The State of the Federation

2010

Open Federalism and the Spending Power

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legislative powers of the Parliament of Canada or of the legislatures of the provinces” (Library of Parliament 1987).

Even though shared-cost programs were still relevant at the time, the Meech Lake Accord was immediately faulted for neglecting the many other forms through which the federal spending power was exercised (Petter 1989, 475). More importantly, as many Quebec legal scholars noted at the time, the proposed new section would have effectively recognized a federal spending power by granting Ottawa the capacity to establish “national objectives” in “fields of exclusive provincial legislative jurisdiction” (Lajoie 1988, 183; Arbour et al. 1987). Quebec premier Robert Bourassa took satisfaction from the fact that “section 106(A) is drafted so that it speaks solely of the right to opt out, without either … [recognizing] or defining the federal spending power…. So Québec keeps the right to contest before the courts any unconstitutional use of the spending power” (Robert Bourassa to the Quebec National Assembly 1987). That the section was silent on recognition and definition did not, however, preclude it from effectively consolidating the spending power or, in the prudent words of Peter Hogg, from clarifying its “breadth” (Hogg 1988, 157). Bourassa’s notion that not naming the spending power might counter its use was as likely to be effectual as the intimation, for those who know their Harry Potter, that the evil and invincible Lord Voldemort be referred to only as “He-Who-Must-Not-Be-Named”. Comforting perhaps, but not convincing.

The Meech Lake Accord nevertheless marked a first step in addressing the surpluses did not yield restored transfers but rather a multiplication of direct initiatives in areas of provincial jurisdiction:

> The 1997 federal budget gave birth for instance to the Canada Millennium Scholarship Fund, the Canadian Foundation for Innovation, the National Child Benefit and the Health Transition Fund. Others were to follow. In other words, the federal government decided to make itself more visible and influential through programs of direct funding to individuals and institutions in areas of provincial jurisdiction, instead of simply restoring funding to pre-1995 levels or vacating room through tax-point transfers to allow provincial governments to raise more revenues through tax increases. (Facal 2007, 157)

The Quebec government offered to join with other provincial governments in a consensus proposal if they would accept genuine limits on the use of the federal spending power. Quebec demanded, in particular, “an unconditional right to opt out with full financial compensation in respect of any new initiative or new federal program, whether jointly funded or not, in the sectors of social programs within the jurisdiction of the provinces”. The Bouchard government insisted, as well, that its proposal “must in no way be interpreted as direct or indirect recognition of federal spending power or any federal role whatsoever in the realm of social policy”.[5] This position took into account the two key aspects of the problem: Quebec did occurs in a province or territory must have the consent of the province or territory involved".[6]

This proposal was innovative and without precedent. For the first time, a formulation succeeded in covering all potential manifestations of the spending power without formally recognizing its legitimacy. Although a form of indirect recognition was involved, since provinces would be allowed to opt out only if federal spending initiatives fell within their areas of jurisdiction, this was balanced by the requirement that a provincial government had to consent before any new federal initiative could apply on its territory. Together with the comprehensive character of the opting-out formula, this requirement for consent would secure provincial governments against encroachments of which they did not approve. These provisions would apply only to new or modified programs, but over time their reach was guaranteed to expand, to make them increasingly effective.

The Victoria Proposal lasted less than a week. Within days, on 4 February 1999, all provinces but Quebec accepted a counter-proposal put forward by the federal government, the Social Union Framework Agreement (SUFA), which embodied a radically different understanding of the federal spending power. In the words of André Tremblay, SUFA was nothing less than a "tribute to the federal spending power" (Tremblay 2001, 170). As mentioned earlier, this intergovernmental agreement treated the spending power as a constitutional attribute of the federal government and as an essential tool for the country, and no meaningful consent and opting-out formula counterbalanced this very explicit recognition (ibid., 175-177; Noël 2001, 12). The Quebec government simply could not approve it.

transfers (Quebec, Commission on Fiscal Imbalance 2002). The constitutional division of powers would then be respected, the allocation of financial resources would roughly match the division of powers and, with strong and autonomous provincial governments, there would be little need for opting out and asymmetry, except perhaps on a symbolic level or on certain matters where specific provinces might choose forms of enhanced cooperation with the federal government.

This possibility of enhanced cooperation would usefully address a concern that had led Petter to his fourth proposition, namely, that constitutional amendment should be made easier. If “governments are to be deprived of spending as an informal means of constitutional adjustment”, he wrote, “it is essential that formal amendment procedures be made more flexible” (Petter 1989, 477). Without a doubt, the Canadian Constitution is difficult to amend. The Constitution Act, 1982 was designed that way, [illegible] up more walls and moats between themselves and their neighbours does not make a country", Rae added. Canadians "want their federal government to support early childhood education, decent housing, cities that work, a healthy environment, new initiatives in health care, more mobility for students, better research and stronger universities", and this "requires a federal government that dares to speak its name and exercise its powers" (Rae 2007).

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8

The Myth of the Federal Spending Power Revisited

Andrew Petter

L'auteur reprend en l'actualisant son analyse de 1989, selon laquelle le pouvoir fédéral de dépenser est inconstitutionnel et ne saurait être légitimé par aucune des justifications

INTRODUCTION

Some 20 years ago, I published an essay arguing that the federal spending power —

time by either the Supreme Court or the Privy Council, Lord Atkin held that money raised by means of taxation could not be disposed of by federal legislation where it was found that "in pith and substance the legislation invades civil rights within the Province…. To hold otherwise", he noted, "would afford the Dominion an easy passage into the provincial domain".[3]

Entering the arena of constitutional values, I maintained that the spending power threatened both the federal nature and the democratic character of the Canadian state. The spending power, I argued, not only allowed political responsibility to be shifted from one order of government to the other but, by causing responsibility to become interspersed, made it "virtually impossible for citizens to determine which order of government to hold accountable for policies that fail or, for that matter, for ones that succeed" (Petter 1989, 467). The result was to reduce the influence of ordinary citizens over the policy-making process and to increase the influence of governmental elites. Moreover, this consequence was not limited to areas in which the spending power was actually exercised. Once it was accepted that the federal government could spend where it pleased, electors and their representatives could attribute responsibility for almost any failure in provincial policy to an absence of federal support:

> In sum, reliance upon the spending power to overcome legislative limitations in a federal system of responsible government creates the worst of all possible worlds. It imposes upon citizens the costs and inconvenience of supporting two orders of government while denying them the benefits of local control. In addition, it creates a situation in which political power is so diffused that citizens possess less ability to influence and control government decision-making than they would even in a unitary state. (ibid., 467-468)

My evaluation of the federal spending power from the perspective of *realpolitik* cut in two directions. On the one hand, I argued that defenders of the power were wrong to suggest that it was required to counter regional disparities, compensate for provincial fiscal incapacities, or maintain progressive politics in Canada. The first two concerns could be better addressed by means of a robust equalization program involving unconditional fiscal transfers and federal relinquishment of the tax room used to fund programs falling within provincial jurisdiction. The third concern reflected mistaken assumptions that national politics are inherently more progressive than provincial politics, and that the spending power is an effective mechanism for realigning jurisdictional responsibilities. On the other hand, I argued that, after four decades of political development based on the spending power, it was beyond the capacity of the courts to invalidate the power itself or the structures of government to which it had given rise. Moreover, given the dynamic nature of social conditions and

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concerning the federal spending power that had been decided by either the Supreme Court or the Privy Council. The decision of the Supreme Court of Canada in *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532 [*YMHA*] was released after the article had been completed but prior to publication, and was referred to in a postscript.

[3] *Unemployment Insurance Reference*, ibid. at 687.

political circumstances in Canada, I maintained that, if the spending power were now to be taken away, it should be replaced with more flexible procedures for constitutional amendment.

Based on the above, I contended that the best hope for addressing the problems with the spending power lay in a program of constitutional reform consisting of four parts. The first would prohibit conditional transfers between governments, with the tax room required to fund existing transfers being given over to the government with legislative jurisdiction. The second would end the federal and provincial governments’ use of other conditional grants, loans, and tax expenditures to promote policies falling outside their respective legislative jurisdictions. The third would spell out in the Constitution a formula guaranteeing that current levels of equalization, including those encased within existing conditional grant programs, would be maintained and enhanced. The fourth would make formal procedures for constitutional amendment more flexible. While I conceded that the chances of achieving such a program of reform were not great, I saw a glimmer of hope in the more limited proposals that had been agreed to at the time in the Meech Lake Accord.

THE FEDERAL SPENDING POWER REVISITED

My critique of the federal spending power was given a cool reception by constitutional scholars in English Canada; however, it received a warmer welcome from academics in Quebec where it has lately gained renewed interest. Indeed, Professor Alain Noël recently went so far as to urge implementation of the four proposals for reform that I proposed two decades ago.[4] This has encouraged me to revisit the issue with fresh eyes. Although I participated in discussions on the federal spending power in the late 1990s as the British Columbia minister responsible for the Social Union Framework Agreement negotiations, I have not broached the topic as a scholar since I penned my previous essay.

So how have two decades of wear and tear affected my thinking on the subject of the spending power? First, my concern about the danger it poses to federal and democratic values persists. This concern is not diminished by the fact that the federal government’s actual use of the spending power has become less prevalent over the past 20 years. On the contrary, the huge cuts in federal transfers to the provinces in the 1990s, and the resulting intergovernmental recriminations and finger-pointing, strengthen my view that the spending power undermines provincial autonomy and political accountability. I find it hard to believe that Canadian governments would have dared to contemplate such massive cuts to health-care spending had political authority over health care, or clearly delineated components of the healthcare system, been confined to a single order of government. Moreover, if political authority had been so confined, I believe that any government proposing such cuts would have been

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[4] In addition to Noël’s chapter in this volume, see Noël (2008).

severely punished at the polls. As it happened, the federal and provincial governments were able to obscure and minimize their respective responsibilities for damaging the health-care system by attributing such damage to each other's policies.

My views on legal doctrine, on the other hand, have been modified by recent case authority. While I continue to believe that the spending power is not authorized by the constitutional text, there can be no doubt in my view that this power has now been authorized by the courts. A constitution is, as Charles Evans Hughes once remarked, "what the judges say it is,"[5] and Canadian judges have gone out of their way in the past 20 years to say that the Canadian Constitution supports the federal spending power. Andrée Lajoie's chapter documents numerous recent cases in which the Supreme Court of Canada has voiced support for that power.[6] While Professor Lajoie valiantly tries to characterize these pronouncements as non-binding *obiter dicta*, this characterization is a bit too strained and formalistic for me. Indeed, the fact that judges of the Supreme Court have so freely and frequently offered their support for the federal spending power, when arguably not required to do so, to my mind only reinforces how convinced they are that the matter is not controversial. This opinion is bolstered by my continuing belief that, as a matter of *realpolitik*, the courts lack the ability to invalidate the spending power. As I put it in my original essay, "It is simply beyond the capacity of courts to undo forty [now sixty] years of political development" (Petter 1989, 473).

My views on other elements of the *realpolitik* of the federal spending power have also remained relatively constant. I continue to believe that, given a robust system of unconditional regional equalization payments, the spending power is not required to address regional disparities, to compensate for provincial fiscal incapacities, or to advance progressive politics in Canada. With respect to the issue of constitutional adaptation, I am more convinced than ever that we need a constitution that is easier to amend in order to meet changing social circumstances and political needs. It is fanciful to think that a document crafted to address the conditions of the 19th century can, without modification, meet those of the 21st century. Indeed, the extensive use of the federal spending power to overcome constitutional limitations over the past 60 years is evidence that it cannot.

Unfortunately, the Constitution has become even less flexible since my original essay was written. A number of developments have further restricted the possibilities for constitutional amendment: the political fallout from the Meech Lake and Charlottetown Accords (Library of Parliament 1987; Special Joint Committee on a Renewed Canada 1992); the emerging political expectations

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[5] Hughes (1908, 139). Hughes went on to become Chief Justice of the United States Supreme Court.

[6] These cases include *YMHA*, *supra* note 2; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525; *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624; *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657; and *Chaoulli v. Quebec (A.G.)*, 2005 SCC 35, [2005] 1 S.C.R. 791.

(and, in some provinces, the legislative requirements[7]) right of compensation for those provinces that do not participate in federal programs initiated under this provision. He further suggests that the courts allow participating provinces to back out of such federal programs should they later wish to do so.

This is all very creative, but no more likely in my view to win judicial favour than simple invalidation of the federal spending power. In addition to asking courts to ignore their jurisprudence of the past 20 years, Adam asks them to bring into play a provision of the Constitution that has never been used, and to transform it in three significant ways. This would be more an act of political invention than constitutional interpretation, and it is surely beyond the creative capacities even of judges schooled in the inventive age of the Charter. Moreover, even if section 94 could be resurrected and reshaped in this way, the section 94 cure could be worse than the spending power disease. A revitalized section 94, with full rights of compensation for provinces that did not participate in federal legislative schemes, could lead to a dangerous and destabilizing degree of asymmetry in federal arrangements, with Parliament exercising varying degrees of authority over social policy in different provinces. Such asymmetrical responsibilities could prove more destructive of political accountability than the diffusion of responsibilities that occurs with the federal spending power, as federal politicians from non-participating provinces set policies for participating provinces whose voters have no means of holding those politicians accountable (except by urging provincial governments to back out of such schemes at huge cost).

This brings me to my proposals for constitutional reform, which Alain Noël has so kindly revived. Do they appeal to me today as they did when I first put them forward? In the abstract, they do. The vision of a flexible federal constitution with clear spheres of federal and political responsibility, combined with an equalization program that guarantees provinces the fiscal capacity to provide their residents with an adequate level of social services, attracts me as much now as it did then. But life, unfortunately, does not play itself out in the abstract. While I continue to favour a constitution with these attributes, the extent of our current constitutional rigidity makes this goal increasingly unattainable. Ironically, our growing need for a more flexible Constitution has become the reason that we are unlikely to get one.

Erratum

Please note that the first two sentences of the last paragraph on page 190 of Open Federalism and the Spending Power should read as fo

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9

Section 36(1), New Governance Theory, and the Spending Power

Hoi Kong

they have particular force in debates about the federal spending power. Authors disagree about the constitutionality of some exercises of the federal spending power, and the complexity of fiscal federalism poses institutional challenges for courts that would oversee the power.

In this chapter, I address the theoretical debates about legal indeterminacy and institutional competence by proposing a doctrinal rule, grounded in section 36(1) of the *Constitution Act, 1982*,[2] that if adopted would enable the judiciary to effectively oversee controversial exercises of the spending power. The argument proceeds in three sections. In the first section, I define the contours of the contemporary Canadian debate over the spending power, justify judicial oversight of the spending power, and argue that section 36(1) is the appropriate locus of constitutional authority for some controversial exercises of the spending power. In the second section, I offer an interpretation of section 36(1) that draws upon the literature on judicial minimalism and responds to critiques of that literature. Finally, I propose a doctrinal rule that draws on New Governance theory, argue for that theory's application to the controversies that surround the spending power, and defend my proposal against a range of objections.

THE SPENDING POWER AND CONSTITUTIONAL AUTHORIZATION

In Canada, federal exercises of the spending power are controversial when they have coercive effects and when those effects lack clear constitutional authorization. In the first subsection, I will assess what coercion means in the federalism context and provide an overview of how the spending power can be exercised coercively. I argue that, unlike some other instances of coercion in context requires an initial inquiry into what autonomy means in that context. The constitutional allocation of legislative responsibilities in a federation constitutes individuals as federal and provincial citizens, and provides forums in which they can exercise their democratic agency.[4] One way in which citizens of a federal state exercise this form of agency is by electing and monitoring legislatures, the scope of whose authority has been defined by the constitution.[5] When a legislative body in a federation is prevented from acting freely within the scope of its constitutional authority, the autonomy of citizens who exercise jurisdictions, or both, can occupy tax room far in excess of what is required to fulfill its constitutionally authorized role within the federation. In so doing, the federal government can deprive provincial governments of resources necessary to fulfill their constitutionally authorized roles.[8] Under these conditions, a provincial government is prevented from acting in ways in which it is constitutionally authorized to act.[9]

With this conception of coercion and these examples of it in view, we can now turn our attention to the significance of coercion in the context of federalism, more generally. Under current constitutional doctrine, Parliament is not absolutely proscribed from legislating in areas that fall within provincial jurisdiction. Double aspect doctrine presupposes the possibility of jurisdictional overlap: a single area of social and ec

By contrast, the federal government is constitutionally prohibited from regulating in areas of provincial jurisdiction in which it does not also have jurisdiction. In addition, a violation of the division of powers occurs when the federal government has an arguable case that it does also have jurisdiction, but intrinsic and extrinsic evidence show that it intends to regulate in a subject-matter area that falls within provincial jurisdiction.[14] In both cases, the federal government is acting ultra vires. Parliament lacks constitutional authority to legislate and, as a consequence, paramountcy doctrine cannot authorize the federal government effectively to command provincial legislatures to refrain from achieving their legislative objectives. The contrast between paramountcy cases and cases where the federal government acts ultra vires reveals that in the federalism context, coercion is not objectionable in itself; rather, only coercion that lacks constitutional authorization is objectionable.

Current theories do not provide convincing accounts of when coercive exercises of the spending power are or are not authorized. Much of the contemporary debate about the spending power has focused on the “gift theory”, and analysis of that debate enables us to see that no existing theory provides a convincing account for when and whether coercive spending is authorized by the Constitution. Professor Peter Hogg is the contemporary scholar most closely associated with the gift theory (see, e.g., Hogg 2007, s.6.8(a)). He argues that because spending is a private act of government, and thus distinct from legislating, federalism considerations cannot limit federal exercises of the spending power. He argues further that a judicial and academic consensus supports his position (ibid.).

Professor Andrée Lajoie challenges the existence of any such consensus: she argues that the Supreme Court of Canada has not made an authoritative

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does not prevent provinces from passing such legislation, nor does it render the legislation invalid. Yet if there is a conflict, paramountcy doctrine has the effect of precluding a provincial legislature from achieving legislative objectives that are within that province’s constitutional authority.

[13] Application of interjurisdictional immunity doctrine has a similar effect on a province, but there is an important distinction to be drawn between the doctrines. Under interjurisdictional immunity doctrine, a federal undertaking or an area of federal jurisdiction is constitutionally immunized from provincial legislation, but not because of

decision about the constitutionality of conditional grants, which, from the perspective of one concerned about the impact of the spending power on the provinces, are particularly controversial when they amount to coercive commands.[15] She argues that, at the time of her writing, the only judicial support for such grants was expressed in obiter dicta of Supreme Court decisions, not in ratio decidendi. She notes further that there is a diversity of academic opinion on the constitutionality of the spending power (see Lajoie 2006, 158-159).

Although the Court has affirmed the constitutionality of conditional exercises of the spending power in several cases,[16] it has not made a clear ruling about the constitutionality of such an exercise in a case where that was an issue presented.[17] The absence of a clear doctrinal statement provides a strong but not decisive response to the gift theory: the case law does not authoritatively resolve the issue of whether conditional exercises of the spending power are constitutional. The fact that the Supreme Court has not authoritatively held that to determine who is ultimately responsible for governmental action, and it permits the federal government to distort the legislative priorities of provincial governments (Petter 1989, 467–68). Ultimately, the attempt to ground coercive

One might argue that whatever our constitutional traditions, there are good reasons for courts to refrain from engaging in federalism review, either in general or in the particular context of disputes over the spending power. Consider first the argument that courts should in general avoid judicial review of federalism disputes. Professor Paul Weiler has presented perhaps the strongest Canadian version of this argument.[21] According to Weiler, the balance of power between the federal and provincial governments should be determined by bargaining between the orders of governments. To my knowledge, no one has offered a convincing response to Professor Katherine Swinton's criticism of Weiler's argument. Absent such a counter-argument, Swinton's claim that there are no political institutions in Canada capable of overcoming imbalances in disputes appeal to reasons framed in terms of constitutional law and principle.[25] One problem of leaving constitutional issues exclusively to the political branches is that they are under no obligation to articulate constitutional, as opposed to purely political, reasons for their actions.[26] By contrast, courts deciding controversial cases involving constitutional provisions give constitutional reasons for their decisions.[27] Any proponent of non-judicial resolutions of spending power disputes bears the burden of showing that, under current conditions, the political branches are in a better institutional position

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[25] See below p. 202.

[26] By "purely political reasoning", I intend reasoning that does not engage constitutional values. Although admittedly vague, this formulation excludes reasons that are not public-regarding and aim only at partisan political advantage; one essential attribute of constitutional reasoning is that it is public-regarding. For the distinction between public-regarding reasons and other forms of reasoning, see Elster (1997). For the contrast between political and judicial decision-making drawn in the text and for the claim that political decision-makers are not required to offer constitutionally relevant reasons for their actions, see Eisgruber (2001, 59-62); and for a claim that courts are "exemplars of public reason", see Rawls (1996, chapter 6, section 6). Dean Larry Kramer has recently argued that the political branches do give reasons, and typically give better reasons that are unconstrained by the requirements of legal convention, through institutions such as senate committees (Kramer 2004). Of course, the importance of committees varies by jurisdiction. In Canada, legislative committees can have relatively little influence on the executive-dominated legislative process (see Freeman and Forcese 2005). Moreover, it is unclear whether deliberation sufficient to safeguard important constitutional interests occurs when interests of greater salience to constituents and interest groups are at stake in a piece of legislation, see Lyons (2005). We presume that

than courts to arbitrate disputes over the spending power and to offer constitutional reasons in support of their resolutions.

No participant in current debates over the spending power has discharged that burden. Recurring charges of political opportunism levied against government actors suggest that these actors are not perceived to be providing good-faith constitutional reasons for their actions.[28] Even if these charges mischaracterize the motivations of political actors, it remains the case that in federalism disputes, the judiciary is the branch most likely to be viewed as an impartial arbiter and as the authoritative source of public-regarding, constitutional reasons.[29] These perceptions provide strong reasons for courts to be involved in the regulation of the spending power, even if their institutional capacity to oversee controversial exercises of the spending power is limited.

This chapter proposes a rule that places the main burden of resolving issues

Ruling Out Alternatives to Section 36(1)

In the previous section, we cleared away several objections to judicial oversight of the spending power, and we can now consider what source of constitutional law is the relevant object of judicial interpretation. Some authors argue that the division-of-powers provisions of the Constitution Act, 1867[31] and a particular set of judicial interpretations of those provisions are the correct source of constitutional authority. Professor Andrée Lajoie, the most prominent proponent of this position, argues that if under current constitutional doctrine the federal government does not have section 91 jurisdiction to legislate in an area, it cannot spend in that area. An initial problem with this position, as we have noted above, is that the Supreme Court has not issued a clear ruling against federal spending — including conditional spending — in areas of provincial jurisdiction. The Supreme Court has acknowledged the validity of such spending in several cases, and authors have noted that it seems strained to insist upon a distinction between obiter dicta and ratio decidendi to support the claim that such spending is constitutionally prohibited (see, e.g., Andrew Petter, this volume). It is unclear why one should disregard the Court's decision to characterize a practice as constitutional particularly since implicit in this decision is a choice not to remain silent on the issue or not to declare that practice unconstitutional. Finally, against this backdrop of decisions affirmatively recognizing the constitutionality of the spending power, the Court recently decided not to speak to the constitutionality of the federal spending power in areas of provincial jurisdiction, when that was one of the constitutional questions posed.[32]

Let us accept for the sake of argument the claim that according to the current division of powers doctrine, most instances of federal spending in areas of provincial jurisdiction are unconstitutional because they are unauthorized by the division of powers. Such a claim cannot be dispositive of a disagreement in constitutional scholarship. Constitutional scholarship does not primarily entail simple descriptions of current constitutional doctrine. Constitutional law is a normative endeavour, and constitutional law scholarship, properly understood, involves evaluations and prescriptions.[33] For instance, Choudhry has argued that even if Privy Council cases excluded Parliament from legislating in areas of social policy and those cases continued to be valid constitutional authority, that restriction should be eliminated. The consequent expansion of federal jurisdiction, he argues, would be consistent with contemporary federalism doctrine.[34] One might respond to Choudhry's arguments by challenging the

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[31] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[32] Confédération des syndicats nationaux v. Canada, supra note 19.

[33] For the normative quality of constitutional scholarship, see e.g., Friedman (2005, 257). For the general claim that constitutional law is a normative practice, see Fallon (2007-08).

[34] Choudhry has articulated a rationale, grounded in the provincial inability step of the Crown Zellerbach test (see Crown Zellerbach, [1988] 1 S.C.R. 401), that would sustain federal legislation over social policy, and might therefore provide support for

wisdom of such an expansion of federa

compromise the sovereignty of the provincial legislature and, ultimately, the democratic agency of the provincial electorate.[39]

In the context of coercive exercises of the spending power, these reasons have additional force. The Court has expressly acknowledged the constitutionality of such exercises and government actors and citizens can reasonably have acted in reliance upon those statements.[43] There may be good reasons for defeating this presumption, even if reliance interests are frustrated as a result.[44] However, section 36(1) provides a normative framework for assessing particular instances of a long-standing practice and balancing the relevant interests. Such an approach to the spending power is more sensitive to the range of interests at stake and, absent arguments against adopting this approach, it is superior to one that requires courts to engage in a wholesale override of the presumption of constitutionality. I turn now to consider how precisely section 36(1) can function as the locus of constitutional authority for exercises of the spending power.

SECTION 36(1) AND PRAG

There are two ways in which governmental action can uncontroversially be considered to be unauthorized by section 36(1).[57] First, although some federal influence on provincial legislative priorities by federal government spending pursuant to the objectives of the section is permissible, federal action that is disproportionate to or unnecessary for the obtaining of those objectives amounts to unjustifiable coercion.[58] Second, provincial action that undermines those objectives cannot be justified by the section. Provincial action in pursuit of legitimate autonomy interests that justify departure from section 36(1)'s standards cannot unnecessarily or disproportionately undermine those standards. Let us consider each of these claims in turn.

Unjustified Federal Government Action under Section 36(1)

It is generally accepted that a vertical fiscal gap between the federal and provincial governments is i4t.

and unnecessary for the pursuit of the legitimate federal objective of equal provision of social services. The federal action would not be authorized by section 36(1).

From this hypothetical, we can infer two clear conditions under which federal governmental action exceeds the range of authority in section 36(1). First, because that section only authorizes federal influence in areas of provincial jurisdiction for specific purposes, any federal action that is not necessary for the achievement of those purposes or any other constitutionally recognized purposes is unconstitutional. Second, federal governmental action that is necessary to the achievement of section 36(1)'s objectives must be proportional and taxing responsibilities of the two orders of government and that imbalance would be necessary and proportionate to the goal of providing a baseline level of services across the country. Imagine further that under these conditions, a province that acted in pursuit of its unique and constitutionally significant autonomy interest would necessarily impose costs on other provinces that would be contrary to section 36(1)'s objectives.

Because our hypothetical province would, on the facts I have stipulated, specified. From that point of agreement, participants can aim to resolve particular conflicts.

Second, proponents argue that judicial minimalism reduces the error costs of constitutional judgment.[64] By reducing the breadth and depth of judicial decision-making, judicial minimalism can limit the possibility that a court will err in its decisions. There are two kinds of errors that can arise from constitutional decision-making. The first kind is normative, and the second empirical. The normative case for leaving constitutional judgments to the political branches is well known. Perhaps its strongest articulation is by Professor Jeremy Waldron.[65] According to Waldron, legislative bodies represent the considered moral judgments of constituents. The process of democratic deliberation, followed by voting, allows all viewpoints to be expressed, considered, and then accepted or rejected. By contrast, judicial review truncates this deliberative process, and entrusts it to a small unrepresentative body that is often constrained by legal conventions from openly debating the relevant moral issues. Proponents of minimalism claim that in cases which attract extensive and contentious democratic debate, minimalism reduces the scope of a judgment's effects and thereby expands the reach of democratic bodies' deliberative domain (Sunstein 1999, 59).

The arguments for deference to elected or delegated decision-making bodies on empirical issues are similarly well established. Adjudication is best suited to bilateral disputes over private claims of rights; it is least well suited to disputes that implicate polycentric issues requiring a weighing of multiple interests and the capacity to seek out and evaluate complex data.[66] By limiting the reach of a constitutional decision's effects, minimalism entrusts most empirical assessments to the legislative and executive branches.

Critics of minimalism have focused on Sunstein's account of how minimalist decisions are extended to novel fact situations. They have charged

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[64] For the notion of error costs, see Vermeule 2006, 77, 256-257. When courts err, they can impose social and legal costs (Sunstein 1999, 49). An interpretive approach that reduces the likelihood of errors tends to reduce the costs of errors, since, as a matter of probability, it will produce fewer errors. When evaluating the error costs of a doctrinal test, one should also assess the potential magnitude of an error (ibid., 4).

[65] Waldron (1999b). For an overview of this debate and its significance in the federalism review context, see Stone (2008, 27-30). Professor Stone argues that the strongest arguments for federalism review address the settlement function of courts in federalism disputes, but she further notes that even this settlement function can be fulfilled by more democratic bodies. We will see below that the possibility to which Professor Stone adverts is essential to the doctrinal rule advanced in this paper.

[66] Fuller (1978). See also Chayes (1976). For recent arguments that the relative institutional competence arguments in Fuller's work, and in the work of legal process scholars more generally, should be supplemented by empirical analysis, see Sunstein and Vermeule (2003, 900-902); Fallon (1994, 977-978). For a recent attempt to cabin and structure the scope of institutional competence arguments in judicial decisions, see King (2008). I will offer below a more nuanced version of the polycentricity argument and trace out the implications of this more nuanced account for judicial interpretations of section 36(1).

minimalism with being under-theorized and with distorting the nature of legal reasoning.[67] For instance, Professor David Brinks argues that Sunstein inaccurately distinguishes analogical from philosophical reasoning. According to Brinks, in Sunsteinian minimalism, reasoning by analogy permits courts to make incremental, fact-specific advances in the law, without appeal to general theories or principles (Brinks 2001, 50). But, Brinks notes, when courts engage in analogical reasoning, they are necessarily guided by theories that allow courts to generalize beyond specific facts and that provide guidance to those who are subject to the authority of judicial decisions.[68] Finally, Brinks argues that because the minimalist rejects theory, he cannot defend any particular decision that instantiates an incompletely theorized agreement (Brinks 2001, 52). The value of legality requires courts to offer public justifications for their actions, and minimalism fails to satisfy this requirement.

In order to respond to this criticism, let us first flesh out this conception of legality. Professor Ronald Dworkin in *Law's Empire* famously argues that constitutional interpretation entails the requirements of “fit” and “justification”. In hard cases, he says, courts should aim to interpret existing constitutional materials in the best possible political or moral light, keeping in view the purposes of those materials (Dworkin 1986, 90 and generally at chapter 6). Such a process of interpretation contributes to a “genuine political community” in which “people are governed by common principles, not just by rules hammered out in political compromise” (ibid., 211). On this account of constitutional interpretation, citizens are participants in a society-wide process of responsive reason-giving and part of a community characterized by the mutual regard of its members (ibid., 211–215). In *Justice in Robes*, Dworkin frames these claims in terms of legality. He argues that legality requires that “governments govern under a set of principles applicable in principle to all”.[69] and notesnot6(a)0.6 Tm -0.0002.be publicly defending and articulating particular conceptions of these principles.[70] I understand him to be arguing that government action is grounded in legality when a constitutional concern for government by common principles is instantiated in the substance of constitutional law and the process of articulating to citizens the reasons for judicial decisions. Sunstein's critics seem to argue that because minimalist decisions deny the possibility of principled reason-giving, they do not meet these substantive and procedural requirements of legality.

My defence of minimalism is partial and begins with a distinction between constitutional interpretation, on the one hand, and extensions of a case interpreting the constitution to novel situations, on the other. Although according to Sunstein's account of analogical reasoning, extensions of constitutional precedents are not justified in terms of a single normative theory, it does not follow that the interpretation of the constitution which grounds a precedent also lacks such justification. We have seen above one general justification for such interpretations: they economize on disagreements.[71] Consider a federalism example that Sunstein cites. He gives as an example of minimalism the United States Supreme Court's reasoning in United States v. Lopez.[72] There, he argues, the Court did not provide a comprehensive theory of federalism (Sunstein 1999, 16–17). The shallowness of the decision, he suggests, permits people with widely divergent views of federalism to support an interpretation of the constitution they all understood to be plausible.

Critics of minimalism might argue that although minimalist interpretations can be so justified, this kind of justification does not meet the requirements of legality. According to this criticism, legal justification requires a commitment to objectivity, and in this context objectivity entails the requirement that courts argue for the correctness of their interpretations.[73] Minimalists do not argue for

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[70] Dworkin (2006, 184). Professor Matthew Adler has recently argued that Dworkin is a kind of popular constitutionalist. He writes: "Dworkin's recognitional community must be the community of all citizens, not merely lawyers, judges, legislators, or officials

the correctness of their interpretations, the critics continue, but merely that their interpretations are accepted by a range of participants in a particular debate.

The critics are mistaken. Minimalist constitutional interpretations have available to them a justification that includes a claim about their correctness. Moreover, the relevant conception of correctness reflects the values that underwrite the principle of legality. This justification for minimalist interpretations finds its roots in American pragmatism.[74] According to the pragmatist, a consensus among the members of a community facilitates pragmatist deliberation, and such deliberation is regulated by a particular definition of truth.[75] Professor Cheryl Misak notes that for Peirce "a true belief is a belief that could not be improved upon, a belief that would forever meet the challenge of reasons, argument and evidence" (ibid., 49). As Misak notes, such a belief was for Peirce a regulative ideal and set the norms by which inquiry proceeds (ibid., 98-99). Inquiries begin against a stable background of set beliefs and assumptions, which are then put into question as they are tested against experience and reason, in a social and cooperative process of deliberation.[76] Recall that the minimalist interpretation I offered for section 36(1) was one that I claimed all reasonable observers would accept. Such an interpretation satisfies the pragmatist's conception of truth.[77] A minimalist interpretation is correct, where "correctness" means that it is currently immune to challenge.

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the position and confirming them (positional judgments). Where such confirmation (or disconfirmation) is ruled out, so too is objectivity" (Postema 2001, 105, 107, 108-109).

[74] In this chapter, I adopt insights from the pragmatic tradition that finds its roots in the work of Peirce (1997) and Dewey (1944). I also draw on legal authors whose work is deeply influenced by the pragmatist movement (see, e.g., Fuller 2001; Dorf and Sabel 1998). I specifically reject the version of pragmatism that understands the ends against which legal acts are measured to be fixed in advance. See for the distinction Garrett and Liebman (2004, 281).

[75] For the distinction between this approach to deliberation and disagreement, and the Rawlsian project of bracketing comprehensive worldviews, see Misak (2000, 20-24, 29-30).

[76] As Hilary Putnam has noted, this version of pragmatism, which finds its roots in Peirce and Dewey, is inhospitable to either thoroughgoing skepticism or relativism. Although the pragmatist accepts the fallibility of his present beliefs, he does not deny the possibility of true beliefs. The pragmatist may doubt the truth of any given belief but he does not doubt the truth of all beliefs. He is a fallibilist but not a skeptic (see Putnam 1995, 21). Peirce famously

repeatedly writing dissents.[80] By contrast, when applying a minimalist interpretation such as the one I propose for section 36(1), judges who hold positions across a normative spectrum can exchange reasons with their opponents and respect the authority of precedent.[81] They engage in responsive reason-giving which, as we have seen above, legality requires of state actors.[82]

Thus far in this section, I have articulated a minimalist interpretation of section 36(1) and defended that interpretation and minimalism itself against a range of criticisms. There remains one serious criticism of minimalism in the section 36(1) context. To introduce this final criticism of minimalism, I will draw in the next section on Professor Mitchell Berman's distinction between constitutional meaning and constitutional doctrine,[83] and I will generate a doctrinal rule that implements the minimalist interpretation of section 36(1) identified above. Berman's distinction reveals that even when, by drawing upon the full range of interpretive techniques available in constitutional law, we can discern with relative ease the meaning of a constitutional provision, that meaning cannot be directly enforced by the courts. In enforcing a constitution, courts generate and apply doctrinal rules that have embedded within them a set of judgments about the effects of doctrine and the ine ection i(g)-29.9( )-4.n1a oe;

expertise, those outcomes may be worse, by any relevant measure, than either the admittedly imperfect status quo or diverse jurisdictions (ibid., 345). The courts in the New Governance federal state adopt the terms of participants in this system of accountability to assess whether policies satisfy the standards defined by the participants themselves (ibid., 288). Any given violation is defined by reference to what is revealed as possible according to standards adopted and generated by the members of the federation (ibid.). Accountability is assured as citizens of particular jurisdictions measure their policies against those of other jurisdictions, and express their reasoned disagreement either at the ballot box or through litigation (ibid.).

The New Governance theorist prescribes for subnational units a continuing raising bilateral claims of rights.[92] Professors Sabel and Simon have noted that even in instances of classic private law litigation, courts often articulate rules that have unforeseen systemic effects.[93] Consider a court articulating a standard of care in tort law. Such standards tend to be framed at a high level of generality, and those potentially subject to a standard will, to varying degrees, be uncertain about what a violation of it entails. They will organize their activities to manage that risk, either by factoring into the cost of operations the value of potential damages or by altering their behaviours to fall within the range of activity that clearly falls within the scope of the standard. Actors who fall within the scope of the standard will respond to actions taken by others, and the costs of such mutually responsive activity will be distributed across the system. The systemic and polycentric effects of judicial rule-making in paradigmatic private law cases are not sharply distinguishable from those of public law cases, and courts formulating rules in private law cases are thrust in the position of considering those effects as they render judgment.

Despite these points of continuity, litigation that aims to restructure public institutions gives rise to particular challenges for courts. Public law litigation arises when there is a dispute about whether a public authority has met some standard of conduct. Resistance to meeting standards tends to result from various forms of political blockage, and it is the political nature of this blockage that sharply distinguishes private from public litigation (Sable and Simon 2003-04, 1062). There are at least three provisional and iterative, and that bring stakeholders together in public processes of deliberation.[95]

Let us consider an example. Sabel and Simon see in the remedies and legislative responses to the Mount Laurel litigation evidence of New Governance regulation.[96] In that case, the New Jersey court held that the exclusion of low- and moderate-income housing in a zoning ordinance violated the state constitution's "general welfare" provision. After a long history of litigation, the Court of Appeal held that the legislature's creation of an administrative agency to determine a municipality's fair share of low- and moderate-income housing was constitutional.[97] Sabel and Simon argue that the administrative process established by the New Jersey legislature has been responsive to the plaintiffs' interests by "creating pressures for local accommodation of low income housing and by making the zoning process more transparent".[98] The remedy fashioned by the final decision involved a variety of stakeholders, since the court consulted broadly in constructing the remedy, and crafted a flexible system, administered by selected trial judges, that was designed to convene stakeholders in subsequent constitutional challenges.[99] The Mount Laurel remedy responded to the complexity inherent in regulating housing markets and evidenced the features of a New Governance remedy: it

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[95] Sabel and Simon (2003-04, 1067-1073). Sabel and Simon describe these remedial orders in a variety of contexts, including litigation over education, mental health, prisons, police abuse, and housing. In each area, the authors argue, courts have moved away from highly specific, command-and-control remedies to remedies with the characteristics described in the main text.

[96] Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [Mount Laurel I], Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [Mount Laurel II] and Hills Developments Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) [Mount Laurel III]. I intend "Mount Laurel" to designate the entirety of the litigation history and events following and surrounding it.

[97] See Haar (1996) for the background and history of the litigation.

[98]

was open-ended, provisional, and iterative, and it brought stakeholders together in public processes of deliberation.

A New Governance Doctrinal Rule

With this example of New Governance judicial oversight in view, I turn now to propose a doctrinal rule that incorporates elements of New Governance theory. This rule states that federal or provincial action will be presumed to be in accordance with section 36(1)'s objectives unless a jointly constituted administrative agency finds that the action is disproportionate to or unnecessary for the achievement of those objectives.[100] If that agency finds that a government has violated section 36(1)'s proportionality and necessity requirements, the agency will issue recommendations on how the government should remedy the violation. If the government decides to depart from those recommendations, it must provide reasons, which a court will review on a reasonableness standard.[101] And if the government's reasons fail on this review, the government will be obliged to provide new reasons or to comply with the agency determination. This doctrinal rule would answer concerns about the institutional capacity of courts to oversee fiscal federalism, and it would have several process-related benefits.

First, because the administrative agency prescribed by the doctrinal rule would be a joint creation of the federal and provincial governments, those governments would be primarily responsible for its institutional design and, by extension, for its outputs.[102] Any problems of agency capture would be the primary responsibility of the political actors who created the agency, although a court could review for bias.

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[100] Professors Albert Abel and Robin Boadway have proposed similar bodies (see

Second, such an agency would provide a forum for governments to come together to discuss differences and arrive at compromises. The New Governance literature suggests that providing such occasions for structured deliberation enables participants in a debate to cast and recast disagreements about policy ends and means, in the course of responding to specific policy problems.[103] An administrative structure such as the one I envision would allow the federal and provincial governments to fashion the grounds of an always provisional overlapping consensus.

Third, such an administrative agency would allow governments to convert

Finally, the existence of a judicially generated constitutional rule would exert pressure on government actors to offer constitutional justifications for their actions and, as a result, judicial review could break through the kinds of blockages I have identified above.[107] To see how, let us consider each form of blockage in the section 36(1) context. First, federal political majorities may frustrate the interest of minorities, concentrated within a province, in receiving the baseline level of services specified by section 36(1); alternatively, national majorities may frustrate the ability of a particular province to provide baseline levels of services to its population. Second, motivated and well-resourced political minorities at either the federal or the provincial levels may dominate the legislative agenda and prevent the pursuit of policies that satisfy section 36(1)'s requirements. Third, all relevant political actors may agree that cooperative policies satisfying section 36(1)'s requirements are optimal, but because each is afraid of the downside risks of pursuing such policies and, in particular, the costs of others' defection from a cooperative policy, the actors collectively accept a suboptimal outcome.

The proposed doctrinal rule aims to break through each of these blockages. The doctrinal rule would, in the first instance, put pressure on political actors to justify a decision not to establish an agency that would facilitate the achievement of section 36(1) objectives and that would permit judicial review of their actions. This kind of pressure provides incentives for legislatures, whether they are dominated by a majority or a motivated minority, to act in ways consistent with a constitutional norm.

forms of pressure provide incentives for governments to respect constitutional norms or to offer reasons to justify departures from these norms. Finally, the proposed constitutional rule provides incentives to political actors to overcome coordination problems. Absent such a rule, political actors can, without political cost, ignore the constitutional implications of their actions. Once the judiciary articulates a constitutional rule, that possibility is no longer open and the political branches must factor into their choices the cost of being perceived to act contrary to a constitutional standard. However, even if one accepts these arguments in favour of the proposed doctrinal rule, one might still object that the agency required by that rule is outside the realm of political possibility. According to this objection, political actors in Canada are not motivated to create intergovernmental agencies, and such agencies are politically impractical in the fiscal federalism context. In the following section I will offer some examples that suggest that the doctrinal rule and its attendant agency are politically possible.

Considering Institutional Examples

I conclude this section by describing some institutions that can serve as templates for the kind of agency that the federal and provincial governments might create,[110] and by answering some criticisms of the proposed doctrinal rule. The existence of those model institutions suggests that members of the federation sometimes believe it to be in their interests to create such mechanisms of accountability.[111]

Consider first the 2007 “Building Canada” plan. This plan provides a framework within which the federal government can collaborate with provinces, territories, and municipalities on matters of infrastructure development, and it envisages a federal investment of $33 billion over seven years.[112] While the

> Governance and Accountability and the Canadian Institute for Health Information (CIHI). (ibid.)

One might concede that these and other forms of accountability institutions exist in Canada[115] and that the requirement to create such institutions, which is imposed by the proposed doctrinal rule, therefore falls within the realm of political possibility. Nonetheless, one might still argue that there is something unique about fiscal federalism that resists the creation of such an administrative agency. To answer this objection, I turn to some comparative examples.

In Australia, South Africa, and India, independent agencies are charged with setting policy to give effect to redistributive objectives similar to those articulated in section 36(1). Since 1933, federal legislation has charged the Commonwealth Grants Commission in Australia with determining how to reduce horizontal fiscal inequity within the Australian federation.[116] Professor Ross Williams notes that "the Australian system of horizontal fiscal equalisation is the most complex and thorough going of all federations. Allowances are made for differences between states in both their revenue-raising capabilities and their costs of delivery of government services" (ibid., 110). The Commission reports members and protects them from political interference. Moreover, its recommendations are binding (Khemani 2007, 468). Stuti Khemani argues that the Indian example provides strong support for the claim that delegating to an independent expert body responsibility for determining the amounts and recipients of federal transfers minimizes the influence of political considerations on fiscal federal policy. Finally, in South Africa part of the mandate of the statutorily created, independent advisory Financial Fiscal Commission is to recommend how the national government should assign revenue to the provincial and local governments and how to do so in ways that account for divergent fiscal needs and capacities.[118]

In this section, I have cited examples of federal-provincial institutions in Canada whose role is to oversee and coordinate policy, and I have described three expert agencies in states where there is a vertical fiscal gap and a constitutional text that at a minimum allows the central government to reduce inequities among the subnational units.[119] With these examples, I hope to suggest that the agency I propose is not outside the realm of pfr fiscao of pnno So.oT4 0.f 19

criticism by considering the ways in which the risks of non-enforcement can be distributed. The risk that a (federal or provincial) government will frustrate enforcement of section 36(1) and undermine the interests of another government may be distributed evenly, so that no government would bear an unequal share of the costs of non-enforcement. Although this may not be an optimal outcome, it is preferable to having the courts directly supervise fiscal federalism under section 36(1)'s auspices. Such supervision, we saw above, would give rise to a host of difficulties. By contrast, reliance on the proposed doctrinal rule would avoid these difficulties. And because, under the hypothetical conditions hee28.8 srys in fedralia (nd)-4.7(i)0.7spout
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rule, while accommodating the judiciary's institutional limits. A court could state that section 36(1) requires that the federal and provincial governments jointly create an administrative body of the kind suggested above. We have seen that such a requirement would be consistent with constitutional precedent: in the Remuneration Reference, the court stated a requirement that provinces create independent agencies. In addition, to mitigate institutional competence concerns, a court might require that the federal and provincial governments create an agency but expressly state that the political branches can satisfy section 36(1)'s requirements in other ways. Miranda v. Arizona[124] provides a model for such a rule. The Court in that decision reasoned that the Fourth Amendment exclusionary rule requires that police officers issue a standard warning when arresting a suspect. But, as Dorf notes, "the Court expressly invited Congress and the states to devise 'other procedures which are at least as effective in apprising accused persons of their right to silence.'"[125] In the section 36(1)

constitutional discourse. The alternative for which I have argued here expressly engages the concerns about institutional competence and reasonable disagreement to which the spending power gives rise. Finally, it imposes a requirement of reason-giving upon political actors. This requirement is credible because it is enunciated by the judiciary, and it is valuable because it meets the demands of legality.

If we accept the foregoing, then the remaining challenges take the form of separation of powers and political feasibility arguments. We have seen that the proposal is consistent with the *Remuneration Reference*, and any separation of powers objections apply to the doctrinal rule enunciated in that case. I have suggested that any such concerns are limited, particularly in the present case, because the responsibility for initiating judicial review and designing the relevant agency would fall primarily on the political branches. Moreover, the political feasibility arguments have been answered by pointing to existing institutions within Canada and abroad. There is nothing in Canadian federalism that precludes the kind of cooperative endeavours that I have proposed, and there is nothing intrinsic to fiscal federalism that resists such oversight.

In short, the proposals I have offered, far from being fanciful, are grounded in constitutional values and in the political experience of our own federation and of others. Ultimately, the value of legality requires governmental accounting to citizens when constitutionally controversial practices are at issue. The proposed rule aims to elicit such reason-giving and to address perennial problems of constitutional theory in the process. Even if my proposals are not adopted, I suggest that the questions I have raised are central to any adequate analysis of the spending power in Canada today.

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IV

The Spending Power and Positive Law

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Current Exercises of the Federal Spending Power: What Does the Constitution Say?

Andrée Lajoie

Le gouvernement fédéral a utilisé son pouvoir de dépenser pour renforcer la centralisation politique, soutient l’auteure de ce chapitre. Rien dans le texte de la Constitution ne légitime pourtant le pouvoir fédéral de dépenser et son utilisation comme instrument de centralisation, qui émanent en fait d’interprétations judiciaires de la répartition des pouvoirs et des pratiques subséquentes de l’État. Les spécialistes du droit et la jurisprudence sont divisés quant à la légitimité constitutionnelle de ce pouvoir, mais

practices. The federal government's use of the spending power as a tool for centralization erodes the constitutional framework of federalism and the provinces' exclusive jurisdiction over spending in certain areas.

I have written on this subject long enough, and those familiar with the field may recognize in this chapter elements of my first paper on the topic (Lajoie 1988a), a discussion that I updated and expanded in my report to the Séguin Commission in 2002.[1] I therefore touch only briefly on these well-known aspects of the subject and concentrate instead on its more recent evolution, both in case law and in government practice. I will also examine current exercises of the federal spending power, which show that it has become the federal government's preferred instrument of centralization.

WHAT DOES THE CONSTITUTION SAY?

The Initial Division of Powers

The *Constitution Act, 1867*, which establishes the Canadian federation, provides for the distribution of legislative powers between the federal and provincial levels of government. Section 91, "Powers of the Parliament", comprises twenty-nine areas of federal power including jurisdiction over the debt and public property,[2] general residual competence (ibid., s.91(29)), unemployment insurance (ibid., s.91(2A)), the raising of money by any mode or system of taxation (ibid., s.91(3)), quarantine and the establishment of marine hospitals, old age pensions[3] (which admittedly gives precedence to any applicable provincial legislation), and paramount jurisdiction over natural resource exports.[4]

As a counterpart to section 91, section 92 is entitled "Exclusive Powers of Provincial Legislatures". It lists sixteen areas of exclusive provincial jurisdiction, including "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes",[5] establishing and running hospitals and charities (ibid., s.92(7)), and residuary powers over matters of a merely local or private nature in the province (ibid., s.92(16)). To this list must

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be added education,[6] the provincial portion of the power over resources (ibid., s92A), and joint powers over immigration and agriculture (ibid., s.95).

By contrast, the powers of the executive are granted by a few provisions

these gifted revenues, which are justified either by virtue of the royal prerogative and common law, according to the oldest position held by Frank Scott (1955), or, more often, by virtue of the federal legislative power over public property, provided for in section 91(1A) of the Constitution Act, 1867.[13]

A common qualification underlines the arguments in favour of the federal spending power in fields of provincial jurisdiction: that spending is justified when the revenues come from a specific source of federal public property. Hogg, Smiley and Burns, Hanssen, and Schwartz understood this source to be the Consolidated Revenue Fund (Hogg 1988; Smiley and Burns 1969; Hanssen indicated the direction it would take if confronted directly with the issue. In the 1930s, the Supreme Court of Canada commented favourably on the constitutionality of the spending power in the Unemployment Insurance the agreement, as Justice Le Dain also did in funds to these programs. The court considered the provisions valid because they dealt "in pith and substance" (ibid., 131) with raising money by taxation; it made no reference to the provincial purposes for which the money was earmarked. If the entire issue posed by the use of the federal spending power in fields of provincial jurisdiction is one of characterization, what has to be asked is whether the Alberta court correctly characterized the purpose of the challenged provisions of the Income Tax Act and whether it is permissible for Parliament to do indirectly what the Constitution prohibits directly. In any event, despite its thorough treatment of the question, this isolated decision by a provincial court of appeal cannot settle the question for all of Canada.

Since the decision in Winterhaven in 1988, four Supreme Court of Canada decisions have addressed the subject but only indirectly and in such a way that these rulings have not altered the substantive law.[34] In the first of these decisions, YMHA Jewish Community Centre of Winnipeg v. Brown,[35] in which the community centre participated in a federal job creation program, the Court decided that the power to establish the program is not founded in the federal government's exclusive jurisdiction over unemployment insurance. Justice L'Heureux-Dubé wrote usra15.ehaacte1('He 0 -1.t)3.c4.tx-ourx-:(t)4.

The third case to indirectly address this question was Eldridge v. British Columbia (A.G.).[37] The opinion of Justice La Forest that the spending power had been constitutionalized does not change matters, given that he made it in express obiter.[38] Moreover, this opinion was pronounced in a case that involved not the spending power but the application of the Canadian Charter to provincial laws. What is more, neither withdrawing federal grants to the provinces, nor placing a cap on these grants,[39] is equivalent to passing federal legislation in areas of provincial jurisdiction. It should go without saying that ending an unconstitutional practice by retracting unjustified federal grants is not itself unconstitutional. By stating this obvious point, the Court did not necessarily give an opinion on the constitutionality of the activity itself—an activity to which the federal executive put an end by withdrawing from shared-cost programs.

Finally, Lovelace[40] dealt with the spending power of the provinces and was decided entirely within the context of the qualification on equality rights enshrined in section 15(2) of the Canadian Charter of Rights and Freedoms.[41] The Court held that an Ontario casino project, contested by some First Nations, did not go to the essence of aboriginality (which would have brought it under federal jurisdiction) but rather that, like the Dunbar case (supra note 29), it involved the use of the provincial spending power in a field of provincial jurisdiction, which is indeed perfectly valid from a constitutional standpoint.

The above cases illustrate the Supreme Court’s interpretation of the federal spending power as it stood when I wrote the second annex to the Séguin Commission report in 2004. Since then, two more decisions have referred to the issue: Auton (Guardian ad litem of) v. British Columbia (A.G.)[42] and Chaoulli v. Quebec (A.G.).[43] In Auton, the Court stated in Annex B that the federal government “has authority under its spending power to attach conditions to financial grants to the provinces that are used to pay for social programs”.[44]

below which there may be no real federalism: that line is drawn when local authorities are subordinate to central authorities (see Hogg 2007, 110; Brun and Tremblay 1982, 294; Tremblay 1982, 88; Chevrette and Marx 1982, 219; Finkelstein 1986, 16-17; Beaudoin 1982, 11; Magnet 1983, 1). Except for Rémillard (1983, 48), who gears his discussion toward the federation/confederation dichotomy and does not address the question of the minimal requirements of federalism, all Canadian constitutional scholars who have written on the subject are in agreement on that threshold (Whyte and Lederman 1977, 2-19; Brun and Tremblay 1982). Some authors even argue that the independence of local authorities from central authorities should be constitutionalized (see Tremblay 2001), or that local authorities must have sufficient fiscal powers to guarantee such independence (Whyte and Lederman 1977, 1-29).

But within this context, it is mainly the opinions of the Supreme Court that matter. The Court recently restated the principle of federalism in three landmark decisions[51] in the very words used by Lord Watson in *Maritime Bank*:

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. (*supra* note 7 at 441-42)

It has further been suggested that

> the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that “a radical change to ... [the] constitution [be] taken at the request of a bare majority of the members of the Canadian House of Commons and Senate”. (Craik *et al.* 2006, 110 [footnotes omitted])

In sum, after this examination of the precedents of the Privy Council, the Supreme Court, and even the lower courts of competent jurisdiction, it may be stated that no judicial pronouncement having the force of precedent has affirmed the constitutionality of the federal spending power in fields of provincial jurisdiction.[52]

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[51] *Reference Re Secession of Quebec*, *supra* note 8 at 250; *Reference Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 81[illegible]; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 751.

[52] Nor were things changed by Alain-G. Gagnon’s recent examination of the “Canadian Social Union Without Québec,” to plagiarize a title that has rightly become famous. See Tremblay 2001. The Social Union Framework Agreement is expressed as an administrative agreement and not a constitutional amendment, as there was no attempt to follow the formal procedures for amendment established by the *Constitution Act, 1982*. See *A Framework to Improve the Social Union for Canadians: An Agreement between the Government of Canada and the Governments of the Provinces and Territories*, Canada, 4 February 1999 [SUFA]. Even if the temporary nature of this agreement were to be changed by the passage of time, it would not constitute a “constitutional

Targeted Grants to Provinces

The second way the federal government currently bypasses the authority of provincial governments is through targeted grants to the provinces. It should be noted that some transfers to provinces seem unconditional, as they do not outwardly imply conditions upon their use. This is the case for equalization payments, authorized by section 36 of the Constitution Act, 1982, and it would also be the case for other truly unconditional transfers. However, such transfers are not popular with the federal government, because it gets no electoral benefits from them. The federal government's preferred solution is therefore to transfer money attached to a certain field of provincial jurisdiction, especially health care and social welfare. However, the very targeting of these grants to a specific area of provincial jurisdiction interferes with the power of the provinces to allocate money to the areas of their choice, a power granted by section 92(2) of the Constitution Act, 1867.

CONCLUSION

The traditional federal tools of disallowance, declarations to the general advantage of Canada, and acquisitions of property by purchase or expropriation have become more difficult to use in the context of the socioeconomic well-being of the population. I think it is quite clear that the spending power has now become the preferred instrument of centralization for the federal government. Of course, such centralization may be the wish of the federal authorities and of some provinces in Canada—although not all, and especially not of Quebec.

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The Spending Power, Cooperative Federalism, and Section 94

Marc-Antoine Adam

federal government argued that, even if the impugned provisions fell outside federal jurisdiction over employment insurance, they would nonetheless have to be declared valid on the basis of the federal spending power, which “is in no way limited by the division of powers”.[4] The Quebec government intervened in both proceedings to oppose this argument and the cases are now under consideration by the Supreme Court of Canada.[5]

This eventful decade-and-a-half naturally generated a great deal of academic discussion around the issue of the fiscal imbalance and the governance of Canada’s social union in general, and the spending power in particular. This volume and the associated conference attest to the high level of current interest.

THE UNLIMITED FEDERAL SPENDING POWER THESIS

What Is the Issue and Why Does It Matter?

I believe that the two most relevant questions to ask with respect to the spending power are *why* and *how*. First, why does the federal government spend in areas of provincial jurisdiction? While there may sometimes be an element of pan-Canadian redistribution when the federal government uses its “spending power”, that is not always the case, and when it is, the redistribution is often a mere side effect. However, a desire to bring some uniformity across the country is almost always a driver behind uses of the spending power; it is assumed that such uniformity would not exist if the federal government were not involved. We will vulnerable individuals or groups from the risk of arbitrary use of power by governments. Since power is held by the representatives of the majority in a democracy, the keenest concerns about its misuse are not likely to come from the majority. In a sense, minorities are like canaries in a mine: they are naturally more sensitive to potentially detrimental changes in their environment. Hence, even though the rule of law and constitutionalism are principles of the utmost importance for everybody because they afford stability and predictability, they are even more vital for minorities. While in a democracy such principles might mean curbing the will of the majority at times, this result scarcely needs to be explained or justified as far as the Canadian Charter of Rights and Freedoms[10] is concerned: it is broadly acknowledged and supported. However, the same logic is sometimes overlooked when it comes to the federal division of powers. As Hamish Telford has noted, because Quebec is the home of a "minority community" in this country, the federal division of powers gives Quebecers a form of constitutional protection in much the same way as the Charter does (Telford 2005). This is why, above and beyond the desirability of any specific federal spending program, the unlimited spending power thesis has always been a problem for Quebec.

The Constitution and the Spending Power

It is usually admitted that the federal spending power, as defined by the federal government in its defence to the constitutional challenge to workforce-training measures mentioned above,[11] is not spelled out in the text of the Constitution. A doctrinal construct that essentially appeared in the mid-twentieth century, it has been articulated in these terms by Peter Hogg:

> Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any condition it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient . . . or obligations which are voluntarily assumed by the recipient.... There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects. (Hogg 2007, 6-18 to 6-19)

Although there is no unanimity among them, legal scholars supporting the unlimited spending power have attempted to infer it from various constitutional

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[10] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].

[11] Defence, supra note 4.

provisions. The most frequently cited are sections 91(3), 91(1A), and 106 of the Constitution Act, 1867 and section 36 of Constitution Act, 1982.[12]

None of these textual arguments are convincing. Sections 91(3) and 91(1A) essentially relate to the organization of the federal order of government, and are designed to enable it to perform its functions adequately. Such organic provisions must be distinguished from those that allocate jurisdiction between the two orders of government. Section 91(3), as it plainly states, deals exclusively with taxation. It grants to Parliament the power to raise autonomous revenues to meet the responsibilities assigned to it elsewhere in section 91: defence, for example. It provides no authorization for public policies other than taxing, let alone for spending conditionally in areas of provincial jurisdiction.[13] What is more, relying on the wording of section 92(2), which grants the provinces exclusive taxing power for provincial objects, the courts have in the past stated that section 91(3) had to be limited to taxation for federal objects. Even though this issue has largely remained theoretical because of the generality of our tax legislation, the constitutional text and the case law on it clearly militate against seeing section 91(3) as the constitutional foundation of an unlimited federal spending power.[14]

Section 91(1A), giving Parliament legislative authority over “The Public Debt and Property”, must also be understood as an organic provision. It is designed to enable the federal order of government to manage its own property free of constraints that could otherwise arise from the provinces’ general jurisdiction under section 92(13) over the field of property and civil rights. In other words, section 91(1A) provides a form of immunity.[15] Accordingly, the provinces do not need a parallel provision because of their general jurisdiction over property and civil rights.

6 As for section 106,[16] it is not even found in Part IV of the 1

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place at Confederation and provided for in sections 118[20] and 119 of the Constitution Act, 1867. A fundamental feature of all of these payments is that they were absolutely unconditional, in order to preserve complete provincial autonomy.

The second, more modern component of section 36 is found in subsection 1,[21] which, if it has any effect at all, does not grant powers to governments but

of the spending power. Indeed, there have been a few instances where the spending power was used by lower courts to validate federal legislation. This was notably the case in the Alberta Court of Appeal *Winterhaven Stables Ltd. v. Canada (A.G.)* judgment;[27] interestingly, the Supreme Court decided not to hear the appeal. It is also revealing that in several cases on the validity of spending measures under the division of powers that did reach the Supreme Court, the Court decided them on the basis of the "classical" heads of power. This was the case in the reference from Quebec with respect to parental benefits under the *Employment Insurance Act*.[28] It was also the case in *Lovelace*,[29] where the Court expressly characterized the impugned provincial measure as an exercise of the provincial spending power, but nonetheless found that since it was relating to a provincial matter and did not encroach upon federal jurisdiction, it conformed to the division of powers. In the coming months, it will be instructive to see how the Supreme Court decides the case, mentioned previously, involving the two Quebec unions.[30]

As several authors have recently pointed out (see Yudin 2002; see also Telford 2003), the only case that truly dealt with the federal spending power in an authoritative manner is the *Unemployment Insurance Reference*,[31] a 1937 decision of the Judicial Committee of the Privy Council that preceded the constitutional amendment transferring jurisdiction over unemployment insurance to Parliament. In that case, the federal government attempted to the Privy Council,[32] even though its implications displeased some. However, the unlimited spending power thesis eventually made a comeback.[33] The process by which the ruling of the Privy Council came to be disregarded by a majority of Canadian scholars is fascinating. Commentators first began treating the decision as unclear and looked to the Supreme Court's reasons, particularly those of its two dissenting judges, for guidance.[34] A number of commentators also considered the Privy Council's comments on the scope of the federal spending power to be *obiter*. Eventually, two distinctions were put forward to argue that, while the power of the federal government to spend "in areas of provincial jurisdictions" (note that the Privy Council never used these words) may have been somewhat limited by the Privy Council's decision, the bulk of federal spending remained unfettered. The first distinction sought to differentiate between federal expenditures made from a special fund and those made from the general consolidated revenue fund. A second, somewhat related distinction was proposed between pure federal expenses (which could nonetheless be conditional!) and expenses mixed with "compulsory" provisions, such as the requirement to pay premiums set out in the impugned *Unemployment Insurance Act*. As time went by, support for federal spending in areas of provincial jurisdiction became so strong in Canada, and its practice so common, that not only did these distinctions take hold but, by some ironic twist, the Privy Council's decision even came to be presented by some authors as the leading case recognizing the constitutionality of the federal unlimited spending power.[35]

With respect, these distinctions, and the resulting interpretations of the Privy Council's decision, fail to recognize a fundamental feature of the decision: Lord Atkin accepted the federal attorney's request to sever the compulsory provisions pertaining to premiums from the spending provisions pertaining to benefits, and to examine each operation separately. The federal government's contention was that the compulsory provisions were a valid federal tax under

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[32] Keith (1937, 433-434); Commission royale des relations entre le Dominion et les provinces (1939, 20); MacDonald (1941, 77); Pigeon (1943, 439-440); Kennedy (1944, 157); Birch (1955, 162); Quebec (1956, 2: 223); Ryan and Slutsky (1964-1966, 302-303; Beetz (1965, 132); Dupont (1967, 75-81).

[33] Many authors have noted that the Privy Council's ruling in the *Unemployment Insurance Reference* has been ineffective at restraining the spending power: Abel and Laskin (1975, 638); Petter (1989, 460); Tremblay (2000b, 304); Beaudoin (2000, 721).

[34] The reasons given in dissent by Duff C.J. in *Reference Re The Employment and Social Insurance Act*, [1936] S.C.R. 427, aff'd *Unemployment Insurance Reference*, *supra* note 31, are sometimes cited to support a broad interpretation of ss.91(1A) and 91(3), even though his suggestion that such powers entitled Parliament to raise and spend monies for any purpose it wanted and his conclusion that the impugned federal statute was therefore valid were clearly dismissed by both the Supreme Court majority and the Privy Council. For an example of reliance on Duff's reasoning, see Scott (1955, 3-4). Pierre Trudeau, before he became prime minister, noted this irony (Trudeau 1967, 87).

[35] On this evolution, see Scott (1955); Smiley (1962, 62); Hanssen (1966-67); La Forest (1981, 48); Cameron and Dupré (1983, 339); Chevrette and Marx (1982, 1040-1041); Rémillard (1983, 355-356); Schwartz (1987-88, 64-66); Choudhry (2002, 184-187); Brun, Tremblay and Brouillet (2007, 429); Beaudoin (2004).

indirectly achieve the same outcome. Finally, we were told that the purpose of the spending is not to be taken into account even though purpose has always been a central element in determining the validity of legislation in disputes over the distribution of powers.

Indeed, one of the very first points that had to be addressed by the courts in deciding cases on the division of powers was how to analyze legislation in order to assess its conformity with the Constitution. Hence, the first step of the test developed by the courts consists of identifying the “pith and substance” of the

Taken to its logical conclusion, the unlimited spending power thesis implies

Canadian Constitution is in essence a division of sovereignty.[44] Furthermore, it is exhaustive.[45] The fact that the language of sections 91 to 95 refers to the distribution of legislative and not executive powers is simply due to the principle of parliamentary sovereignty. There are numerous other constitutional past decade, starting with the *Quebec Secession Reference*,[51] the Supreme Court has reaffirmed on many occasions the importance of keeping federalism alive:

> The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good. To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss.91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution—this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136—the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in

example, the Millennium Scholarship Fund, the National Child Benefit and, more recently, the creation by the federal government of the Mental Health Commission of Canada).

While there may be uncertainty about the respective constitutional rights of the federal government and the provinces over the issues being discussed and negotiated, few would dispute the necessity of such discussions and negotiations.[54] The federal government itself has on several occasions presented provincial consensus as a precondition for its interventions. SUFA was essentially an attempt—however disappointing—to codify some of the "rules" never widely supported as a sustainable proposition to guide the operation of Canadian federalism. This is why several rounds of constitutional negotiations have sought in one way or another to prescribe limits to federal spending.[57] In retrospect, given what has happened to efforts at constitutional reform, choosing this course instead of an outright constitutional challenge may have been a mistake. As we have seen, after the failure of the Charlottetown Accord,[58] the seldom are. For others, especially in the policy industry, it is an open invitation to disregard the Constitution and the division of powers. For many in the general public, it has become an empty political phrase. What has perhaps been forgotten is that cooperative federalism was once the subject of serious legal studies in Canada. The original inspiration came from the Privy Council in the 1930s when the courts were asked to decide on the validity of a number of economic and social pieces of federal legislation put forward in the aftermath of the Great Depression. The Unemployment Insurance Reference was but one of a string of cases where the judiciary confirmed that many such measures fall within provincial areas of jurisdiction.[60]

In Canada, the big test came with the Inter-Delegation Reference[62] in 1951. In that case, the Supreme Court of Canada had to decide whether a Prince Edward Island statute allowing for the delegation of legislative authority to Parliament over employment matters normally falling within exclusive provincial jurisdiction, and vice versa, was constitutional. The answer was negative. Many commentators consider this decision unfortunate because it deprived the Canadian federation of a most convenient consensual tool. Still, it did not completely close the door to legal cooperative federalism. Indeed, the Inter-Delegation Reference dealt with one form of delegation, which is sometimes called legislative or horizontal interdelegation: in other words, a direct transfer of powers between two legislative assemblies. The decision left untouched many other devices capable of achieving analogous results.[63]

One such alternative is administrative interdelegation. This occurs when Parliament or a provincial legislature enacts a statute and entrusts its implementation to an agency or to the executive branch of another order of government. This may involve bestowing a power to grant licences and even some regulatory powers. The courts have validated administrative delegations, such as allowing a single administrative body to regulate both intra-provincial and inter-provincial commerce.[64]

Another alternative is through the technique of incorporation by reference where, instead of devising its own rules concerning an issue falling within its jurisdiction, a legislative assembly decides to make applicable to this issue the rules adopted by the legislature of another order of government to deal with similar issues. This too has been validated by the courts.[65] For a time, there was some doubt as to whether the reference could only incorporate rules in existence at the time it was made or whether it could include future amendments to these rules as well. Again, the concern was that the latter might be seen as a form of abdication of parliamentary sovereignty. Nevertheless, the courts decided that so long as the intention to include future amendments was clear, such a reference was valid too. A good example of this technique is provided by the Indian Act, which incorporates all general provincial laws for the purpose of regulating activities on Indian reserves that would otherwise fall under provincial jurisdiction.[66]

A third, somewhat related, alternative approach is conditional legislation. This takes place when the laws passed by a legislative assembly will apply, cease to apply, or apply differently subject to conditions determined by the other order of government.[67] Gerard V. La Forest thought that the provisions allowing

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[62] Nova Scotia (A.G.) v. Canada (A.G.) (1950), [1951] S.C.R. 31 [Inter-Delegation Reference].

[63] Several scholars have written about these devices. See, e.g., Lederman (1967).

[64] Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc., [1952] 2 S.C.R. 392.

[65] See Coughlin v. Ontario Highway Transport Board, [1968] S.C.R. 569.

[66] R.S.C. 1985, c. I-5, s. 88.

[67] See , e.g., R. v. Furtney, [1991] 3 S.C.R. 89 at 101-106.

provinces to opt out of social programs created by the federal government fell into this category (La Forest 1975, 138). The recent parental leave agreement

legislatures of the provinces where the federal legislation is to apply. The section reads:

> Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.[73]

Section 94 is essentially the only provision[74] in the Constitution that contemplates in general terms the possibility of the federal government considerable benefits could ensue from such a change in legal paradigms in terms of transparency, accountability, effectiveness and quality of programs, reduced political tensions and, ultimately, Canadian unity. From a public law standpoint, perhaps the greatest benefit of all would be that this would allow us to reconcile the Canadian practice of federalism, in particular the governance of Canada's social union, with the principles of constitutionalism and the rule of law.

Anticipating possible objections to my proposal, I had also identified a number of legal issues that would have to be addressed concerning section 94 and attempted to provide arguments as to how they could be approached so that

Indeed, many provisions in the *Constitution Act, 1867* that are still in force have language that refers to only the original provinces. For example, section 5 reads: “Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia and New Brunswick.” Today, of course, we must interpret such provisions as also applying to the provinces that were added after Confederation. This result is ensured by express provisions contained in the constitutional statutes that incorporated the latter provinces into Canada such as section 2 of the *Manitoba Act*,[78] which reads as follows:

> The provisions of the *British North America Act, 1867*, shall, except those parts thereof which are in terms made, or, by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

There is compelling historical evidence to suggest that the framers intended section 94 to apply to the “whole” of the provinces except for Quebec. This is made clear by the fact that section 29(33) of the Québec Resolutions, the precursor of section 94, adopted in 1865, also listed Newfoundland and Prince Edward Island, which at the time were still negotiating to become original members of the new federation.[79] The purpose behind section 94 is obvious: the framers of Confederation foresaw that although they had agreed upon a federal-provincial distribution of powers, there would eventually be a desire for further integration among the common law provinces. The framers also foresaw that this would not be true for Quebec given its specificity.

Actually, with the help of the techniques that I have alluded to above—namely, incorporation by reference and administrative interdelegation—even Quebec could now indirectly opt into a section 94 scheme, with slightly different legal effects,[80] but with essentially the same practical result. Indeed, if by virtue of section 94, Parliament legislated in the domain of property and civil rights and its legislation was in force in some of the common law provinces, we would not be in a situation where the federal law “would have no significance and validity independent of the delegation” made by Quebec (Hogg 2007, 14-32); therefore, the Quebec National Assembly could resort to interdelegation effectively to opt in without violating the prohibition established in the Inter-

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[78] S.C. 1870, c. 3.

[79] “The Québec Resolutions, October, 1864 (The 72 Resolutions)” (2005), online at Library and Archives Canada at www.

Delegation Reference. To conclude, I believe that today all the provinces could benefit equally from the opportunities offered by section 94.

The Material Scope of Section 94

Another potential issue with section 94 is its seemingly limited material scope: “property and civil rights”. The same expression is used in section 92(13). Even so, we must remember that this is the most comprehensive head of provincial power. A lot can already be achieved under it. And, as Barbara Cameron once reminded me, social programs were originally conceived as public insurance — this is how they came to be classified as matters of provincial jurisdiction under this all embracing category, as was decided in the **Unemployment Insurance** Reference.[81]

If we return to the origins of this phrase in the 1774 Quebec Act,[82] we can understand why section 92(13) has become a kind of provincial residuary clause akin to “peace, order and good government” (Hogg 2007, 17-1 to 17-3, 21-2 to 21-3). The legal category of “property and civil rights” was originally conceived as an inclusive formula to allow for the restoration in Quebec of French law (which had been abolished pursuant to the British conquest) in all matters but criminal law, external trade, and a few others. This is evidenced by the way the Quebec Act is structured: it establishes in section VIII, in the broadest terms possible, the general principle of the restoration of French law in all matters related to “property and civil rights” and subsequently sets limits or carves out exceptions to this principle, such as the one concerning criminal law. Indeed, the expression “property and civil rights” would have included criminal law had it not been for its expressed subtraction in section XIsiib8(si).8(t)7., 2(t)7-7 to 2(t)7-8).

Interestingly, the expression “civil rights” was unofficially translated in 1774 as “droits de citoyen”sicitizen rights), thus reflecting the wide meaning ascribed to it at the time. Accordingly, the conventional assimilation of the notion of “property and civil rights” to the field of “private law”, as opposed to “public law”, may be historically inaccurate. Aside from criminal law, there were other principles of English public law that were meant to continue to rule the inhabitants of Quebec, not necessarily because such principles fell outside the scope of the expressionsiroperty andsiil rights” by definition.si5.9(Rath)-5(er,)]TJ 0 -1.1437 TD 0.0

threat to English sovereignty, that Quebecers were to be governed by English law as opposed to their own pre-existing law.[83]

Of course, today, the scope of the provincial jurisdiction under section 92(13) is much more limited. That is because when the phrase "property and civil rights" was recycled in the *Constitution Act, 1867*, further subtractions were made to its scope by assigning a number of other subject matters in addition to criminal law and external trade—for instance bankruptcy and insolvency—to Parliament (Brun, Tremblay, and Brouillet 2007, 422). The majority of the federal heads of power can be seen in this light. In turn, such assignments to Parliament of matters related to property and civil rights led to further refinements in regard to section 92 so as to avoid any risk of confusion. That is why there are in section 92 many items other than section 92(13) that deal with property and civil rights: for example, provincial undertakings (section 92(10)), incorporation of companies with provincial objects (section 92(11)), and solemnization of marriage (section 92(12)). As can be seen, many of the subsections both in sections 92 and 91 were carved out of the legal category of property and civil rights in order to fine-tune the division of powers in this area. Section 92(7) (hospitals, asylums, charities, etc., other than marine hospitals) and section 93 (education) may well be other examples of this.

What does this mean when it comes to defining the material scope of section 94? Should it be limited to the residual matters of section 92(13), or should it extend to the other matters found in section 92—or elsewhere in Part VI—that can also be included in the notion of property and civil rights? I believe that the second view is the better one. Excluding the "offspring" of section 92(13) would not make much sense, because it is often their close proximity with matters assigned to Parliament that has led to their express mention in section 92. Accordingly, they might be viewed as ideal candidates to be transferred to Parliament under section 94. Would it make sense, for instance, to prevent the unification of corporate law under section 94—assuming there was a wish for it—simply because the incorporation of companies with provincial objects is specifically provided for in section 92(11)?

Reversibility of a Section 94 Transfer

Another difficult legal issue with section 94 is the potentially irreversible minds and return to the status quo ante? The possible irreversibility of a section 94 transfer was, together with its apparent limited geographical scope, the main reason why the Rowell-Sirois Commission in 1939 chose to disregard it as a potential solution for adapting Canada's division of powers to the needs of the twentieth century. The Commission viewed this as a non-starter from a

Additional support for this interpretation can also be found in the new translation of the *Constitution Act, 1867*.[85] The text that was presented read:

> Nonobstant toute autre disposition de la présente loi, le Parlement du Canada peut prendre des mesures d'uniformisation totale ou partielle du droit relatif à la propriété et aux droits civils en Ontario, en Nouvelle-Écosse et au Nouveau-Brunswick, ainsi que de la procédure devant tout ou partie des tribunaux de ces trois provinces. En outre, nonobstant toute autre disposition de la présente loi, le Parlement, à compter de l'adoption d'une loi d'uniformisation, acquiert le pouvoir entier de légiférer en toute matière dont il est traité dans cette loi d'uniformisation, laquelle n'a toutefois effet dans une province que si sa législature lui donne elle-même force de loi.

Hence, this new French translation indicates very clearly that the legal authority ("force de loi") of a federal the context of today’s welfare state, to be faithful to the spirit of this provision, it must be possible for provinces to exercise a genuine choice between retaining their autonomy or opting for uniformity. And this can only be ensured if non-participating provinces are entitled to compensation. Otherwise, the same kind of coercion and tension at present associated with the unlimited spending power thesis would continue, which, in the end, would be detrimental to both autonomy and uniformity.

As section 94 was drafted in the nineteenth century with the classical liberal model in mind, it is silent on the issue of compensation, even with respect to Quebec. In those days, the provision of social services was ensured by religious and private organizations. Therefore, the substantial costs now associated with areas of provincial jurisdiction were not readily foreseeable. However, ever since the topic of interdelegation came to the fore in the twentieth century, discussions over potential reallocation of powers between the two orders of governments have included the issue of fiscal adjustments, particularly in view of potential asymmetrical outcomes. When large sums of money are involved, current instances of asymmetrical arrangements using the various techniques I described earlier nearly always involve some fiscal adjustments. These adjustments often take the form of a transfer of resources from the delegating province to the federal government as is the case, for example, when the Royal Canadian Mounted Police acts as a provincial police force.

When it comes to Canada’s social union, a solid textual argument can be made that the commitment to promote equality of opportunity for the well-being of Canadians while respecting the division of powers constitutionalized in section 36 of the *Constitution Act, 1982* would require that non-participating provinces under a section 94 scheme be compensated. Compensation could take the form of transfers to the non-participating provincial governments or lower federal taxes for their residents, as with the existing Quebec abatement. Indeed, it would create inequality of opportunity among Canadians if Parliament were to put in place a social program in some provinces without some form of compensation for those that exercised their constitutional right to make different choices in ensuring the well-being of their residents. Similarly, given that Ottawa has, under section 36(2), a constitutional duty to equalize the fiscal capacity of provinces in order to compensate for external inequalities among and 40. These provide that a constitutional amendment transferring provincial jurisdiction to Ottawa will have no effect in a province that has not consented to it, and if such power touches upon education or any other culturally sensitive matter, reasonable compensation will have to be awarded to that province.

A further argument could be made on the basis of section 15 of the *Charter*, the essence of which is also to protect the values of equality and respect for diversity, but unlike section 36, it is clearly enforceable. The fiscal prejudice provinces, would deprive Ottawa of the necessary financial tools to induce provinces and would remove all incentive for further integration, even among the common law provinces. I think that this view is overly pessimistic.

First, an argument could be made that the current system, where the federal government claims it has a unilateral right to intervene and uses its financial leverage to pressure the provinces, is not truly conducive to provincial volv1(ov is otemin)4.24.79645TD 0.07 TD 0.000eTssu230031 Tw 5(29)4.6giern.9(8(gea ie)8.4s)]21

On the issue of asymmetrical federalism linked to section 94, the other policy concern that has been raised is what is sometimes called the "West Lothian question" in reference to the United Kingdom and Scotland where it has been a topic of intellectual discussion for decades. Essentially, the concern is that if given subject matters are devolved to subnational governments in some but not all regions, the legitimacy of the elected representatives in the central institutions who come from the more autonomous regions will become problematic, particularly when they are called on to vote for the remainder of the country on matters that have been devolved to their home regions. In search for a solution to this perceived problem, some interesting suggestions have occasionally been put forward in academic circles, such as reducing the total number of representa

Who Could Revive Section 94?

Whether governments would by themselves revive section 94 is difficult to predict at this juncture. Such a move into new territory would have to be driven by a sense of necessity. This might happen in areas such as securities regulation, as in Australia. After all, this is an instance of state activity traditionally associated with property and civil rights, and section 94 would appear to apply quite naturally in this context. In the social domain, much of the fortunes of section 94 would depend on what happens with the unlimited spending power thesis.

Much of what will happen with this thesis, and federalism more generally, will depend on the Supreme Court. Some argue that courts are no longer apt to police federalism due to the growing complexity of governance. If this were the case, we should start worrying about the future prospects of federalism. However, I find this argument unconvincing, particularly when we consider how much courts throughout the Western world have become involved in the policy process through the adjudication of individual rights under such instruments as the Charter. If anything, policing federalism as opposed to the Charter should be easier because, in doing so, courts are not asked to decide what should or should not be done; they are simply asked to decide who can do it.

CONCLUSION

In this chapter I have tried to demonstrate, as others have done before me, that the unlimited spending power thesis does not work. It has no basis in the Constitution and is at odds with many of our constitutional rules and principles.

is hardly realistic in the current context. Then there are those who, in the name of realism, suggest that governments should simply ignore the Constitution and try to cut "administrative" (or "para-constitutional" or "non-legal") deals to regulate their actions. In my view, the problem with this approach is twofold. First, it does not work well: it tends to generate a lack of transparency and accountability and a great deal of political tension, and all attempts to agree on and abide by permanent voluntary rules have failed. Second, it boils down to relinquishing the principles of constitutionalism and the rule of law, and this is a slippery slope. Constitutional constraints are there for a reason.

Accordingly, before setting aside the Constitution, it is important to explore all of the possibilities it affords. After all, the dynamics at play, particularly in the relationship between Quebec and the rest of Canada, but also between central Canada and the other regions of the country, are not new; we could say they are as old as Canada itself. For this reason, I have tried to shed light on what is probably the least known of all the division of powers provisions in the Constitution Act, 1867 section 94. I think this section captures many of the subtleties of Canadian federalism.

Of course, section 94 also raises a numb

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12

Building Firewalls and Deconstructing Canada by Hobbling the Federal Spending Power: The Rise of the Harper Doctrine

Errol P. Mendes

C’est en toute connaissance de cause que l’actuel gouvernement conservateur du premier ministre Stephen Harper cherche à miner l’application du pouvoir fédéral de dépenser, observe l’auteur, qui qualifie de « doctrine Harper » cette démarche visant à favoriser une politique traditionnellement préconisée par les dirigeants du Québec, à savoir la restriction maximale sinon la suppression totale de la capacité d’Ottawa de dépenser dans les domaines de compétence provinciale.

Retraçant l’historique du pouvoir de dépenser tel qu’il est établi dans l’Entente-cadre sur l’union sociale (ECUS) de 1999, l’auteur ne met pas en cause sa légitimité constitutionnelle et rejette la possibilité de l’inscrire dans la Constitution en étendant la portée de la section 94 de la Loi constitutionnelle de 1867. Il estime en effet que la section 36 de celle-ci, jumelée à l’ECUS, suffit à légitimer l’exercice responsable de ce pouvoir dans l’intérêt des Canadiens et le respect de l’autonomie provinciale. Il conclut

Watertight Compartments and Firewalls

In his famous decision in Labour Conventions — a judgment handed down before the rise of the modern welfare state —

Minister Harper claims that he is determined to end what he terms the "domineering and paternalistic federalis

> now more constrained, the provinces have more revenue, and conservatives should be happy. (ibid.)

Flanagan seems particularly proud that the Harper government has been

discuss among themselves a social union with the federal government. The to that agreement given its traditional antipathy to the federal spending power. This antipathy—which can be traced to the early years of the Duplessis provincial government in the 1940s, was reflected in the findings of the 1953 Tremblay Commission (ibid., 4), and crested during the Quiet Revolution of the

THE CONSTITUTIONALITY OF THE FEDERAL SPENDING POWER

While the hostility toward the "unlimited spending power" has led to debate regarding its constitutionality,[11] Professor Peter Hogg is strongly of the view that "the federal Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate" (Hogg 2007, 174). According to Hogg, the spending power must therefore be inferred from the constitutional power to levy taxes (section 91(3)), the power to legislate in relation to public property (section 91 (1A)), and the power to appropriate federal funds (section 106) (ibid., 173). If Parliament has these revenue-raising powers, it must also have the power to dispose of its own property. Hogg makes a distinction between compulsory regulation, which can be enacted only within jurisdictions permitted by sections 91 and 92, and the spending, lending, and contracting abilities, which impose neither binding nor voluntary obligations on the recipient.[12] In support of this view, Hogg refers to the Supreme Court of Canada's decision in Reference Re Canada Assistance Plan (B.C.),[13] which he considers to be a

> clear affirmation of both of the Parliament's power to authorize grants to the provinces for use in fields of provincial jurisdiction and the power to impose conditions on the recipient provinces. Provided Parliament's intervention does not go beyond the granting or withholding of money, there is no unconstitutional trespass on provincial jurisdiction. (Hogg 2007, 175-176)

The arguments in favour of the constitutionality of the federal spending power made by Hogg and other leading jurists have been vigorously critiqued by power and attempts to demolish them by claiming that nothing in the text of the Constitution justifies the exercise of the spending power in fields of provincial jurisdiction (see Chapter 6, pp. 11-12).

Lajoie further argues that decisions such as Canada Assistance Plan (B.C.) deal only with situations where provinces are seeking to obtain funds from the federal authorities and are therefore trying to secure performance of the federal-provincial agreement. Lajoie concludes that the Supreme Court's decision merely amounted to a statement that to stop doing something unconstitutional is not in itself unconstitutional (Hogg 2007, 175). In other words, Lajoie is arguing that a Supreme Court decision that the federal government is perfectly entitled to cease its unconstitutional actions does not suddenly retroactively make those actions constitutional—an interesting constitutional twist on the old common-law rule ex injuria non oritur ius (a right cannot arise from a wrong).

The real thrust of critiques of the spending power is revealed by references to Privy Council decisions, such as the 1937 Labour Conventions case.[14] As discussed earlier, the Labour Conventions decision.6.4(ts7.6(ae2.2(d))6(o)n)- 32t1(oh3 .325e8.4(tp)-- 32)-0.7

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This view of the constitutionality of the federal spending power has received support from the Alberta Court of Appeal in *Winterhaven Stables Ltd. v. Canada (A.G.)*.[17]

- to promote equal opportunities for the well-being of Canadians;
- to further economic development to reduce disparity in opportunities; and
- to provide essential public services of reasonable quality to all Canadians.[19]

Reinforcing this implied penumbra entitlement is section 36(2), which states: “Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public service at reasonably comparable levels of taxation” (ibid., s.36(2)). This provision imposes a constitutional obligation to equalize the fiscal capacity of provinces and compensate for existing disparities.[20] The federal government, through a resurrected section 94, could then create the same fiscal inequities by not compensating non-participating provinces (Adam 2007, 34).

This argument is contradictory given the antagonism by some jurists, especially from Quebec, who decry the adequacy of SUFA to limit the federal spending power as it is only an administrative agreement, not a constitutionally entrenched framework. However, the possibility of a penumbra entitlement based on section 36(2) of the Constitution is much weaker than a federal-provincial agreement such as SUFA. In contrast to the tortured interpretation of section 94, combined with teasing out some penumbra entitlement from section 36, it is suggested that the ordinary meaning of section 36 gives constitutional support to a federal spending power that is exercised responsibly in the interests of a common Canadian citizenship, while SUFA works with section 36 to avoid as much as possible the undermining of provincial autonomy and spending priorities.

UNMASKING THE HARPER DOCTRINE

The Harper Doctrine is driven in part by an ideological position that the federal spending power is a by-product of excessive taxation by successive federal governments. According to this Conservative view, the best way to begin attacking both the federal spending power and excessive taxation is to first reduce the federal government’s revenue-raising ability. Harper succeeded in doing this through his 2 percent reduction of the GST, taking tens of billions of dollars out of the Canadian treasury. The next step is to increase spending in areas that are clearly within federal jurisdiction and that reinforce the Conservative agenda. Defence and military procurement has become a top priority in this regard, especially with the extension of the military mission in Afghanistan until 2011. As of the end of 2007, Canada had spent approximately $7.2 billion in Afghanistan in six years of warfare. It has been reported that, since the start of the Afghan mission, “national military spending has increased

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[19] *Constitution*, *supra* note 1, s.36(1).

[20] Some scholars would disagree, given the horatory language in s.36(2).

by 27 per cent and is at its highest level in 55 years" (Goar 2007). According to one think tank (the Rideau Institute), Canada's military spending in 2007-08 alone will reach $18.24 billion after major expenditures on military heavy-lift transport planes and other equipment; in adjusted dollars, it will surpass Canada's spending on the military during the peak of the Cold War (1952-53) by 2.3 percentage points (Staples and Robinson 2007, 1). The increased

- Second, the federal government might use legislation to severely limit its ability to initiate any new direct transfer programs, such as the Millennium Scholarships, which are funded solely by the federal government. This

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controversies over the federal spending power have been at the heart of the politics of social policy, which in turn have been at the very centre of federal-provincial relations since the rise of the Canadian social union after the Second World War. Throughout, debates about the federal role in social policy have not merely been debates over the design of social programs, or even about the appropriate division of labour between the federal and provincial governments. Rather, the politics of social policy have been a terrain for competing nationalisms. In the post-war period, the construction of the welfare state has been central to a pan-Canadian nationalism, centred on the federal government. Though the origin of modern Quebec nationalism is a complex story, to a considerable extent it was a defensive response to this federally led nation-building project. Federal social-policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebecers were a small minority.

For over a decade, I have contributed to these debates myself. There are three strands to my work. First, I have devoted considerable attention to the legal framework governing shared-cost programs, in particular the design and enforcement of federal statutes authorizing transfers to the provinces and territories conditio the “peace, order and good government” (POGG) power for federal jurisdiction over social policy.

This chapter extends arguments that I have developed in the third and most recent strand of my work (Choudhry, Gaudreault-DesBiens, and Sossin 2006a; Choudhry, Gaudreault-DesBiens, and Sossin 2006b; Choudhry 2006; Choudhry, Gaudreault-DesBiens, and Sossin 2006c). Rather than diving into the familiar jurisdiction on the federal government over unemployment insurance (1940),[3] old age pensions (1951),[4] and supplementary benefits including survivors' and disability benefits irrespective of age (1964).[5] But sections 91 and 92 have survived largely intact.

It is beyond dispute that if the division of powers were drafted today, it would look rather different. By way of comparison, consider the 1996 South African Constitution, one of the leading examples of a contemporary federal constitution. It refers explicitly, and at length, to the welfare state.[6] It allocates jurisdiction over health care, social assistance, and housing (ibid.). In addition, it driven approach to constitutional development.[7] An excellent example is provided by the fairly recent decision in Reference Re Employment Insurance Act (Can.), ss. 22 and 23,[8] where the Court invoked the living-tree doctrine to reject a constitutional challenge to the maternity and parental-leave benefits provided under the Employment Insurance Act, notwithstanding their weak connection to the original rationale for the employment insurance system.

This mechanism of ad hoc incremental change remains an important, if underappreciated, form of judicial interpretation, which is likely to be deployed in the service of the ongoing project of constitutional adaptation. In challenges now pending against thansch(n)-1.6d Hf jins.8(9(Reprn)-3(ooy)4.4uc8(a)2.1(t)3.8y)4.4nnce Act in Labour Conventions,[16] the intuition that Canada’s international legal personality had domestic constitutional implications was carried forward, through the “gap” branch of peace, order and good government, in cases on jurisdiction over the continental shelf.[17]

was on the table did not serve to modify the division of powers.[24] Extended to the federal spending power, this reasoning would render unconstitutional any condition attached to federal monies in areas of provincial jurisdiction. However, that has not occurred because our twentieth-century fiscal Constitution clearly divorces the federal government's regulatory jurisdiction from its fiscal jurisdiction. Similarly, the twentieth-century Constitution distinguishes between treaty negotiation, which by constitutional practice vests with the federal crown, and treaty implementation, which tracks the division of powers. It is the friction between the nineteenth- and twentieth-century Constitutions and, more fundamentally, the clash between their underlying logics that more than anything else has generated more than five decades of conflict over the federal spending power.

THE TWENTY-FIRST CENTURY

Viewed in broader historical perspective, the constitutional politics of the spending power are the product of a larger process of constitutional adaptation. This raises the following question. Suppose our Constitution comes under pressure to change again. What will the constitutional politics of the spending power look like in the twenty-first century? To answer tiaf0.065wo.2(goecific1( )qu3(esti,1( )Iry)]TJ 17.425

now live in metropolitan Toronto, Montreal, and Vancouver, although those cities account for only 0.1 percent of Canada's total territory. The rise of urban Canada has been fuelled by two kinds of migration: international and internal. Over time, immigrants have increasingly tended to settle in Toronto, Montreal, and Vancouver. Nearly three-quarters of the immigrants who arrived in Canada

major urban areas again. In the literature on the cities agenda, one of the most common assumptions is that the only appropriate response to the importance of cities is their jurisdictional and fiscal empowerment, with the ultimate goal of turning them into city-states. However, this would be a serious mistake. Even the most expansive vision of urban autonomy in Canada would leave many important policy areas in federal jurisdiction. Macroeconomic policy, innovation manifest in a new type of debate over the spending power—a debate that would give voice to the larger, underlying pressures that are building for constitutional change. If we examine debates over the spending power in isolation, we will not fully understand what is at stake.

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