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## Awakening Canada's Dormant Trade and Commerce Clause: How Canadian Courts Test Concurrent Provincial Legislation

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AWAKENING CANADA'S DORMANT TRADE AND COMMERCE  
CLAUSE: HOW CANADIAN COURTS TEST CONCURRENT  
PROVINCIAL LEGISLATION

I. INTRODUCTION

Imagine you manufacture a unique style of furniture in U.S. State Z. Only State X harvests the lumber you require. State X passes an ordinance requiring State X suppliers to sell this lumber exclusively to State X residents. The State X legislature claims it passed the ordinance to conserve its precious forestry resource.

Because your business will be ruined unless you move to State X, you challenge the ordinance in court. The court strikes the ordinance because it violates the dormant commerce clause.<sup>1</sup> On its face, the ordinance has a legitimate purpose—to conserve a state resource. Conservation, however, is an incidental purpose to that of shielding residents from competition in the use of unique lumber. The state legislature could have used means less burdensome on interstate commerce than completely blocking lumber exports at the state border. Moreover, the legislature's solution is not evenhanded for residents and nonresidents. Rather, it discriminates against nonresidents.

Imagine now you are a resident of Canadian Province Z. Only Province X grows the trees you need. Province X bans exportation of the trees outside its borders. In the ensuing litigation, the court strikes the ordinance, noting the language of the Canadian Constitution, which prohibits provinces from discriminating when supplying other provinces with natural resources.

Assume further the U.S. or Canadian ordinance sets size specifications for all trucks used to ship lumber on the state's or province's highways. In the name of maintaining the highways, the legislature declares a ten ton weight limit on trucks. Plaintiff truck driver submits conclusive evidence that the heaviest truck in use, a fifteen ton truck, does no more damage than lighter trucks.

A U.S. court will likely strike the ordinance because it forces

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1. Courts use the dormant commerce clause, a non-textual constitutional provision, to test state legislation that affects interstate commerce.

out-of-state drivers to supplement their fleets with trucks that meet State X standards. The burden outweighs the debatable state benefit. The Canadian court, however, might determine that the regulation does not burden interprovincial commerce in the supply of lumber. This contrary result may occur because Canadian Constitutional law lacks a dormant commerce clause analysis to reign Canadian legislation. Thus, the court might end its inquiry there and sustain the ordinance.

Even with the possibility that a rogue Canadian court might consider the ordinance's actual effect, Canadian courts have not developed a standard method for testing provincial legislation that affects interprovincial commerce. This causes two problems: (1) without stringent legislative restraints, provinces could become economic islands unto themselves, as evidenced by recent events surrounding Quebec; and (2) such economic isolation frustrates the Canadian Constitutional framers' intent to obviate provincial isolation. This Comment proposes as a solution that Canadian courts adopt the U.S. courts' dormant commerce clause analysis.

The framers of the U.S. Constitution and Canada's Constitution (the British North America Act) drafted their respective documents with different goals. The U.S. framers, their new nation having recently shirked the Crown, sought to preserve individual state power.<sup>2</sup> The Canadians, drafting their Constitution eighty years later in 1864-65, sought to avoid the "paroxysm of state's rights" then plaguing the U.S. To that end, they deliberately centralized their federal government.<sup>3</sup>

The Commerce Clause of the U.S. Constitution empowers Congress to create federal legislation relating to interstate commerce. When a state legislates in an area reserved by the Commerce Clause for the federal government, courts will sustain the state's action if it does not violate the *dormant* commerce clause, an implied restraint on state power.<sup>4</sup> States may also exercise the residual power of the Tenth Amendment, which immunizes states

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2. See GEORGE BROWN TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 303, 313 (4th ed. 1996).

3. See William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585, 601 (1985); see also WILLIAM H. MCCONNELL, *COMMENTARY ON THE BRITISH NORTH AMERICA ACT* 137 (1977).

4. If a state legislation conflicts with already existing federal legislation in the same area, this discussion is moot. See U.S. CONST. art. IV, cl. 2. In that situation, courts wield the Supremacy Clause to invalidate state legislation, making any dormant commerce clause jurisprudence unnecessary. *Id.*

from federal regulation of state activity.<sup>5</sup>

By contrast, the Canadian Constitution prohibits provinces from legislating in the federal arena, even when the federal government has not acted.<sup>6</sup> When provinces legislate, they must do so within a specifically enumerated provincial power.<sup>7</sup> Moreover, any power not specifically assigned to provinces by default belongs to the federal government under its "general" or "Residuary" power.<sup>8</sup>

The U.S. Constitution has always allowed concurrent commerce power.<sup>9</sup> U.S. jurisprudence, therefore, contains a well-developed mechanism to determine the constitutionality of state legislation that regulates interstate commerce. Courts apply a five-part analysis that considers: (1) whether the state had a legitimate purpose in enacting the regulation; (2) whether the means of the legislation are rationally related to its purpose; (3) whether the burden on interstate commerce substantially outweighs the benefits; (4) whether the legislation discriminates, either on its face or as applied; and (5) whether the legislation necessarily and inevitably causes extraterritorial effects.<sup>10</sup>

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5. See *New York v. United States*, 505 U.S. 144, 166, 178-79 (1992) (invalidating part of a federal plan for radioactive waste disposal because it compelled the state either to manage waste according to the federal government's method, or take title to the waste and incur all liability for environmental effects).

Congress may, however, regulate the states in efforts to ensure all citizens the right to vote and to enforce 14th amendment rights. See U.S. CONST. amend. XIII, § 2, amend. XIV, § 5, amend. XV, § 2, amend. XIX, § 2, art. XXIV, § 2.

6. See *Union Colliery Co. v. Bryden* [1899] A.C. 580, 588; see also ALBERT S. ABEL, *LASKIN'S CANADIAN CONSTITUTIONAL LAW* 10 (4th ed. 1973).

7. See *McConnell*, *supra* note 3, at 137; see also *British North America Act, 1867*, § 92. The Constitution Act of 1982 did add *concurrent* provincial powers to export natural resources to other provinces, the exercise of which is superseded by conflicting federal legislation. See *CAN. CONST. (Constitution Act, 1982)*, § 92A. Section 92A seems to insert a quasi-U.S. dormant commerce clause safeguard because it prohibits provincial export laws from "authoriz[ing] or [discriminat]ing in prices or in supplies exported to another part of Canada." See also *id.* § 92A(2). Section 92A(2), however, does not address a main concern of U.S. dormant commerce clause jurisprudence: prohibiting states from discriminating against out-of-state businesses wishing to sell or provide services within the state. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Section 92A(2) solely protects businesses and provinces from discrimination in pricing and supply when *buying* natural provincial resources.

8. See *CAN. CONST. (British North America Act, 1867)*, § 91. This clause is known as the "Peace, Order and Good Government" clause.

9. See *generally* U.S. CONST. The U.S. Constitution enumerates federal power in article I, section 8 but does not similarly limiting state jurisdiction to specifically enumerated areas.

10. The prongs combine the factors the U.S. Supreme Court has used to evaluate

The British North America Act of 1867 did not allow concurrent power.<sup>11</sup> When determining whether provincial legislation was *intra vires* the Constitution, courts asked whether the province had acted in an area delegated to the federal government (which included trade and commerce).<sup>12</sup> In 1982, the Canadian legislature overhauled the British North America Act of 1867, establishing the current Canadian Constitution, known as the Constitution Act of 1982.<sup>13</sup> The Constitution Act of 1982 gives the provinces concurrent power to regulate the export of natural resources between Canadian provinces, as long as provincial legislation does not conflict with existing federal legislation.<sup>14</sup>

Unlike U.S. courts, Canadian courts have not devised a safeguard to limit provincial exercise of this concurrent power. Canadian common law, however, does recognize three sources of legislative control that can eradicate offensive provincial legislation: the aforementioned Residuary Power, the Emergency Power,<sup>15</sup>

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state regulation of interstate commerce. See *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 891 (1988); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Brown-Forman Distillers Corp. v. Liquor Auth.*, 476 U.S. 573, 582-83 (1986); *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670-71 (1981); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 529 (1959); *Dean Milk Co.*, 340 U.S. at 356; *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779-80 (1945); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *Bradley v. Pub. Util. Comm'n*, 289 U.S. 92, 95 (1933); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925).

11. This statement is qualified by the British North America Act's implied grant of concurrent power, as interpreted by Canadian courts. Provincial governments may infringe on textually exclusive federal power when the "pith and substance" of the provincial act concerns exclusive provincial power. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 314 (3d ed. Supp. 1992)[hereinafter HOGG, *CONSTITUTIONAL LAW*]. For further discussion see *infra* Part III.B.

12. Courts will occasionally answer this question by determining whether the province has acted "extra-provincially." *Burns Food Ltd. v. Att'y Gen. for Manitoba* [1973] S.C.R. 494, 502-04 (Can.) (stating "the direct regulation of interprovincial trade is of itself a matter outside the legislative authority of any Province and it cannot be treated as an accessory of local trade"); *Attorney Gen. for Manitoba v. Manitoba Egg & Poultry Ass'n* [1971] 19 D.L.R. 3d 169, 177, 179 (The Egg Case) ("The issue which has to be considered in this appeal is as to whether the [provincial act] is *ultra vires* the [provincial legislature] because it trespasses upon the exclusive legislative authority of the Parliament of Canada to legislate on the matter of the regulation of trade and commerce conferred by s. 91(2) of the *B.N.A. Act, 1867*") (emphasis in original); *John Deere Plow Co. v. Wharton* [1914] 18 D.L.R. 353, 357, 363.

13. See CAN. CONST. (Constitution Act, 1982), § 60.

14. Section 92A represents the only change to the distribution of legislative powers promulgated in 1982. See PETER W. HOGG, *CANADA ACT 1982 ANNOTATED* 102 (1982) [hereinafter HOGG, *ANNOTATED*].

15. The Emergency Power permits the federal government, in cases of "emergency,"

and the National Dimensions Test.<sup>16</sup> The federal government may summon any of these powers in conjunction with the paramountcy clause (akin to the U.S. Supremacy Clause).<sup>17</sup> Governmental action, however, is time-consuming and financially burdensome.

Before 1982, provinces rarely regulated inter-provincial commerce (in the absence of federal legislation) in a way that overburdened extraprovincial participants. Courts could easily dismiss offensive action by holding that trade and commerce were within the exclusive ambit of federal power.<sup>18</sup> Nevertheless, the 1982 amendments to the Constitution, particularly the addition of section 92A, now allow provinces to act in the realm of trade and commerce.<sup>19</sup> Because this was never previously an issue, Canadian courts are ill-prepared to test the constitutionality of such actions. At least one commentator has suggested this bodes poorly for the future of free interprovincial trade and commerce:

There has been no development in Canada of [any doctrine similar to the U.S. dormant commerce clause jurisprudence] . . . or other comparable doctrine to limit provincial regulatory authority over the sale or distribution or processing of goods within the Province although brought in from . . . another Province. Indeed, there is no reason presently to doubt the power of a Province to establish at least a public monopoly in certain goods or services, or otherwise to exclude competition

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to assume jurisdiction over an area normally specifically reserved for provincial control under section 92. JAMES MACPHERSON, *DEVELOPMENTS IN CONSTITUTIONAL LAW* 43, 44-48 (James MacPherson ed., 1978).

16. The federal government may legislate in a section 92 area if the subject matter is of broad national concern. *See id.* at 43, 48-52.

17. *See* CAN. CONST. (Constitution Act, 1982), § 52. The British North America Act of 1867 enjoyed implicitly supreme status because "it was an imperial statute extending to Canada," but lacked an explicit supremacy clause. HOGG, *ANNOTATED*, *supra* note 14, at 105. The U.S. Supremacy Clause mandates that in the case of a direct and obvious conflict between federal and state legislation, the federal law preempts state law.

18. *See* MCCONNELL, *supra* note 3, at 142. "Once the possibilities of s. 92 were exhausted, further enquiry was needless, since any jurisdiction not given to the provinces would be embraced automatically in the residue known as the 'peace, order and good government' clause." *Id.*

Three other areas of concurrent Canadian legislative power exist: section 94A (added in 1951) confers concurrent power to make laws in relation to old age pensions; section 95 confers concurrent power over agriculture and immigration; and arguably sections 92(2) and 92A(4), in conjunction with section 91(3), create concurrent taxing power. *See* HOGG, *CONSTITUTIONAL LAW*, *supra* note 11, at 15-34.

This Comment focuses on the concurrent power over the interprovincial export of natural resources. Provinces are more likely to abuse this power and consequently transform themselves into economic islands.

19. *See* HOGG, *CONSTITUTIONAL LAW*, *supra* note 11, at 102.

in intra-provincial dealing.<sup>20</sup>

Part II of this Comment describes the structure and distribution of both U.S. and Canadian legislative power, including the Constitutional framers' intent as they drafted their respective constitutions. Part III contrasts how U.S. courts have used the dormant commerce clause to control state legislation. Part III further demonstrates how the Canadian courts have declared provincial legislation *ultra vires* the Constitution, and how the Canadian government may also act to invalidate provincial acts. Part IV recommends that, to avoid provincial monopolies, Canadian courts adopt an analysis similar to the one adopted by U.S. courts. Placing such a restraint on provincial sovereignty maintains the intent of the original framers. The drafters of the Constitution Act of 1982 surely agreed with this intent, because they merely amended, and did not replace, the British North America Act.

## II. THE STRUCTURE AND DISTRIBUTION OF LEGISLATIVE POWER

### A. *The United States: Fear of Tyranny v. Fear Of The "Spirit Of Locality"*

The U.S. broke away from Great Britain in 1783<sup>21</sup> and focused on the task of forming a distinctly American method of government.<sup>22</sup> In 1781, the states had adopted the toothless Articles of the Confederation. At that time, the states were in "no mood for a strong central government" and had not even granted Congress the power to regulate interstate commerce.<sup>23</sup>

Revolutionary leaders such as James Madison, however, were concerned that the state legislatures' "spirit of locality" was wreaking havoc on the "aggregate interests of the community."<sup>24</sup> At the Constitutional Convention in 1787, most delegates agreed that the country would prosper under a strong central government.<sup>25</sup> To restrain federal authorities from abusing this power, however, the framers gave the states broad sovereignty.<sup>26</sup>

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20. ALBERT S. ABEL, *LASKIN'S CANADIAN CONSTITUTIONAL LAW* 251 (4th ed. 1973).

21. *See* TINDALL & SHI, *supra* note 2, at 263.

22. *See id.* at 265.

23. *See id.* at 268.

24. *See id.* at 299.

25. *See id.* at 303.

26. *See id.*

The U.S. Constitution enumerates seventeen federal powers and grants Congress the power to "make all laws which shall be necessary and proper" to execute these powers.<sup>27</sup> The Constitution does not specifically list the states' powers. Instead, the Tenth Amendment reserves to the states all powers not apportioned to the federal government.<sup>28</sup> Moreover, as discussed below, the power to regulate interstate commerce exists concurrently with the state power in the absence of conflicting federal legislation.<sup>29</sup>

The framers, therefore, had addressed their concerns that a "more perfect union" required a stronger central government. They had achieved this goal while still granting the states ample discretion. This discretion, however, did not come without a price. In December 1860, the Southern states began signing the Ordinances of Secession. This marked the start of the Civil War.<sup>30</sup>

### *B. Canadian Centralism*

The Canadians drafted their constitution in 1864, at a time when their southern neighbors were experiencing a "paroxysm of state's rights."<sup>31</sup> Hoping to avoid these tensions,<sup>32</sup> the Canadians centralized their government.<sup>33</sup>

27. U.S. CONST. art. I, § 8, cls. 1-18.

28. See U.S. CONST. amend. X.

29. See TINDALL & SHI, *supra* note 2, at 414-15. The *Gibbons v. Ogden* opinion "stopped just short of stating an exclusive federal power over commerce" and noted that "later cases would clarify the point that states had a concurrent jurisdiction so long as it did not come into conflict with federal action." *Id.*

30. See *id.* at 685-86.

31. See Hodge, *supra* note 3, at 601.

32. See MCCONNELL, *supra* note 3, at 137. Many delegates to the Canadian Constitutional Convention opined that the American Civil War was simply an exacerbation of "states' rights":

[M]any of the delegates considered that the insidious "states' rights" doctrine that the central government was a mere delegate of the thirteen states, who retained jurisdiction over all matter not given to Washington, was one source of the conflict. It provided an intellectual basis for the exaggerated claims to "state sovereignty" made by states like South Carolina.

*Id.*

33. See Hodge, *supra* note 3, at 602. John A. MacDonald, a Conservative leader, said during the constitutional debates:

The primary error at the formation of [the U.S.] constitution was that each state reserved to itself all sovereign rights, save the small portion delegated. [Canada] must reverse this process by strengthening the General Government and conferring on the Provincial bodies only such powers as may be required for local purposes.

The British North America Act of 1867 grants exclusive federal control over twenty-nine areas (section 91 powers)<sup>34</sup> and exclusive provincial control over sixteen areas (section 92 powers).<sup>35</sup> Generally, matters that are local or private in nature fall within the ambit of provincial governance,<sup>36</sup> although these "matters" are strictly limited to those enumerated in sections 92 and 92A of the Constitution Act of 1982. In contrast, Section 91, is construed as merely providing *examples* of areas over which the federal government has power. If one cannot locate a source of provincial power in section 92, then the "peace, order and good government" clause of section 91 assigns that power automatically to the federal government.<sup>37</sup>

This clause counters the de-centralizing influence of the Tenth Amendment of the U.S. Constitution, and reserves all residual power to the federal government.<sup>38</sup>

A recent application of the "peace, order and good government" clause occurs in *Jones v. Attorney-General*,<sup>39</sup> in which the Canadian Supreme Court sustained federal legislation authorizing the use of Canada's two official languages. The Act's subject matter could not be found anywhere within section 92, and therefore it fell somewhere within the federal residuary power.

The residuary power stemming from the "peace, order and good government" clause of section 91 is limited by a parallel grant of provincial residuary power.<sup>40</sup> The "peace, order and good government" clause is qualified by the next phrase in section 91, "in relation to all [m]atters not coming within the [c]lasses of [s]ubjects . . . assigned exclusively to the [l]egislatures of the [p]rovinces."<sup>41</sup> This qualification, in conjunction with section

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(1969).

34. See CAN. CONST. (British North America Act, 1867), § 91.

35. See *id.* § 92; see also *id.* § 93 (granting provincial control over education, making a total of 17 provincial powers).

36. See *id.* § 92, cl. 16.

37. See MCCONNELL, *supra* note 3, at 142.

38. Moreover, section 90 of the British North America Act of 1867 further centralizes control. See *infra* Part III.B. Section 90 enables federal government officers to invalidate provincial statutes without restriction. See CAN. CONST. (British North America Act, 1867), § 90. The framers of the United States Constitution provided nothing similar. See MCCONNELL, *supra* note 3, at 132. U.S. courts, however, have taken on the task of invalidating state statutes. See cases cited *supra* note 10.

39. [1975] 2 S.C.R. 182, 189 (Can.).

40. See Hodge, *supra* note 3, at 607.

41. See CAN. CONST. (British North America Act, 1867), § 91.

92(16),<sup>42</sup> allows the reserve power to “seep” from the federal branch to the provinces when the unenumerated power is local in nature.<sup>43</sup>

The provincial residuary power is more akin to a slight of hand than a true grant of power. While some matters are local in nature and should belong exclusively to the provinces, the provincial powers are, more accurately, concurrent. This is due to the Emergency Power and the National Dimensions Test.<sup>44</sup> Like the residuary power, these sources of federal power stem from an interpretation of the “peace, order and good government” clause.<sup>45</sup>

In times of crisis, the Emergency Power allows the federal government to legislate in relation to subject matters normally covered by section 92.<sup>46</sup> The courts have greatly expanded the scope of this power over the years and the power reached its zenith in the *Anti-Inflation Reference* case.<sup>47</sup>

In *Anti-Inflation Reference*, the court upheld federal wage and price controls in the provinces.<sup>48</sup> Pursuant to that case, courts are guided by seven factors when considering federal exercise of the Emergency Power. These seven factors are:

1. It is unnecessary for Parliament to declare a state of national emergency for a situation to become an “emergency” within the power.

2. It is irrelevant that the federal legislation incompletely remedies the emergency. For example, in the *Anti-Inflation Reference* case, the Anti-Inflation Act only applied to forty-two percent of the workers in the country.

3. The federal legislation need not be short-lived. For instance, the Anti-Inflation Act had a potential life of thirty-eight months.

4. A state of apprehended emergency suffices to justify Parliament in taking preventative measures.<sup>49</sup>

42. Section 92(16) authorizes provincial power over all local matters. *See id.* § 92(16).

43. *See Hodge, supra* note 3, at 607.

44. *See generally* MACPHERSON, *supra* note 15.

45. *See id.* at 43.

46. *See id.* at 43, 43-48.

47. *See Reference Re Anti-Inflation Act* [1976] 68 D.L.R. 3d 452, 454 (Can.).

48. *See id.*

49. *See* MACPHERSON, *supra* note 15, at 47 (noting that all nine justices joined in this holding).

5. Emergency power is not limited to wartime situations.<sup>50</sup>
6. The federal government may summon the Emergency Power when confronted with national economic problems.<sup>51</sup>
7. Courts accord rational basis review to Emergency Power legislation.<sup>52</sup>

The second avenue the federal government may explore when seeking to act in a seemingly local way is through the use of the National Dimensions Test. The verbal formulation for the test is as follows:

[I]f [the legislation] is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures.<sup>53</sup>

These two tests are almost reverse dormant commerce clause analyses, i.e., they test federal action that impinges on provincial authority just as the dormant commerce clause tests state action that impinges on federal jurisdiction. In each case, the federal action survives if there is a conflict.<sup>54</sup> Therefore, a Canadian federal statute that deals with local topics will be *ultra vires* the constitution only if it fails the Emergency Power test or National Dimensions Test.<sup>55</sup>

No such similar process exists for provincial action that intrudes into the federal dimension. The reason is simple. According to the text of the Canadian Constitution, provinces may only act according to the powers explicitly listed for them in section 92.<sup>56</sup> Moreover, provinces may not exercise unused federal residuary power to make laws for the peace, order and good gov-

50. See *id.* (noting all nine justices agreed to this principle).

51. See *id.* at 48 (noting unanimous approval of this point).

52. See *id.*

53. See Canada Temperance case [1946] A.C. 193, 205; MACPHERSON, *supra* note 15, at 48-49.

54. See U.S. CONST. art. VI, § 2 (Supremacy Clause); CAN. CONST. (Constitution Act, 1982), § 52(1) (Paramountcy Clause); see also HOGG, CONSTITUTIONAL LAW, *supra* note 11, at 105 (noting that the British North America Act of 1867 had an implicit paramountcy clause); see also MCCONNELL, *supra* note 3, at 141.

55. See MACPHERSON, *supra* note 15, at 43.

56. See MCCONNELL, *supra* note 3, at 142.

ernment of Canada.<sup>57</sup>

Until recently, the powers enumerated in section 92 (which had been essentially the same since the Constitution's inception in 1867) had a local flair.<sup>58</sup> Therefore, no provincial act that had extra-provincial effects would stand, because it exceeded section 92.<sup>59</sup> Because this exceeded section 92, no test was necessary to determine whether it remained constitutional (i.e., in the sense that the U.S. states can appropriately exercise a federal power).<sup>60</sup>

In 1982, however, the Canadian legislature called a constitutional convention and overhauled the British North America Act. The Constitution Act of 1982 made one change in the delegation of legislative powers:<sup>61</sup> provinces may now control the export of natural resources between themselves and other Canadian provinces—an area which previously came exclusively within the federal authority under section 92, clause 2 (the “trade and commerce clause”) or the residuary power.<sup>62</sup>

The provincial power to control the export of natural resources lies in section 92A. Section 92A also checks this power by proscribing discrimination when provinces determine the price and supply of natural resources to other provinces.<sup>63</sup> The legislature was concerned that this new autonomy would intoxicate the provinces into isolating themselves.

Because provinces had never been allowed to wield federal commerce power, Canadian courts had never had to evaluate provincial exercises of commerce power. By 1982, U.S. courts, however, had developed an intricate test for state legislation that treaded on federal commerce power.

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57. See ABEL, *supra* note 20, at 10-11.

58. See MCCONNELL, *supra* note 3, at 142. There is always, of course, that sneaky implied concurrent power, which arises when provinces legislate locally in “pith and substance” but impinges on federal jurisdiction. See HOGG, *CONSTITUTIONAL LAW*, *supra* note 14, at 314.

59. See *id.*

60. See MCCONNELL, *supra* note 3, at 142.

61. See HOGG, *ANNOTATED*, *supra* note 11, at 102.

62. See *id.* (stating “[b]efore coming into force of the Constitution Act, 1982, laws in relation to the export of natural resources were outside the power of the provincial Legislatures”); see also *Cent. Canada Potash v. Gov. of Saskatchewan* [1979] 1 S.C.R. 42.

63. See CAN. CONST. (Constitution Act, 1982), § 92A(2) (“but such laws may not authorize or provide for discrimination in prices supplies exported to another part of Canada.”).

### III. ENFORCING THE BOUNDARIES OF LEGISLATIVE POWER

#### A. *Letting Sleeping Dogs Lie: To What Extent May the States Act When the Federal Government Declines to Legislate?*

The U.S. Constitution provides for concurrent commerce power.<sup>64</sup> States may act in those areas of commerce where Congress has been silent.<sup>65</sup> Courts will invalidate a state exercise of the commerce power, however, if it fails an inquiry into purpose and means.<sup>66</sup>

The dormant commerce clause, a nontextual constraint on state power, provides the source of this intricate investigation. The doctrine reflects the perpetual tension between the federal and state governments. The source of this tension lies in the question: How much national influence may a state exert?<sup>67</sup> The U.S. Supreme Court has applied various tests for the past seventy years to check state regulation of interstate commerce. Part III.A synthesizes these tests into a five-prong analysis.<sup>68</sup>

64. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power . . . [t]o regulate Commerce among the several States").

65. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 353-54 ("[S]ince Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate commerce may be affected.").

This Comment does not analyze express Congressional grants of commerce power to the states, by which Congress can authorize states to interfere with interstate commerce. See *White v. Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 213 (1983) (stating in dicta that "[w]here state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce"); see also *Cooley v. Bd. of Wardens of the Port of Philadelphia*, 53 U.S. 299, 311-12, 320 (1851) (upholding Pennsylvania statute requiring vessels coming into or leaving the Port of Pennsylvania to accept local pilots. Regulation of pilots is within the federal commerce power, but here Congress had granted this power to the states.).

This Note likewise does not contrast the Canadian counterpart with U.S. constitutional grants of power to states. Canada's counterpart, "federal inter-delegation," allows the federal government to delegate its power to the provinces. See BERNARD W. FUNSTON & EUGENE MEEHAN, *CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL* 57 (1994).

66. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) (stating "[i]t has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce.").

67. See TINDALL & SHI, *supra* note 2, at 303.

68. I would like to thank Professor David Burcham of Loyola Law School, Los Angeles, California, for gathering the various factors of this test; no court has applied this test in its entirety.

1. Was the state pursuing a legitimate purpose in enacting the statute?

Determining what constitutes a legitimate purpose requires a case-by-case analysis. Safety measures, however, carry a strong presumption of validity, as long as the state can prove the safety purpose is nonillusory.<sup>69</sup>

In *Bradley v. Public Utilities Commission*, the Court sustained an Ohio requirement that common carriers traveling on the state's highways use the least congested routes.<sup>70</sup> The Court noted that the order did not preclude common carriers from participating in interstate commerce; they simply had to apply for alternate routes.<sup>71</sup>

The *Bradley* court distinguished the case at bar from *Buck v. Kuykendall*, in which it struck down a Washington statute that similarly required common carriers using state highways to obtain certificates of "convenience and necessity."<sup>72</sup> In *Buck*, the state would not certify the plaintiff because the route he had applied for was already being adequately served.<sup>73</sup> The Court held the primary purpose of the regulation, however, was to prohibit competition; the state could use the statute to determine exactly who could use the highways.<sup>74</sup>

The Court compared the test for route-approval in *Bradley*, which looked closely at congestion, to the test in *Buck*, which inquired into whether the route was currently being adequately served.<sup>75</sup> Therefore, the court held that the advancement of safety in *Buck* had been merely incidental, whereas the statute in *Bradley* specifically promoted safety.<sup>76</sup>

69. See *Bradley v. Pub. Util. Comm'n*, 289 U.S. 92, 95 (1933).

70. See *id.* at 94.

71. See *id.* at 94-95.

72. *Buck v. Kuykendall*, 267 U.S. 307, 315-316 (1925); see also *Bradley*, 289 U.S. at 95.

73. See *Buck*, 267 U.S. at 313.

74. See *id.* at 316.

75. See *Bradley*, 289 U.S. at 95.

76. See *id.* at 95-96. Note that even if the Court finds a legitimate purpose, such as safety, it will invalidate a statute as *per se* unconstitutional if the statute's means employ economic protectionism. Thus, in *Baldwin*, the Court struck a statute that sought to maintain a plentiful milk supply by requiring purchasers of out-of-state milk to pay no less than the minimum in-state milk prices. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519, 521 (1935). The Court held that the state must use other means to accomplish its purpose because the statute's means shielded in-state farmers from competition with out-of-state farmers. *Id.* at 528.

2. Are the state legislature's means rationally related to its ends?

The court here defers to the state legislature and does not explore whether more functional alternatives exist.<sup>77</sup> In *Barnwell Brothers*, for example, the Court sustained a statute that restricted imposed widths on trucks for safety reasons. The Court said its job did not include weighing the "merits of legislative choice and reject[] it if the weight of evidence presented in court appears to favor a different standard."<sup>78</sup>

3. Does the statute's burden on interstate commerce substantially outweigh the benefits?<sup>79</sup>

Contrary to the issue of whether the means are rationally related to the purpose, this "balancing test," which weighs the burdens a statute places on interstate commerce against its benefits, receives much stricter scrutiny.<sup>80</sup>

In *Bibb v. Navajo Freight Lines, Inc.*, Illinois required truckers to use a certain type of mudflap when traveling on the state's highways.<sup>81</sup> The Court looked at the practical effect of this regulation on other states and determined that the cost clearly out-

77. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

78. *Id.* at 191.

79. Since *Kassel*, the Court has declined to apply this balancing test to "true safety" cases, reasoning that in the field of safety, state lawmakers deserve deference. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 681 n.1 & 691 (1980) (Brennan, J. and Marshall, J. concurring and Burger, C.J., Rehnquist, J. and Stewart, J. dissenting, combined to make five justices against applying this prong in true safety cases.).

80. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-82 (1945). The court determined a statute limiting the number of cars per freight and passenger train had used means rationally related to safety. The Court struck the statute, however, because of the substantial cost railroad companies would incur changing the length of their cars at the state's border, and the availability of more efficient alternatives. See *id.*

Justice Scalia, concurring in *Bendix Autolite Corporation*, discussed *infra*, felt this balancing test should be left to the legislature. If Congress felt the burden of a state's legislation outweighed its benefit, it could enact a statute in direct conflict. Then, by virtue of the Supremacy Clause, it could void the state's statute. *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897-98 (1988)(Scalia, J., concurring).

In *Bendix*, the Ohio statute of limitations for breach of contract was tolled when a defendant corporation was not present in the state. See *id.* at 888. The only way to become "present" in the state was to consent to general jurisdiction. See *id.* The court held this clearly burdened out-of-state corporations because they either had to submit to general jurisdiction or refrain from pleading a statute of limitations defense. See *id.* at 895. Conversely, there was slim benefit because plaintiffs could simply use long-arm statutes to reach out-of-state defendants. See *id.* at 894.

81. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 522-23 (1959).

weighed any debatable contribution to safety.<sup>82</sup> If the regulation stood, truckers would have to change equipment at the border to meet the states' different standards, and "carriers who [did] only a minor amount of their business in Illinois [would be required] to equip all their trailers with the . . . mudguards."<sup>83</sup>

If the Court cannot declare that the burdens *clearly* outweigh the benefits of a state statute, it inquires whether the state is employing the least burdensome, but equally effective, alternative.<sup>84</sup> In *Maine v. Taylor*, Maine prohibited baitfish retailers from importing baitfish.<sup>85</sup> The purpose was to prevent parasites prevalent in out-of-state baitfish from infecting the in-state baitfish population.<sup>86</sup> The Court held the plaintiff's conviction under the statute was proper. Although the plaintiff proposed an inspection and sampling method as an alternative, it would not have been as effective as the complete ban on importation.<sup>87</sup>

#### 4. Does the state legislation discriminate against non-state residents?

The Court asks whether the legislation discriminates either facially or as applied. The Court uses strict scrutiny to protect out-of-state plaintiffs who may be excluded from the state's political process.<sup>88</sup>

In *Dean Milk v. City of Madison*, milk-sellers could only sell milk that was pasteurized within five miles of Madison City.<sup>89</sup> The statute did not, on its face, discriminate against pasteurizers on the basis of state residency. Discrimination was, however, its effect.<sup>90</sup>

If the state legislation does discriminate, the Court asks whether less discriminatory alternatives exist that are equally as effective: (1) whether the state has exhausted all other nondiscriminatory measures; and (2) whether the state distributed the burden among in-state and out-of-state residents.

82. *See id.* at 530.

83. *See id.* at 528.

84. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986).

85. *See id.* at 132.

86. *See id.* at 133.

87. *See id.* at 147. This case prompted Justice Blackmun to bemoan, "Once again, a little fish has caused a commotion." *See id.* at 132.

88. *See South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

89. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 350 (1950).

90. *See id.* at 356.

With respect to the first criterion, the Court in *Philadelphia v. New Jersey* determined that the statute in that case effected economic protectionism because supposedly to conserve space only in-state companies could dump at landfill sites.<sup>91</sup> Nonetheless, the Court could have struck the ordinance on the ground that New Jersey had not considered other conservation methods.

In *Sporhase v. Nebraska*, the Court ruled on the second part of the discrimination test. The Court held a state permit requirement for exporters of water was constitutional because the requirement applied evenhandedly to both residents and nonresidents.<sup>92</sup> By contrast, the Court in *Hughes v. Oklahoma* struck an Oklahoma statute that purported to conserve minnows by forbidding their export out of the state.<sup>93</sup> The Court noted that, “[t]he state places no limits on . . . how these minnows may be disposed of within the state.”<sup>94</sup>

#### 5. Does the state measure have extraterritorial effects?

The Court will hold any legislation with extraterritorial effects *per se* unconstitutional. The Court invalidates only those laws which necessarily and inevitably have extraterritorial effects.<sup>95</sup>

“Necessarily and inevitably” does not mean simply that the law caused a plaintiff to change his out-of-state behavior for cost efficiency reasons.<sup>96</sup> Rather, the law must result in the plaintiff having no choice but to change some aspect of his out-of-state behavior.

In *Brown-Forman*, for example, New York required out-of-state distributors to affirm that the prices they charged New York buyers were no higher than the lowest price they charged in other states.<sup>97</sup> This prevented out-of-state liquor sellers from subsequently lowering the prices they charged in other states, because to do so would put them at odds with their New York buyers.<sup>98</sup>

The U.S. Constitution has presented federal courts with many

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91. See *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

92. See *Sporhase v. Nebraska*, 458 U.S. 941, 941 (1982).

93. See *Hughes v. Oklahoma*, 441 U.S. 322, 322 (1979).

94. *Id.* at 338.

95. See *Brown-Forman Distillers Corp. v. Liquor Auth.*, 476 U.S. 573, 581-82 (1986).

96. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-72 (1945). Southern Pacific limited the length of all the trains in its line, not just the trains that entered Arizona, because it would not be cost efficient to build a separate line. See *id.*

97. *Brown-Forman*, 476 U.S. at 579-80.

98. See *id.*

opportunities to judge state action, and courts have interpreted it to afford concurrent jurisdiction over interstate commerce. Through these opportunities, U.S. courts have honed their analyses and created the above five-prong test.

The Canadian courts, however, have not created a similar test. The Canadian Constitution has presented Canadian courts with concurrent jurisdiction for a relatively short fourteen years. Moreover, Canadian courts have hesitated to address even cases of provincial legislation that impinge on exclusive federal power because the area is unclear and untested. Canadian courts, therefore, have not yet finely tuned their federal-provincial separation of powers mechanism.

*B. From Eggs and Hogs to Trees and Electricity: How Canadian Courts Ensure the Free Flow of Commerce and Why They are Ill-Equipped to Handle Section 92A's Fall-Out*

Canadian courts must be loathe to confront provincial legislation enacted pursuant to section 92A of the Constitution Act of 1982. Section 92A bestows concurrent provincial jurisdiction with the federal government over the export of natural resources, including nonrenewable resources, forestry resources, and electrical energy.

Canadian courts previously inquired into whether provincial legislation stepped beyond the boundaries of an exclusive enumeration of provincial powers.<sup>99</sup> Now, they venture through the murky realm of interprovincial discrimination. The test for whether a province properly exports a natural resource is whether it "discriminat[es] in prices or in supplies exported to another part of Canada."<sup>100</sup>

Because for fourteen years Canadian courts only had to determine whether provinces have abused this concurrent grant of power, they have not developed a test as thorough or effective as the U.S. dormant commerce clause analysis. Though section 92A proscribes discrimination in supplying and pricing, and thus, reduces discrimination to a certain extent, it fails to prevent provinces from actually or effectively blocking the flow of commerce into their territory.

The framers of both the U.S. Constitution and British North

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99. See CAN. CONST. (British North America Act, 1867), § 92.

100. CAN. CONST. (Constitution Act, 1982), § 92A(2).

America Act of 1867 shared a common desire to facilitate "the free flow of commerce across local borders, and also to prevent discrimination by local units against goods coming in from outside, which could thereby impose a fetter on interstate or interprovincial commerce."<sup>101</sup> The two sets of framers, however, structured their governments in diametric opposition to one another.

Describing how the British North America act distributed legislative power, Canadian Supreme Court Justice Fournier said:

[T]he Canadian trade and commerce power should be stronger than its American counterpart . . . . [W]hile in the United States the power to regulate "interior and exterior" commerce was divided between the states and the central power, and consequently had to be shared, in Canada the power to regulate trade and commerce belonged exclusively to the Dominion . . .<sup>102</sup>

Historically, Canadian courts had an easy task when testing provincial exercises of power because section 91 delegated exclusive powers to the federal government. The courts simply inquired whether the province had acted in an exclusive section 91 area. If so, the court invalidated the action.

For example, in the *Egg Case*, the province had imposed limits on egg marketing.<sup>103</sup> The province expressly sought to maintain domestic egg prices.<sup>104</sup> The Supreme Court struck the egg marketing control, not because it discriminated against out-of-province eggs, which it did, but simply because it had invaded the federal trade and commerce power.<sup>105</sup>

Similarly, in *Burns Food Limited v. Attorney General for Manitoba*, the Supreme Court struck provincial legislation requiring hog processors to purchase hogs at a provincially constituted board.<sup>106</sup> The opinion hinged on the idea that the province was regulating extraprovincial contracts, e.g., trade and commerce, and that it was simply an added evil that this fettered interprovincial commerce.<sup>107</sup>

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101. See MCCONNELL, *supra* note 3, at 169.

102. *Id.* at 171; see also *Severn v. The Queen* [1878] 2 S.C.R. 70, 121 (Can.) (interpreting the British North America Act and citing, for comparison, *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)).

103. See *The Egg Case* [1971] 19 D.L.R. 3d 169, 173.

104. See *id.*

105. See *id.* at 179.

106. See *Burns Food Ltd. v. Att'y Gen. for Manitoba* [1973] S.C.R. 494, 505-06.

107. See *id.*

Three glitches remain, however, in this seemingly comprehensive system: (1) it is unclear whether the legislative, executive, or judicial branch is responsible for striking provincial legislation that is *ultra vires* the Constitution;<sup>108</sup> (2) because they are unsure of their role, Canadian courts have traditionally been hesitant to find provincial legislation intrudes into the exclusive domain of section 91, i.e., federal control; and (3) when courts do find something is within the exclusive control of the province, which they are apt to do, they typically afford the province *carte blanche* to discriminate against other provinces and to protect themselves against competition. These problems with the "exclusive-power-jurisprudence," explained more fully below, exist in full force today. This is because the Constitution Act of 1982 still assigns predominantly exclusive power.<sup>109</sup>

Three theories exist regarding who checks Canadian provincial legislation. The first theory, stated in *John Deere Plow Company v. Wharton*, provides that the provinces must not intrude on "federal heads" and that any intrusion would be remedied by the federal legislature superseding the provincial legislation.<sup>110</sup>

Twenty-four years later, the Supreme Court gave effect to the second theory, by reaffirming the federal "power of disallowance" of provincial legislation.<sup>111</sup> In *Reference Re Power of Disallowance and Power of Reservation*, the Court discusses section 90 of the British North America Act,<sup>112</sup> which delegates this power of

108. See FUNSTON & MEEHAN, *supra* note 65, at 57.

109. See CAN. CONST. (Constitution Act, 1982), §§ 91, 92 (listing the exclusive federal and provincial powers, respectively); see also, *supra* Part II.B.

110. See *John Deere Plow Co. v. Wharton* [1914] 18 D.L.R. 353 (suggesting regulating the sale of guns has local, section 92 aspects, but more appropriately falls under section 91 federal power); see also MCCONNELL, *supra* note 3, at 135 ("However outrageous and unjust a law may be, if it presents no clear conflict with existing federal policy or interest . . . the cure for it lies with the provincial electorate.").

Note that this is different from the situation discussed in Part II.B, in which the federal government eradicates offensive provincial legislation (using the residuary power, the emergency power, or national dimensions test.). See MACPHERSON, *supra* note 15, at 44-52. In that situation, the provincial legislation is properly within its section 92 powers, but considered so harmful that the federal government steps in and preempts the legislation. *Id.*

111. *Reference Re Power of Disallowance and Power of Reservation* [1938] 9 S.C.R. 71, 72 (Can.).

112. The British North America Act of 1867 was in effect until 1982, when the legislature enacted the Constitution Act of 1982. See HOGG, ANNOTATED, *supra* note 11, at 142. Section 90 remained unchanged. See CAN. CONST. (Constitution Act, 1982), § 90.

disallowance to the Governor General in Council.<sup>113</sup> The power of disallowance is an executive power that is subject to "no limitations or restrictions," except that it must be exercised within one year of the Governor-General's receipt of the legislation.<sup>114</sup>

No instances of disallowance have occurred since Canada enacted its Constitution Act in 1982.<sup>115</sup> Nevertheless, "[t]he possibility is still not foreclosed that in the case of provincial legislation which clearly challenges important federal policies or interests the federal disallowance power might once more be invoked."<sup>116</sup>

The final theory is that unless a provincial statute conflicts with a federal statute, an individual or entity may only challenge the provincial statute in court.<sup>117</sup> Courts that exercise this power determine whether a province has intruded into a federal sphere of power. This theory treats the legislative and "power of disallowance" theories as mere operations of the paramountcy clause. It gives courts the more formidable task of determining when a province has acted impermissibly but its action does not conflict with federal legislation.

This leads to the second problem with Canadian exclusive-power-jurisprudence: Canadian courts hesitate to find provinces have legislated to control subjects, individuals, or entities outside their local control. Theoretically, this is because courts do not want to be chastised for having stepped outside their boundaries.<sup>118</sup>

For example, in *Re Conklin Garrett Ltd. and Director of Elevating Devices, Ministry of Consumer and Commercial Relations*,<sup>119</sup> the Supreme Court sustained the Ontario Amusement Devices Act's authority over the appellant.<sup>120</sup>

113. See CAN. CONST. (British North America Act, 1867), § 90 (also delegating this power of reservation to a provincial lieutenant-governor, acting as a federal executive officer); Reference Re Power [1938] 9 S.C.R. at 74.

114. Reference Re Power [1938] 9 S.C.R. at 79.

115. The federal government has not exercised the power of disallowance since 1943. See MCCONNELL, *supra* note 3, at 133, 135.

116. See *id.* at 136.

117. See *id.* at 135.

118. See *id.* at 136 (noting that the Canadian political climate has always tended towards co-operative federalism, in direct contravention of the Constitutional framers' intent, and that political leaders therefore give broad leeway to provincial governments).

119. See *Re Conklin & Garrett Ltd. and Director of Elevating Devices, Ministry of Consumer and Commercial Relations* [1989] 63 D.L.R. 4th 545 (Can.).

120. See *id.* at 546.

The Amusement Devices Act required that “no amusement device [could] be operated in Ontario without a permit and that technical dossiers showing compliance with detailed requirements of the [Act] . . . be filed with Ontario officials . . . before a permit [would] be issued for that device.”<sup>121</sup> Appellant owned and operated amusement park rides, which it trucked interprovincially to various fairs and exhibitions.<sup>122</sup> Appellant claimed the Amusement Devices Act intruded upon interprovincial trade and commerce.<sup>123</sup>

The court acknowledged that the Act undeniably intruded on federal authority and that it regulated “in great detail” the operations to which it applied.<sup>124</sup> The court, however, held that the Act did not impinge on the exclusive federal power to regulate interprovincial trade and commerce because it was aimed at activities taking place within Ontario’s borders:

The [appellant] operates its rides in one place at a time. Ontario purports to regulate only the operations in Ontario. Neither the Act nor the Regulations [imposed pursuant to the Act] was applied to the Ontario operations of the applicant are in our opinion beyond the constitutional powers of the Province of Ontario.<sup>125</sup>

Arguably, the court would have approached this case differently if it had not been concerned with its power to declare provincial legislation invalid. The court might have held appellant’s business was inherently interprovincial in nature, and appellant would have been subject only to the exclusive legislative power of the federal government.<sup>126</sup> Instead, the court avoided the thorny problems of federalism and circumvented it to achieve a more

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121. *Id.* (operators of these devices also had to be licensed).

122. *See id.* at 547.

123. *See id.*

124. *See id.*

125. *Id.* at 549. The court further held that the appellant could not avail itself of section 92(10)(a) of the British North America Act of 1867, which gives provinces control over all local works and undertakings, with the exception of, among other things, “[w]orks and [u]ndertakings . . . connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.” *Id.* at 548.

The court limited section 92(10)(a) to transportation or communications undertakings, and held it therefore did not apply to the appellant because, “[t]he communications elements of the [appellant’s] undertakings are local and the transportation elements do not involve transporting people or freight across provincial . . . boundaries for hire.” *Id.*

126. *See id.*

logical result. This was unfortunate, because the most effective method of checking runaway provinces is a judicial declaration of unconstitutionality.

The propensity of Canadian courts to find provincial legislation valid within the exclusive power of the provincial governments is the third problem with exclusive-power-jurisprudence. As long as the province has proven it has exclusive power, courts grant broad deference to provincial legislatures to exercise this jurisdiction. The extreme result has potentially become the nightmare vision of the Canadian constitutional framers.

A good example is *Bennett v. British Columbia (Securities Commission)*.<sup>127</sup> In *Bennett*, appellants traded shares of a corporation on the Toronto Stock Exchange through the exchange's Computer Assisted Trading System (CATS),<sup>128</sup> a national communication system.<sup>129</sup> The British Columbia Securities Commission instituted criminal proceedings against appellants when it suspected that they were involved in insider trading.<sup>130</sup>

Appellants challenged the Commission's action.<sup>131</sup> They argued that legislation regarding securities trading with CATS completely exceeded provincial jurisdiction, and thus, section 68 of the Securities Act was inapposite.<sup>132</sup>

The court employed the "pith and substance" test, which Canadian courts have occasionally used to characterize legislation.<sup>133</sup> The court inquired "whether the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence."<sup>134</sup> It held that section 68's pith and substance concerned ethical trading conduct, and that it was purely local and intraprovincial.<sup>135</sup> Therefore, British Columbia had the power to enact section 68.<sup>136</sup>

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127. See *Bennett v. British Columbia (Securities Commission)* [1992] 94 D.L.R. 4th 339 (Can.).

128. See *id.* at 340.

129. See *id.*

130. The Commission alleged appellants had violated section 68 of the British Columbia Securities Act. See *id.*

131. See *id.*

132. See *id.*

133. See HOGG, CONSTITUTIONAL LAW, *supra* note 11, at 313; see also FUNSTON & MEEHAN, *supra* note 65, at 124.

134. *Bennett* [1992] 94 D.L.R. at 357.

135. *Id.*

136. *Id.*

As noted, section 68's pith and substance was local. Therefore, it was valid even though it might have an extra-provincial effect and even though "the conduct which it authorize[d] or prohibit[ed] [was] carried to fruition *via* the national . . . system."<sup>137</sup> These incidental or consequential effects on extra-provincial rights were not *ultra vires*.<sup>138</sup>

More troubling is that while there is an "effects" test available to Canadian courts, the courts use the test sparingly.<sup>139</sup> The "effects" test checks provinces' wielding exclusive provincial power to incidentally affect matters outside their jurisdiction. It considers how statutes "change the rights and liabilities of those who are subject to it."<sup>140</sup>

The court in *Reference Re Alberta Legislation* applied the test to strike a statute that Alberta characterized as a tax (strictly local).<sup>141</sup> The court, using the effects test, called the "tax" a banking statute because of its likely severe impact on banks.<sup>142</sup>

This test would have been an appropriate tool with which the *Bennett* court could have struck section 68, or at least not have applied it to the appellants. Curiously, however, the court did not even mention the effects test.

The effects test is discretionary and many courts prefer not to apply it. This is perhaps because they are uncomfortable with their role in declaring provincial legislation *ultra vires*.<sup>143</sup>

In addition, the effects test has been watered down, leading some scholars to speculate that if the effect is necessarily incidental to an otherwise constitutional law and the statute's purpose is rationally related to its means, the courts will sustain the legislation.<sup>144</sup>

Seemingly, a provincial legislature could enact a measure with a purported local aim, and subsequently use it to regulate inter-provincial trade and commerce at will. The framers of the British

137. *Id.*

138. *See Id.*

139. *See FUNSTON & MEEHAN, supra* note 65, at 124.

140. *Id.*

141. *See Reference Re Alberta Legislation*, A.C. 117 (P.C. 1939).

142. *See id.*

143. *See FUNSTON & MEEHAN, supra* note 65, at 52 ("marginal encroachment will more likely be tolerated than one which is highly intrusive, but this will be determined on the facts of each case"). *See generally* *City National Leasing Ltd. v. General Motors of Canada Ltd.* [1989] S.C.R. 641 (Can.).

144. *See FUNSTON & MEEHAN, supra* note 65, at 52.

North America Act of 1867, whose main goal was to safeguard the strong central federal government, would be dismayed to see their safeguards transmuted in such a way.

Similar problems are brewing in Canada's concurrent-power-jurisprudence, because in Canada, exclusivity is the rule and concurrency is the exception.<sup>145</sup> Scant case law exists regarding section 92A, which confers concurrent powers over natural resources. Most discussions regarding its scope are speculative.<sup>146</sup> Using the available material, however, a trend emerges—courts seem not to care whether provinces discriminate against interstate commerce.

Canadian courts resist finding that federal and provincial legislation in concurrent areas conflict, perhaps because this would then require them to strike the provincial legislation pursuant to the paramountcy doctrine.<sup>147</sup> This has resulted in a major shift towards giving effect to provincial power. Perhaps Quebec's recent move towards independence and separation from Canada has made the judiciary react by attempting to pacify other similar sentiments.<sup>148</sup> Whatever the motive, this deference to provincial command signifies a clear revolt against Canada's carefully constructed central system of government.<sup>149</sup>

The only time courts will strike a provincial statute is when it: (1) encroaches on an exclusive federal power (see above discussion); or (2) inhabits a concurrent seat that clearly and directly conflicts with federal legislation.<sup>150</sup> Scholars explain the courts' timidity by noting that courts pay no attention to any other criteria and will uphold provincial legislation that erects economic barriers at provincial borders.<sup>151</sup> Another reason is that Canadian citizens who engage in interprovincial trade and commerce do not bring their suits into the court system.

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145. See *id.* at 119 (noting that this is in contrast to the U.S., in which exclusivity is the exception and almost all other powers are concurrent).

146. See *Allard Contractors Ltd. v. Coquitlam* [1991] 85 D.L.R. 4th 729, 735 (Can.). In reference to section 92A, the court noted, "[c]ounsel were unable to refer us to any appellate judgment which has yet been delivered upon the meaning and operation of this section." *Id.*

147. See *FUNSTON & MEEHAN, supra* note 65, at 51.

148. See *id.* at 24 (stating "while the establishment of the Canadian federation may have been driven by external forces . . . internal forces are now more likely to influence the future of the country").

149. See *id.*

150. See *id.* at 52.

151. See *id.*

Canadian courts will accord a presumption of validity to provincial legislation.<sup>152</sup> They occasionally refer to the absence of federal legislation in a certain area, and uphold provincial measures on the basis that the federal government failed to act.<sup>153</sup>

In *Fulton v. Energy Resources Conservation Board*,<sup>154</sup> for example, the Supreme Court sustained the authority of the Alberta Energy Resources Conservation Board.<sup>155</sup> The court reasoned that because no federal regulatory authority embraced the situation at hand, the unexercised federal authority gave "leeway to the exercise of provincial authority."<sup>156</sup>

The court failed to search for improper motives or burdens on interprovincial trade and commerce. The court simply noted that should federal legislation enter the scene, the doctrine of paramountcy would invalidate the Board's authority.<sup>157</sup> The court added, however, the caveat that the doctrine of paramountcy could take effect only if a court construed the provincial legislation to conflict with the federal legislation.<sup>158</sup> A U.S. court, by contrast, would have gone through a two-step process: (1) it would have determined that Congress had not acted; and (2) it would have put the legislation through the dormant commerce clause test.

The U.S. Constitution provides many instances of concurrent jurisdiction. U.S. courts have adapted to analyzing state-level concurrency. The Canadian Constitution, however, allows little concurrent jurisdiction. Canadian courts are understandably confounded when they must decide whether a province has acted *intra vires* the Constitution in enacting, e.g., an ordinance regulating the export of natural resources to and from its territory.

152. See HOGG, CONSTITUTIONAL LAW, *supra* note 11, at 15-34 n.158.

153. See *id.*

154. See *Fulton v. Energy Resources Conservation Bd.* [1981] S.C.R. 153 (Can.).

155. *Id.* at 154.

156. See *id.* at 164-65 (stating "the field is open for valid provincial legislation of the kind which the Board has acted in this case").

157. See *id.* at 169.

158. See *id.*

#### IV. A CANADIAN DORMANT COMMERCE CLAUSE APPROACH: RETURNING TO THE CENTRALISM THE FRAMERS INTENDED

*Fulton v. Energy Resources Conservation Board*<sup>159</sup> parallels the U.S. case *Buck v. Kuykendall*.<sup>160</sup> A comparison of these two cases illustrates what Canadian courts might overlook when they face provincial legislation in a concurrent area.

In *Buck*, the U.S. Supreme Court invalidated a state statute that required common carriers using state highways to obtain certificates of "convenience and necessity."<sup>161</sup> The Court based its decision on the state's illegitimate purpose for denying the plaintiff a certificate.<sup>162</sup> The state claimed the route plaintiff had applied for was already being adequately served.<sup>163</sup> The Court, however, held the state's primary purpose was to prohibit competition; i.e., the state could determine exactly who used the highways and for what purpose.<sup>164</sup>

The plaintiff in *Fulton*, a Calgary power company, was denied approval to construct a transmission line connecting Alberta to British Columbia.<sup>165</sup> The court mentioned that landowners in the area surrounding the proposed construction site opposed the plaintiff's application.<sup>166</sup> The court, however, did not consider Alberta's motive in creating the Energy Reserve Conservation Board (the entity that had denied the plaintiff's permit) and giving it the discretionary power to grant and deny permits.

The court, therefore, never considered that Alberta had possibly wanted to exclude "out-of-state" power companies from the market, so as to make room for its own.<sup>167</sup> U.S. courts would have at least, reached this issue, rather than ending their analysis as soon as they determined that the federal government had not acted.<sup>168</sup>

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159. *See id.* at 153.

160. *See Buck v. Kuykendall*, 267 U.S. 307 (1925).

161. *See id.* at 313, 317.

162. *See id.*

163. *See id.*

164. *See id.* at 315.

165. *See Fulton v. Energy Resources Conservation Bd.* [1981] S.C.R. 153, 157 (Can.).

166. *See id.* at 160.

167. This motive would mirror the state's motive in *Buck* to prevent out-of-state truckers from competing with in-state truckers. *See Buck*, 267 U.S. at 317.

168. For a discussion of the dormant commerce clause analysis, the method that U.S.

The problem Canadian courts have when confronting provincial legislation lies not only in explicit concurrent powers, but also in implicit grants of concurrent power. The pith and substance test, for example, allows provinces to affect matters coming exclusively within federal power, as long as the pith and substance of the provincial legislation is a "matter within the competence of the [province]."<sup>169</sup>

Therefore, Canadian courts are actually surrounded by hidden exercises of concurrent power.<sup>170</sup> The Canadian Constitution, after having been amended in 1982, still champions a strong central government.<sup>171</sup> If Canadian courts are to remain true to the basic structure of their Constitution, they must begin limiting these provincial exercises of concurrent power.

The *Fulton* and *Bennett* cases illustrate the numerous safeguards in the U.S. dormant commerce clause analysis. As already mentioned, the *Fulton* court could have easily swept the provincial legislation *ultra vires* the constitution under the first prong of the dormant commerce clause analysis. Alberta was not pursuing a legitimate purpose in enacting the Energy Resources Conservation Board.

The *Fulton* court could have also, however, struck the measure by employing prong three of the dormant commerce clause analysis. Alberta's legislation discriminated against non-provincial residents because the ordinance that created the Board only considered interconnections with facilities in other provinces. More than likely, as in the *Fulton* case,<sup>172</sup> the applicants wishing to connect Albertan electrical lines with those in other provinces will be nonresidents of Alberta.

Similarly, in *Bennett*, British Columbia enforced the British Columbia Securities Act against the appellants who were trading shares of a corporation on the Toronto Stock Exchange.<sup>173</sup> This Act substantially burdened more than it benefited inter-

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courts have tested state exercises of concurrent legislation. See *supra* Part III.A.

169. See HOGG, CONSTITUTIONAL LAW, *supra* note 11, at 15-35.

170. See *id.* at 15-37 (finding "there are many cases in which provincial laws, held to be in relation to a matter coming within a provincial class of subject, have been held to have a valid incidental effect on a matter within federal jurisdiction").

171. See generally CAN. CONST. (Constitution Act, 1982) (retaining sections 91 and 92, the two exclusive lists of, respectively, federal and provincial power).

172. The *Fulton* plaintiff was a power company based in Calgary. See *Fulton* [1981] S.C.R. at 160.

173. See *Bennett v. British Columbia* [1992] 94 D.L.R. 4th 339, 340 (Can.).

provincial commerce. Conceivably, participants in securities transactions, such as the appellants in *Bennett*, would have to change policies and practices at the border in light of other provinces' standards.<sup>174</sup>

Moreover, the *Bennett* court could have sounded the British Columbia Securities Act's death knell by applying prong five of the dormant commerce clause analysis—the Act most certainly had necessary and inevitable extraterritorial effects. The *Bennett* appellants had no choice but to change some aspect of their out-of-province behavior. They had to ensure that if they used the CATS system in another province to access a trader within British Columbia, their practices, which might have been perfectly acceptable in their forum province, were acceptable under the British Columbia Securities Act as well.

Arguably, neither of the above two provincial measures would have survived had they been state measures in the United States. This despite the fact that the U.S. Constitution is considerably less textually focused on a powerful federal government than its Canadian counterpart.<sup>175</sup>

## V. CONCLUSION

A proverbial saying admonishes us to let sleeping dogs lie. But should we remain passive when those dogs are needed to guard and protect their owners? U.S. courts have answered that question in the negative, by awakening the dormant commerce clause to prevent states from establishing economic barriers at their borders.

Canadian courts, in contrast, have wielded solely the paramountcy clause, which voids provincial legislation when it directly conflicts with federal legislation. This timidity, however, causes courts to shy away from finding conflicts.<sup>176</sup> They allow their

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174. Truckers would have had to do this in *Bibb v. Navajo Freight Lines* had the U.S. Supreme Court upheld the state statute requiring a certain type of mudflap. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 522-23, 530 (1959). The Court struck that statute and arguably the Canadian Supreme Court should have given the British Columbia Securities Act its internment as well. See *id.* at 529.

175. See *supra* Part II.A-B.

176. Moreover, if the federal government dislikes a piece of provincial legislation, it cannot rely on the courts to strike it, even if it is truly offensive. Instead, the government must enact its own legislation and hope the courts will find it contrary to its provincial counterpart.

sleeping dog, i.e., their trade and commerce clause,<sup>177</sup> to remain dormant. Meanwhile, provinces freely enclose themselves within protective economic barriers.

This is the Canadian framers' nightmare vision. They feared the secession of the southern U.S. states would inspire similar action in Canadian provinces. In light of recent events in Quebec, their fear forecasted the future. Canadian courts should, therefore, employ the dormant commerce clause or an appropriately adapted Canadian version to halt any further economic provincial protectionism or separatism.

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177. CAN. CONST. (Constitution Act, 1982), § 91, cl. 2.

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