Legislative Power in Federal Constitutional Systems - The Experience of the Commonwealth Countries

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A comparative study, with particular attention to the role of the states in federal systems other than the United States presents a timely opportunity for a consideration of the basic characteristics of federal government, for the years since the end of World War II have seen a marked interest on the part of academic writers and also of professional constitution-makers in the federal form as a solution for assorted political ills, this interest culminating last year in the preparation by an informal committee of European statesmen and jurists of a detailed and comprehensive draft federal constitution for the projected European Union.¹

Yet preoccupation with constitutional forms may be a rather barren exercise, unless it is allied with some detailed attention to actual patterns of governmental and community practices. We know that the professorial constitution-makers in Europe after 1918 were concerned, above all, with the rationalization of power, the attempt to replace the extra-legal facts of power by written provisions. The constitutions that were drafted, in consequence, were marked by elaborate Bills of Rights asserting fundamental limitations on the user of legislative and executive powers under the constitution. Yet the paper guarantees in these constitutions collapsed altogether when subjected to the first real challenge by anti-democratic political forces operating within the state.

I

The old British Commonwealth, now styled more simply (with the Imperial prefix deleted) as the Commonwealth of

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* Barrister-at-Law; Assistant Professor of Political Science, Yale University.

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Nations, contains several examples of federal systems of government. Canada and Australia are both federal states; and the federal form was also for a time considered for the Union of South Africa, though eventually abandoned.

Now constituent power in the old British Commonwealth, in terms of strict juridical theory, was exercised very simply. The constitutions of Canada, Australia, and the Union of South Africa, according to this conception, were not of popular origin at all, but were imposed from above, through enactment of the sovereign United Kingdom Parliament. The Canadian Constitution is thus to be found in the British North America Act, a British statute passed in 1867;\(^2\) the Australian Constitution in the Commonwealth of Australia Constitution Act, passed in 1900;\(^3\) the South African Constitution in the South Africa Act of 1909.\(^4\) Yet this fact of formal enactment by the United Kingdom Parliament does not explain altogether, or even substantially, the ultimate form and content of those constitutions; for it is true to say that in each case the action by the United Kingdom Parliament was preceded by the holding of representative local conventions at which agreement was arrived at on the essentials and frequently on the details of the principles subsequently embodied by the United Kingdom in its legislation. There is, it is true, a harmony of language and of style in each of the three constitutional instruments (notwithstanding their being spread over a period of forty years) that a common subjection to correction, in their final versions, by the British parliamentary draftsman no doubt partly explains;\(^5\) yet the fundamentals of the governmental systems established under each of the new constitutions were essentially due to the efforts of the local political leaders. Each constitution thus has, apart from its formal, juridical, imperial origins, an unimpeachable local, popular root.

Why are the constitutions of Canada and Australia federal,
and not that of South Africa? To answer this question we must look to the historical events preceding the adoption of the constitution in each country. In each case, of course, there was an awareness of American constitutional history and experience, for the local political leaders were men frequently of broad education who had some acquaintance with and interest in the governmental forms of other countries, and not unnaturally they drew on American constitutional experience in working out the scheme of their own constitutions. Another parallel with the United States was provided by the fact that the constitutions of Canada, Australia, and South Africa were each to be built, like the United States Constitution, on a number of existing states which had, like the original thirteen American States before 1776, an autonomous constitutional history and development of their own. Is it to be wondered, then, that the Canadian constitution-makers, faced with the problem of devising an appropriate form of government for two distinct and differing nationalities (French and English), should seize upon the American federal type of government as the best constitutional device to offer to those who wanted to form a common government and to act as one people for some purposes but to remain independent and to retain their own national identity in all other respects? The Canadian political leaders selected, therefore, a federal constitution, though with an eye to the internal dissensions which the American Constitution seemed, in the 1860's, to be unable successfully to contain; they deliberately sought to provide in their own Constitution for a stronger, more centralized form of government than was the case with the United States. Likewise, the Australian constitution-makers at the turn of the century, though they had the good fortune, in comparison with Canada, to be dealing with an unusually homogeneous racial group, selected the federal form as the best means of combining six existing states that were scattered around the periphery of a vast and sparsely-settled continent.6

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6. It might have seemed, therefore, in the case of South Africa in 1909 that the federal form would have been the ideal constitutional solution, especially as the central problem was, as in the case of Canada, to weld together two rival European races—this time Boer (Dutch) and English—differing basically in language, culture, history, and even to some extent in religion. If there was to be a union of the two European races then, a federal rather than a unitary state would have seemed natural; and in fact the principal official proposals (that is, by the British Government) favored a federal constitution. Yet the federal form was rejected, notwithstanding the advantages it might have seemed to offer in terms of reconciling the interests
There is one further instance of the application of the federal form in the Commonwealth that deserves some attention. It was expected, when the United Kingdom Government announced after World War II that it was withdrawing from India, that a federal union could be formed which would enable the Moslem minority of the population of India to combine peacefully and fruitfully with the Hindu majority and so preserve the essential structure of India as it had existed under British rule. A constituent assembly for undivided India, with both Hindus and Moslems fully represented in its personnel, was in fact convened in December, 1946, but it soon became apparent that no agreement between the rival forces could be arrived at. Under pressure from the powerful Moslem League, the Moslem delegates in the constituent assembly broke away, declaring that their cultural identity could not be preserved by their becoming a unit within the framework of a federal state having a Hindu majority. Instead, they formed an independent, sovereign, Moslem state of Pakistan; while the rump of the original constituent assembly continued their deliberations and eventually in 1949 established a predominantly Hindu Republic of India, without Pakistan. Partition, not federation, was therefore the solution in India; and it was achieved in the teeth of geography and also of demography.  

II

The organic law of the Canadian federal system, as we have noted, is contained in the British North America Act of 1867, commonly referred to as the B.N.A. Act. Now it seems clear that the intentions of the drafters of the B.N.A. Act were that the legislative powers of the national government should be of the rival European races in South Africa. Political leaders on both sides in South Africa in 1909 recognized that the central problem confronting the new union would be how to regulate the affairs of the native (African) population who formed an overwhelming majority of the total inhabitants of South Africa. They believed that the political interests of the European population imperatively demanded a single policy on native affairs, and that such a single policy could only effectively be developed and maintained in a unitary as distinct from a federal state. KENNEDY & SCHLOSENBERG, THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION 60 (1935).  

7. The new Hindu Republic of India, which came into operation, legally, in 1949, is expressed, in its constitutional instrument, to be federal in form, and provision is made under the constitution for both a union (national) government and also for member states. Generally speaking, these states accord in their boundaries with the administrative divisions existing historically in the era of British rule in India.
paramount importance; that insofar as the system of government under the B.N.A. Act was a federal system it should be a centralized federalism. 8 The B.N.A. Act effects a distribution of legislative authority between the Dominion (national) Government and the provincial (state) governments, the purpose being to allocate the whole field of legislative powers between the two types of governing authority; 9 and unlike the United States Constitution, there are no legislative powers which are denied to both Dominion and Provincial Governments—there is no Canadian Bill of Rights. Under Section 91 of the B.N.A. Act, the Dominion Government is given a general power to make laws for the “Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” Section 91 goes on to declare that “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms,” the legislative authority of the Dominion Parliament shall extend to all matters coming within a list of twenty-nine enumerated subjects. Under Section 92, on the other hand, the provincial legislatures are given exclusive legislative authority over a list of sixteen subjects, of which perhaps the two most interesting from the constitutional viewpoint have been Section 92(13), “Property and Civil Rights in the Province,” and Section 92(16), “Generally all matters of a merely local or private nature in the Province.” Finally, in respect to the subjects of agriculture and immigration, under Section 95 the Dominion and the provinces are given concurrent power, with Dominion legislation to prevail in cases of conflict.

By reason of the very precise delineation of the respective powers of the Dominion and the Provincial Governments and also of the absence of any formal Bill of Rights, it might have been expected that Canada would have been spared the battles that centered around the United States Constitution in the period from the Civil War up to the Court Revolution of 1937. Instead there is a surprisingly parallel development, with the

9. “[T]here can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within . . . Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.” Lord Loreburn, L.C., in Attorney-General for Ontario v. Attorney-General for Canada, [1912] A.C. 571, 581 (P.C.).
conflict in Canada, however, revolving around an apparently simple choice in modes of judicial interpretation—whether the Constitution is to be regarded as an ordinary statute to be interpreted according to the ordinary rules of statutory construction, or whether it is something more—a "constitutional statute"—and therefore deserving of more "beneficial" interpretation than the normal rules of statutory construction might allow. The judicial approach to the interpretation of the Canadian Constitution has fluctuated widely between these two alternative approaches, and the fluctuations tend to accord with two and possibly three basic time periods.

In the first period, from the passing of the B.N.A. Act in 1867 until the middle 1890's, the Privy Council, as final appellate court in Canadian constitutional cases, was disposed to construe the legislative powers of the Dominion Parliament broadly, in particular conceding full value to the Dominion Government's general power under Section 91 to legislate for the "Peace, Order, and good Government of Canada."  

In the second period, beginning about 1896 and lasting generally right up to the present day, there is a notable contraction of Dominion legislative powers and an accompanying assertion of provincial rights. Led first of all by Lord Watson and then by his intellectual disciple, Lord Haldane, the Privy Council in this period cut down the Dominion's general legislative power under Section 91 by deferring to the heads of provincial power enumerated in Section 92—the Dominion, the judges held, cannot legislate under the general power in Section 91 where the effect is to "trench" upon the provincial classes of subjects. Lord Haldane, indeed, went even further and enunciated the so-called "emergency" doctrine under which the Dominion's legislative power under Section 91 was confined to use in periods of national emergency, such as war, famine or pestilence. In addition, the

10. Russell v. The Queen, 7 App. Cas. 829, 839 (1882). Sir Montague E. Smith said: "Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it."


12. In re Board of Commerce Act, 1919, and the Combines and Fair
Dominion's power under Section 132 of the B.N.A. Act to legislate to implement the obligations of Canada or any Province "as part of the British Empire . . . arising under Treaties between the Empire and such Foreign countries" was held not to cover obligations entered into by Canada herself in her new status as an international person,\(^{13}\) this although the Privy Council expressly took notice of the changes in the status and powers of the self-governing Dominions over the years since the enactment of the B.N.A. Act in 1867.\(^ {14}\) Finally, the Dominion Government's head of power over the "regulation of trade and commerce,"\(^ {15}\) a power which has proved so fertile a source of national legislative power in the United States, was deprived of any real significance. Lord Haldane went so far, indeed, as to rule\(^ {16}\) that the trade and commerce power was available only to "aid" the Dominion in an exceptional situation to exercise the powers conferred by the general language of Section 91 and that, where no power was possessed by the Dominion Parliament independently of the trade and commerce section, the trade and commerce section could not operate. So low, indeed, did the trade and commerce power fall that Chief Justice Anglin of the Canadian Supreme Court was moved to protest that it had been "denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction. . . ."\(^ {17}\)

This second period of judicial interpretation cannot yet be regarded as having come to an end, but there is nevertheless a trend of decisions from the 1930's onwards which may represent something more than the mere working out of the dialectic. Thus Lord Sankey, in the so-called Persons case in 1930, declared: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada . . . . Their

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\(^{14}\) "While it is true . . . that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event." Lord Atkin, in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326, 350 (P.C.). See also In re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304 (P.C.).

\(^{15}\) BRITISH NORTH AMERICA ACT § 91(2) (1867).

\(^{16}\) In re Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919, [1922] 1 A.C. 191 (P.C.).

Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation. ... Lord Sankey did, it is true, somewhat limit the sweep of his own dictum by going on to add that he was not considering the question of the respective legislative competence of the Dominion and the provinces under Sections 91 and 92 of the act. Yet in British Coal Corporation v. The King, Lord Sankey quoted with approval his own remarks in the Persons case, this time without the caveat as to Sections 91 and 92, and expressly recognized that "in interpreting a constituent or organic statute such as the [B.N.A.] Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

It might be unwise to make too much of all this. As late as 1947, Lord Wright was apparently re-affirming Lord Haldane's "emergency" theory of the Dominion's general legislative power under Section 91, even though only the previous year Lord Simon had thrown cold water on the emergency doctrine. Still, if the Canadian Supreme Court, in its capacity of final arbiter of the interpretation of the B.N.A. Act, now that the appeal to the Privy Council has been finally abolished, wishes to essay anew a broad, liberal interpretation of Dominion legislative powers, Lord Sankey's "living tree" metaphor will be available as a principal doctrinal justification for this.

Understandably, most of the controversy as to the role played

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20. Id. at 518. And cf. also the statement of Lord Atkin in Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127, 154 (P.C.): "It is . . . irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require. . . ."
24. The antithesis of Lord Sankey's "living tree" metaphor and the doctrinal justification, therefore, for a narrow, restrictive interpretation of Dominion legislative powers is Lord Atkin's "ship of state" metaphor: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326, 354 (P.C.).
by judicial interpretation in the development of the Canadian Constitution centers around the period from 1896 onwards, and the judicial personalities of Lord Watson and Lord Haldane. In treating the B.N.A. Act as an ordinary statute without regard to the intentions of the “fathers” of the Constitution, the Privy Council after 1896, it has been said, reached a “result which the historian knows to be untrue”:

“One of the plain facts . . . is that the Constitution (rightly or wrongly) embodied a Centralized Federalism in which Dominion legislative power was of paramount importance. Another plain fact is that the course of judicial interpretation has yielded a Decentralized Federalism in terms of legislative power; and one, moreover, that is ill-adapted to present needs.”

Turning to Australia, it is to be noted that the scheme of division of legislative powers made under the Australian Constitution Act, in contrast to the Canadian Constitution, is very close to the American model. Section 51 of the Commonwealth Constitution confers on the Commonwealth (national) Parliament power to legislate “for the peace, order, and good government of the Commonwealth” with respect to a list of thirty-nine classes of subjects. The Constitution does not specifically and in terms provide for the allocation of the residue of legislative powers, but it has been assumed right from the outset that these remain with the states. Under Section 109 of the Constitution, Commonwealth laws prevail over inconsistent state laws and the latter are, to the extent of the inconsistency, invalid. There is no formal Bill of Rights, although the Constitution does contain one or two express restrictions on the user of legislative power: Section 80 requiring that the trial on indictment of any offense against any law of the Commonwealth shall be by jury; Section 116 prohibiting the Commonwealth from making any law establishing or prohibiting any religion; and Section 92 providing that “On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

Section 92 is the only one of these provisions that has had any significant operation. It is clear that this provision was

intended, historically, to end in Australia what had been popularly referred to as the barbarism of borderism, the problem of border tariffs which had so plagued the six pre-federation Australian colonies. It was held, originally, by the courts that Section 92 was addressed only to the states—that state legislation only and not Commonwealth legislation could be struck down as violative of Section 92.  

In 1936, this view was reversed, and Section 92 for the first time was held to apply to the Commonwealth as well as to the states, the occasion for this judicial volte-face being a successful challenge to Commonwealth legislation establishing a marketing scheme controlling the production of primary products. As the courts had previously, in terms of Section 92, outlawed state legislation imposing marketing quotas, the end result by 1936 was to create a legislative no-man’s land, so far as organization and control of primary production was concerned, into which neither Commonwealth nor states might enter. From the original rather modest purpose at the time of the drafting of the Constitution in the 1890’s, indeed, conceptions of the content and scope of Section 92 had developed sufficiently, over half a century, to provide by 1949 the doctrinal basis for the courts’ invalidating Commonwealth legislation nationalizing the private trading banks. The effect has been to impose on both Commonwealth and state governments, in the name of freedom of trade, commerce and intercourse among the states, an effective legal barrier against social and economic planning legislation.

So far as more strictly federal matters are concerned, that is to say, matters involving the division of legislative powers between the Commonwealth and the states, the Australian courts showed some disposition, early, to flirt with the American doctrine of the Immunity of Instrumentalities, with its implied prohibition upon either state or federal governments legislating against the other. This doctrine, however, was soon perceived by the courts to be unnecessarily fettering and restrictive in its

operation on both Commonwealth and states, and was soon abandoned.\textsuperscript{31}

The most significant developments affecting the constitutional distribution of legislative powers between Commonwealth and states, however, have occurred during time of war. There has been, during these periods, a sustained and marked expansion of the area and extent of Commonwealth legislative powers, always at the expense of the states. In time of war, as Mr. Justice (later Chief Justice) Isaacs noted during the course of World War I, the Commonwealth defense power becomes the "pivot of the Constitution, because it is the bulwark of the State," having a kind of overriding force in relation to the rest of the Constitution.\textsuperscript{32} The apogee of beneficial judicial construction of Commonwealth legislative powers was the uniform taxation decision during World War II\textsuperscript{33} when the courts held that the Commonwealth could validly move so as to exclude the states altogether from the field of income taxation, the decision being rested by the judges not merely on the Commonwealth's legislative power over defense, but also upon the Commonwealth's general taxation powers allied with the provision in Section 109 of the Constitution for the supremacy of Commonwealth laws over inconsistent state laws; with the necessary consequence that the Commonwealth power in this regard availed in peacetime as well as in war. World War II also saw the judicial extension of the Commonwealth's legislative power over defense to cover, during wartime, such subjects as the pool marketing of primary products,\textsuperscript{34} the fixation of prices of all goods and services,\textsuperscript{35} the regulation of conditions of employment in all industry,\textsuperscript{36} settling disputes in all industry,\textsuperscript{37} and controlling essential materials.\textsuperscript{38}

Where, therefore, the trend of judicial interpretation under

\begin{footnotesize}
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\item South Australia v. Commonwealth, [1942] 65 C.L.R. 373.
\item Victorian Chamber of Manufacturers v. Commonwealth (Prices Regulations), [1943] 67 C.L.R. 335.
\item Pidoto v. Victoria, [1943] 68 C.L.R. 87.
\item Stenhouse v. Coleman, [1944] 69 C.L.R. 437.
\end{enumerate}
\end{footnotesize}
the Canadian Constitution has been to maintain and extend provincial rights at the expense of the Dominion Government's powers, the trend under the Australian Constitution has been (most significantly, of course, in wartime) to extend Commonwealth legislative powers at the expense of the states, with, however, the field of social and economic planning at the present time substantially foreclosed to both Commonwealth and states through the operation of Section 92 of the Constitution as interpreted by the courts.

III

The constitutions of the component member states that exist within the general framework of the federal constitutions of Canada and of Australia show certain common patterns in their development to the present day.

First it is to be observed that these state constitutions are not to be found in any single document, but rather are scattered over a number of different documents. They are, in fact, only part written, and in large part unwritten since they are supplemented to a great extent by custom and convention. The written portions of these constitutions are usually skeletal in character, setting out the minimum framework necessary for the conduct of government within the state, but not much more: in particular, the written portion of the constitutions will not normally contain anything corresponding to a Bill of Rights or other system of fundamental limitations on legislative power.39

All of this stems from the historical fact that the constitutions of the states (or at least those of the original member states of the respective federal systems), began as charters defining and establishing the machinery of government of colonies within what was then, as we have noted, a dependent colonial empire ruled ultimately from London. The basis of formal authority within the colony must therefore be set forth in the charter, and the instruments of its exercise and user identified; but there was little need for anything beyond this, the manner of the exercise of formal authority within the colony being capable of being controlled by other means.40

39. Though the formal Instructions issued to colonial governors on their appointment by the Crown frequently contained detailed provisions as to procedural safeguards to be afforded in the administration of justice. Reed, The Early Provincial Constitutions, 26 CAN. B. REV. 621, 627-29 (1948).
40. For example, the colonial governor's powers of veto of bills passed by
We are speaking now of the origins of the state constitutions. They were, essentially, handed down from above in the sense that they were all made in London. In 1865 the United Kingdom Parliament, in a general constitutional statute of far-reaching significance, the Colonial Laws Validity Act, 41 conferred upon those colonies that had by that time been granted the right of self-government, that is, representative legislatures, the power inter alia, of amending and altering their own fundamental law. Yet little action seems to have been taken by representative colonial legislatures in terms of these new powers and their constitutions are today much the same (in their written portions, that is) as they were prior to 1865. What are the reasons for this? Primarily, I think, the absence of affirmative action directed towards constitution-making on the part of representative colonial legislatures is due to the pervasive influence throughout the colonies of English constitutional notions in favor of uncontrolled (or flexible) constitutions. According to accepted English constitutional theory, the Parliament at Westminster (the United Kingdom Parliament) is sovereign: it is but a short step from this to argue that within their own particular boundaries and subject to the original grant of authority by the United Kingdom, representative colonial legislatures should possess plenary law-making powers in the same way as the United Kingdom Parliament. 42 Other factors no doubt reinforced this basic attitude so far as those colonies that later became member states within a federal system were concerned. It must be remembered that the guarantees contained in the American Bill of Rights were always substantially part of the common law of England, and as such were carried with them by English settlers to the various colonies; 43 these principles would presumably gain very little in import by being written down in a constitutional instrument. Again, we must look to the climate of the time when the Colonial

the local colonial legislature or reservation of such bills for consideration and possible disallowance by the Imperial (United Kingdom) Government. Id. at 623-24.

41. 28 & 29 Vict., c. 63 (1865).

42. Thus today, in the case of the Union of South Africa, which has a written constitution with several “entrenched” (that is, fundamental) clauses, Prime Minister Malan has found the notion that the South African Parliament is “sovereign” and uncontrolled in the same manner as the United Kingdom Parliament, a very persuasive argument at general elections.

43. Compare Griffith, C.J., in The King v. Kidman, [1915] 20 C.L.R. 425, 435: “It is clear law that in the case of British Colonies acquired by settle-ment the colonists carry their law with them so far as it is applicable to the altered conditions.”
Laws Validity Act was first passed. Laissez-faire was at its height, manifesting itself in notions of self-help that brooked no sympathy for (much less, indeed, recognized) those social and economic rights that are so popular with constitution-makers of the present age. When collectivist ideas became more popular in the United Kingdom and the Overseas Empire, the colonial constitutions were going concerns, and simple inertia seems to have combined with the general British distaste for drafting constitutions to insure that those constitutions remained in their original skeletal form. For all these reasons, therefore, the constitutions of the member states within the federal systems of Canada and Australia are generally as rudimentary and scattered as they were even before 1865.

In seeking, therefore, to ascertain the scope and content today of state legislative power within the federal systems of Canada and of Australia, it is hardly necessary to look to the state constitutions themselves for limitations upon that power. There are, it is true, one or two vestigial survivals from the historically subordinate position of those states at the time of the Colonial Laws Validity Act, 1865, that may still be relevant today if they have not, like the historical powers of the United Kingdom vis-à-vis the national governments of Canada and Australia, already been eroded away by developing custom and convention. I speak particularly of the inability of the state legislatures to make laws having extra-territorial effect and of limitations said to have been imposed by the Colonial Laws Validity Act on the “manner and form” of amending the state (colonial) constitutions at the same time that the amending power was conferred by that act on the state (colonial) legislatures. Yet by and large it is true to say in the case of both Canada and Australia that the only limitations imposed on the legislative powers of the states will be imposed by the national constitutional instrument. And since these national constitutional instruments gen-

44. In the Canadian Province of Saskatchewan, in 1947, however, a C.C.F. (Socialist) government enacted a fairly comprehensive Bill of Rights—the Saskatchewan Bill of Rights Act (c. 35 of 1947). This act does not seem to have been tested as yet in the courts.


46. COLONIAL LAWS VALIDITY ACT § 5 (1865). See generally, Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526 (P.C.). It is no doubt also true that in theory at least, as distinct from practice, state legislation would still today, in terms of § 2 of the Colonial Laws Validity Act fall on the score of repugnancy to the provisions of any act of the United Kingdom Parliament made to extend to the state in question.
generally lack Bill of Rights-type provisions, the limitations on state legislative powers will substantially derive by radiation from the legislative powers conferred on the national government under those instruments. That is why it becomes so important to look to the key concepts of the federation in question to determine what part the states will play in the federal system. If the demands for local autonomy are strong, one can reasonably expect that the constitution, under judicial interpretation, will manifest patterns of decentralized federalism. On the other hand, if local pressures are weak and the component member states shadowy or even somewhat anachronistic, one can expect the federal system to be characterized by strong centripetal tendencies, with marked accretions of power to the national government; and the concepts of state legislative powers in such a federal system will all be cast strictly in terms of, and in deference to, national powers.

IV

What lessons are to be gained by the United States from the federal experience of other countries, especially Canada and Australia? Granted that both Canada and Australia lack any systematic Bills of Rights after the American model, it is still true to say that the Canadian and especially the Australian constitutions are rather close in formal outline and structure to the Constitution of the United States, a situation that is not so very surprising if we remember the strong American influences operating in their drafting and adoption. The history of all three countries indicates tendencies towards the exertion by the national government, especially in time of war or parallel economic emergency, of the full measure or more of its announced legislative powers. In Canada, this pressure from the center has generally been resisted by the courts: in the United States and Australia, at least during time of emergency, the courts have tended to allow an expansion of national legislative powers. The courts' stand in Canada has been taken in the name of provincial rights—its effect has been an interdiction of national social and economic legislation at a time when national action has seemed to offer the major hope, perhaps the only hope, of such legislation. In Australia, the states' rights cry has been less effective as a doctrinal argument, though it is significant that it has been the states (or more accurately their attorneys-general) who have
so often taken the initiative in challenging national legislation as violative of Section 92 of the Constitution.\(^47\) States rights to that extent in both Canada and Australia have operated as a justification for the maintenance of economic laissez-faire, quite apart from any significance in terms of the safeguarding of local autonomy.

Yet so far, at least, as Canada is concerned, it would be wrong to underestimate the importance of regional considerations in the development of constitutional law. The period from the passing of the B.N.A. Act in 1867 until 1896, represented in the judicial arena by the Privy Council decision in *Russell v. The Queen*\(^48\) favoring a broad interpretation of Dominion powers even at the expense of the provinces, coincides with the dominance in the legislative arena of Sir John A. MacDonald and the Conservative Party. This is the era of the "moving frontiers," when the settlers advanced ever westward and into the north, when the railway was pushed across the continent, and the new provinces were admitted to the Canadian Confederation as the settlers' frontiers extended. It is a period when a strong centralized administration could patently aid and foster such expansion.

The period from 1896 onwards, however, when first of all Lord Watson and then Lord Haldane and his successors restricted Dominion powers in the name of provincial rights, is the period of the substantial political dominance of the Liberal Party of Laurier and Mackenzie King, which rested for its parliamentary majority (as the Conservative Party never did) upon the French as well as the English voting population. It was a period introduced, appropriately enough, by the Manitoba education crisis when Laurier (a French-Catholic himself) sacrificed short-range French-Catholic interests in separate schools for the French-Catholic minority in the province of Manitoba for the long-range safeguard to the French Catholic Province of Quebec of the autonomy of provincial administrations as against interference by the Dominion Government.\(^49\)

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\(^{47}\) Thus, in *Bank of New South Wales v. Commonwealth*, [1948] 76 C.L.R. 1, the states of Victoria, South Australia, and Western Australia, all of which at that time had conservative governments, intervened in the High Court on the side of the private trading banks in challenging the constitutionality of the bank nationalization legislation introduced by a labor government at the national level.

\(^{48}\) 7 App. Cas. 829 (1882).

\(^{49}\) *Kennedy, The Constitution of Canada* 431 (2d ed. 1938), refers to this
While, therefore, one may suspect at times in the United States that states rights are being raised merely as a protective umbrella under which economic special interests may shelter, this plea may frequently spring in Canada from some more deeply-rooted claim for the treatment of a problem at the local level. The existence in Canada of two distinct racial groups differing radically in language, religion and social customs points to the existence of two distinct "living laws" within the Canadian nation, requiring something of a pluralist approach to government with a large degree of policy-making located at the periphery rather than at the center. Nor has the fact that the Dominion Government was not allowed social and economic planning legislation necessarily prevented all legislative activity in this field—for example, although labor law seems effectively barred to the Dominion Government, most of the provinces have in fact legislated on this matter; and there is also considerable scope for legislative cooperation between the Dominion Government and the provinces, though the difficulties here should not be underestimated. The special position of the French Canadians and the Catholic Church had been recognized by the United Kingdom Government as early as 1774 with the passage of the Quebec Act, and the denominational schools in the provinces were specially provided for in Section 93 of the B.N.A. Act. Even the invalidation by the Privy Council of the Canadian as an "experiment in sovereignty... a serious contribution to the destruction of the Austrian idea. Every province is from one point of view at least—in relation to the federal government—an example of a group with a life and purpose of its own."

Thus, Mr. Justice Jackson, in *The Struggle for Judicial Supremacy* 21 (1941), comments upon *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936): "Seven states appeared and joined with the Federal Government in support of the Act—no state appeared against it. Nevertheless the Court spoke of the danger of the states' being 'despoiled of their powers' and being reduced to 'little more than geographical sub-divisions of the national domain'."

Compare recent French Canadian argument in favor of "provincial autonomy": Pigeon, *The Meaning of Provincal Autonomy*, 29 CAN. B. REV. 1126, 1134 (1951): "[T]t is wrong to assume that the same laws are suitable for all peoples. On the contrary, laws have a cultural aspect; hence due consideration should be given in framing them to the character, condition and beliefs of those for whom they are made. Autonomy is designed for the very purpose of meeting this requirement. The French-speaking population of the province of Quebec is obviously the group of Canadian citizens specially interested in it. For them autonomy is linked up with the preservation of their way of life." And contrast with this, Scott, *Centralization and Decentralization in Canadian Federalism*, 29 CAN. B. REV. 1095 (1951).


Id. at 39-40.

British North America Act § 93 (1867): "In and for each Province
dian "new deal" legislation introduced by the Conservative Government of Mr. R. B. Bennett (which seems to have aroused more ire among the critics than anything else) was largely an academic question, at the time when the decisions were given, for the Conservative Government had been defeated at the general elections, and it was Mr. Mackenzie King's Liberal Party Government which had referred its predecessor's legislation to the courts for opinion.

One might, incidentally, in the case of Australia, also, tend too easily to exaggerate the extent to which the courts have stood in the way of popular opinion. The court decision in *James v. Commonwealth* in 1936 declaring Section 92 henceforth to apply to the Commonwealth as well as to the states, which had the effect immediately of striking down Commonwealth marketing control legislation, was given at a time when the worst effects of the depression were diminishing and when the immediate pressures for such centralized economic controls had therefore abated somewhat. And the court decision of 1936 may perhaps be regarded as having received some sort of popular ratification from the fact of the rejection soon afterwards by the voters at a public referendum held in 1937 of a proposal to confer centralized marketing powers of this nature on the Commonwealth Government by way of a constitutional amendment. Likewise the rejection by the courts, in terms of Section 92 once again, of the Labor Government's legislation, after World War II, nationalizing the private trading banks, was followed by the defeat of the Labor Government at an election fought primarily on the issue of nationalization.

To return again to the question posed earlier—what can the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

"(1) Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:"

56. Under § 128 of the Australian Constitution Act, proposals for alteration of the constitution must be passed by both Houses of the national Parliament and then submitted to a popular referendum for approval: the proposal for amendment then becomes effective as an amendment to the constitution if it is approved at the referendum by a majority of the voters throughout the nation, and also by a majority of the voters in a majority of the states. It must be stated, however, that in practice this machinery, like the procedures for amendment under Article V of the United States Constitution, has been rather unproductive of constitutional changes.
United States learn from the experience of the other federal
countries?

First, I think it is clear that constitutions, no matter how
carefully and cautiously drafted, may operate in significant ways
despite the historical intentions of their drafters. This is not, of
course, a novel proposition to the student of comparative constitu-
tional law generally, though it is perhaps of value to have it
confirmed also by working experience under federal constitu-
tions, granted the current tendency to regard federalism as some
sort of general constitutional panacea.

If the words of the constitutional text are unlikely always to
be effective, however, what are the factors that go to shape the
development and ultimate course of a particular constitution? We
must look to the key concepts of the society in question, its
history and traditions, its racial and religious composition, its
social and economic organization—to answer this question. In
the case of Canada, for example, it was indicated as early as the
Quebec Act in 1774 that the only viable Canadian society that
could be built was one that was founded upon a modus vivendi
between the two races, French and English. This political fact
of life is responsible more than anything for the destruction of
the founding fathers' ideal in Canada in 1867 of a strong, central-
ized government for Canada. And looking at the political history
of Canada since 1867, it seems true to say that Canadian Govern-
ment in patterns of working practices has been more nearly
pluralist in the sense of continuing to embody a compromise
between French and English forces, than federalist insofar as
the latter term would imply, strictly, arrangements between a
national government and a number of state or provincial authori-
ties of reasonably equal strength—a situation which the distinc-
tive organization of party politics in Canada (with the French
Canadian vote, located as it is in the Province of Quebec, usually
cast as a whole and so determining the balance of political power
in Canadian national affairs), has materially assisted in preserv-
ing. Again, in the case of Australia, though the founding fathers
at the close of the nineteenth century no doubt expected that a
genuinely federal, decentralized form of government would pre-
vail permanently in Australia, it is true to say that once the
problems of geographical distances had been overcome by the
technical advances in transport and communications in the
twentieth century, the existence of a federal form alone could not
keep a racially and culturally homogeneous people long divided. Federalism in Australia, therefore, seems to represent a step not merely to union but ultimately towards unity, and the marked centripetal action under the Australian Constitution has been materially assisted by the centralized, nation-wide basis of the organization and control of the major political parties, particularly of the Australian Labor Party. To this extent it is reasonably to be expected that the future of the states in the United States will be determined and conditioned not so much by formal provisions in national and state constitutional instruments as by the operation of extra-constitutional forces, and especially by the future role of the major political parties. If both main parties continue to be characterized, as they have heretofore, by a large degree of local, state control in terms both of policy formation and also selection of personnel, then it can be expected that the states will be able to maintain themselves against any further trenching on their spheres of legislative activity.

Lastly, and speaking now specifically of state constitutional instruments, it must be stressed that presence of power does not necessarily mean its user (or, for that matter, its abuse). Though the courts in Canada, as we have said, have cut down national powers in the name of provincial rights, this has not necessarily involved correlative attempts on the part of the provinces always to legislate in the fields thus denied to the national government. Likewise, in Australia, although the position of the states in terms of division of legislative powers with the national government is less favorable than the situation of the provinces under the Canadian Constitution, the fact of the absence of any express constitutional limitations on the states stemming from the skeletal state constitutions has not been an invitation, any more than it has been in the case of the Canadian provinces, to unbridled legislative activity on the part of the states. My hope here would be that in the revision of the Louisiana State Constitution, something of a rule of reason should be applied; and that the drafters of the new instrument should not strain too much after an elaborate, all-foreseeing blueprint for the future. There is something to be said after all for not trying to put legislators (state as well as national) into a constitutional straitjacket, but leaving something to the legislators' own innate judgment and sense of public responsibility, and ultimately to correction by the normal operation of the political processes.