS: ESSAYS ON THE CONSTITUTIONAL HISTORY, PUBLIC LAW AND FEDERAL SYSTEM OF CANADA 241 (1981)).
232 LEDERMAN, supra note 231, at 241.
time of constitutional crisis when the Prime Minister lacks the confidence of the majority of the elected House of Commons, “is somewhat akin to that of a judge—another non-elected official to whom we readily entrust large powers in the expectation that they will be exercised impartially.”

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Justices of all stripes seek to create constitutional doctrine that is both analytically sound (according to their own jurisprudence) and workable for application by lower courts. The Equal Protection Clause of the Fourteenth Amendment is unlimited in its textual scope and the concept that statutes should afford equal protection is conceptually sound, but the U.S. Supreme Court has confined active judicial policing to those situations where legislation that is unfairly discriminatory is unlikely to be corrected in the political process. In *Vance v. Bradley*, the Court observed that the “Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwise we may think a political branch has acted.”

Two Canadian constitutional doctrines could be borrowed by American judges to police federalism. Both reflect a workable effort to achieve the current majority’s goal of a judicially arbitrable means to effectuate a modern-day distinction between limited federal power and unlimited state power. Limiting federal authority to non-pretextual remedies for (1) state jurisdictional incompetence or (2) external harms caused by individual state legislation resulting from collective action problems seems, as well, to be analytically sounder than limiting federal authority to anything that affects our completely integrated national economy as long as federal lawyers can imagine some limiting principles to identify some morsel of state autonomy untouched by the statute.

However, importing Canadian doctrines requires a significant revision of American constitutional politics. The national concern and pith and substance doctrines significantly limit the ability of the American people, through their national representatives, to effectuate public policies that promote the general welfare when the need for national legislation is due to the disagreement between state legis-

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235 1 HOGG, supra note 37, §9.7(a).
237 Id. at 97 (footnote omitted).
lative majorities and the national majority. Debates over major na-
tional legislation, from the Fair Labor Standards Act of 1938, through
the Civil Rights Act of 1964, the Americans with Disabilities Act of
1990, to the Affordable Care Act of 2009, all show heated disagree-
ment about the substantive merits of the legislation, but relatively lit-
tle concern that these measures should be limited to overriding
weaker state laws with external effects. Rather, these major pieces of
legislation reflect the national judgment that Americans should not
be subjected to exploitive and unfair workplace conditions, racial and
gender-based discrimination, unreasonable obstacles in overcoming
disabilities, and avoidance of the ravages of expensive and unafforda-
ble health care, whether or not their own state legislatures could pro-
tect them, and whether or not their own state legislatures would be
deterred from protecting them by the threat of weak regulation from
other states.

To continue the current doctrinal path provides little in the way
of restraining Congress. To adopt meaningful standards fundamen-
tally alters American constitutional politics, making our federation
more similar to our northern cousin. This is the choice of constitu-
tional law and politics facing the United States Supreme Court.

CONCLUSION

The United States and Canada are both federal systems, with the
constitutional assignment of specific powers to the national legisla-
ture and independent judiciaries that have the final say in questions
of legislative conformance to a written constitution. Both constitu-
tions were drafted to permit the federal legislature to act in cases
where (1) sub-national governments lack jurisdictional competence
or (2) national uniformity is essential to effectuate public policy. In
Canada, Parliament-authorizing provisions have been narrowly con-
strued by judges to limit federal legislation to where these two scenar-
ios demonstrably exist. In the United States, Congress-authorizing
provisions have, since the New Deal, been broadly construed by judg-
es to permit federal legislation that establishes a national policy, with
which some state legislatures may disagree on the policy merits,
whenever Congress reasonably believes that the legislation affects
economic relations not entirely internal to a single state.

The virtually complete integration of the American economy,
however, means that there is virtually no intrastate activity that, in the
aggregate, does not have the requisite interstate effect. Recent deci-
sions claim to impose new limits, but they fail to limit Congress’s abil-
ity in any meaningful way to national problems arising out of jurisdic-
tional or collective action problems. If American Justices seek doctrines that are both workable and analytically sound, they could borrow from Canada, insisting on a close judicial review of federal statutes to ensure that they address truly “national concerns” and that they are not pretexts for federal laws that seek to override policy judgments by state legislative majorities with which federal legislators disagree. However, adoption of these workable doctrines would result in a significant change in American constitutional politics and law.

Even in Canada, observers recognize that their tests, while workable, afford a very high degree of discretion to unelected judges. The resolution of intergovernmental disputes by a politically unresponsive arbiter is seen as desirable, however, in light of the inability of the Canadian political process to adequately protect the interests of Canadians in maintaining provincial rights. This is due to the realities of parliamentary politics (strong party discipline inhibits the “faction against faction” political constraint Madison accurately foresaw between federal and state politicians in the United States), and the particular demographics of Canada, where a permanent linguistic minority is a permanent linguistic majority in the second largest province. Active judicial arbitration of Canadian federalism importantly reflects a widely shared view, historically and today, that Canadians prefer to ensure that important economic, social, and cultural policies they prefer are enacted in their own provinces, even if what they perceive as misguided policies are imposed on their fellow Canadians in other provinces.

In interpreting broadly worded provisions relating to constitutional rights, the U.S. Supreme Court has been extremely cognizant that its role varies not only with text and original intent but with the need for judicial intervention to effectuate constitutional values. The widespread judicial discretion required to meaningfully distinguish what is national and what is local, and the widely shared view, historically and today, that Americans aspire to enact important economic, social, and cultural policies they prefer for the entire country, even if what they perceive as misguided policies might be favored by a majority in one or more states, suggests that the Court may reject, as inappropriate to our own condition, the more restrictive approach adopted by our cousins in Ottawa.