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THE CONSTITUTIONAL SYSTEMS OF CANADA AND THE UNITED STATES: SOME COMPARISONS*

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OUR two countries are federations, created under written constitutions.[1] Each has a national government with a bicameral legislature and each has a national Supreme Court. Each has constituent local units called Provinces and States respectively, and these, too, have their own legislatures and their own courts. Law-making power is distributed in Canada as in the United States between the national and local legislatures. These common features, formally stated only, suggest that we are organized for governmental activity in much the same way. It would be misleading, however, to insist that you can learn much about the Canadian constitutional system from a study of your own; or that we in Canada could learn much about your system of government by studying our scheme of organization and operation. I propose to consider four illustrative matters to demonstrate how little the form corresponds with the reality. I shall briefly consider (1) our respective court systems; (2) our respective Supreme Courts; (3) our respective legal responses to civil liberties issues; and (4) our respective legal conceptions of the interaction of national and local power.

The American system of federal district courts and federal circuit courts of appeal, operating alongside state courts, and with an assured jurisdiction based in large part on diversity of citizenship, is unknown in Canada and, indeed, could not constitutionally be established on such a jurisdictional foundation. The superior courts of first instance and of appeal in my country are primarily provincial courts, but there is this peculiarity; although they are established by the respective provinces, the judges who man them are appointed and paid by the federal government.[2] Therefore, there must be practical co-operation between the two levels of government (which cannot be legally coerced) in order to effect an increase in the number of superior court judges. The same situation prevails with respect to the provincial district and county courts. Magistrates, juvenile and family court judges (considered as presiding over courts of inferior jurisdiction) are not subject to this constitutional division of authority; they are appointed and paid by the provinces in which they serve.[3]

Provincial courts of whatever dignity exercise jurisdiction in both federal

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1. In Canada, the written constitution is the British North America Act, 1867, 30 & 31 Vict., c. 3 [hereinafter cited B.N.A. Act], a British statute which contains no provision for its amendment, but which has been amended frequently by the United Kingdom Parliament at the behest of the Canadian government. The conventional procedure is to forward a joint address of the Senate and House of Commons of Canada, with the text of the desired amendment. For a history of the attempts, so far unsuccessful, to fashion a domestic amending procedure, see Favreau, The Amendment of the Constitution of Canada (1965 Doc. No. 964).

2. B.N.A. Act, §§ 92(14), 96, 100.

3. See Reference *re* Adoption Act, [1938] Can. Sup. Ct. 398, [1938] 3 D.L.R. 497.

and provincial areas of legislative authority. This is, first, because it is open to the national Parliament to repose jurisdiction in federal matters in the provincial courts and in the judges thereof;[4] the classic illustration is in respect of the criminal law, which is included among the national Parliament's exclusive powers, and Parliament has chosen to use provincial magistrates as well as county, district and superior court judges of the provincial courts, to administer the federal Criminal Code. Second, there is a well-accepted presumption—perhaps more properly a rule of construction—that where federal legislation invites the exercise of jurisdiction by a court and no special tribunal is constituted or designated, it falls to be exercised by the ordinary provincial courts, generally the superior courts.[5]

The picture I have drawn would not be complete without pointing out that under our Constitution the national Parliament has the power to establish its own system of courts for the adjudication of controversies arising out of matters within Parliament's legislative power.[6] It has done this sparingly; we have an Exchequer Court of Canada which deals to a large extent with claims by and against the federal Crown (government), and also has jurisdiction in federal tax matters.[7] It also has admiralty jurisdiction but it is assisted in this respect by District Judges in Admiralty who are, as a rule, persons already members of provincial courts.[8] Parliament could similarly establish federal divorce courts since "marriage and divorce" (but not solemnization of marriage) is within the catalogue of exclusive federal legislative powers. Generally, the national Parliament has been content to have the provincial courts pass on litigible issues arising under federal legislation; this is true, for example, in the fields of banking, bankruptcy and insolvency, and commercial paper.

It follows from what I have said that there is no place in Canadian constitutional law for such a principle as that in *Erie R.R. v. Tompkins*.[9] A dual system of courts is constitutionally possible in Canada; but the duality would not permit the application of both federal law and local (provincial) law in the federal courts, as is the case in the United States. Any federal courts established in Canada—and I do not here include the national Supreme Court, to which different considerations apply—are constitutionally limited to the application of federal law only. However, it should be pointed out that instances are multiplying where the federal law to be applied is in reality provincial law referentially

4. See *In re* Vancini, 34 Can. Sup. Ct. 621 (1904).

5. Board v. Board, [1919] A.C. 956, 48 D.L.R. 13. It would appear to be competent also to a provincial legislature, in the absence of federal directing legislation, to give express jurisdiction to provincial courts to process causes of action arising under federal legislation. See Attorney-Gen. for British Columbia v. McKenzie, [1965] Can. Sup. Ct. 490, 51 D.L.R. 2d 623.

6. B.N.A. Act, § 101; see also Valin v. Langlois, 3 Can. Sup. Ct. 1 (1879), *leave to appeal denied*, 5 App. Cas. 115 (1879).

7. Exchequer Court Act, Can. Rev. Stat. c. 98 (1952); Income Tax Act, Can. Rev. Stat. c. 148, § 60 (1952).

8. Admiralty Act, Can. Rev. Stat. c. 1 (1952).

9. 304 U.S. 64 (1938).

adopted or incorporated where there has been no statutory definition of the applicable federal law.[10] It is perhaps an obvious comment that the common law must be regarded as "federalized" for the purpose of its relevant application in a federal court of original jurisdiction such as the Exchequer Court.

Our respective national Supreme Courts also offer significant contrasts in their organization and jurisdiction. The Supreme Court of Canada is a statutory court, created in 1875 by the Parliament of Canada and vested by it with appellate jurisdiction which has been varied from time to time.[11] The Supreme Court of the United States, on the other hand, is a constitutional court in the sense that its existence and jurisdiction are derived from the Constitution. The Canadian Supreme Court came into existence under power given to the national Parliament to "provide for the constitution, maintenance and organization of a general court of appeal for Canada."[12] Until the passage of the Statute of Westminister in 1931, it was constitutionally impossible for Parliament to make the Supreme Court the ultimate, final appellate court for Canadian causes through ouster of the jurisdiction of the Privy Council.[13] Appeals to the latter were not abolished until 1949, and prior to this time the Supreme Court remained at best a penultimate appellate court which could neither command appeals nor control further appeals to the Privy Council.[14]

However, from the beginning, Parliament's power to create a "general court of appeal" for Canada was construed to mean that Parliament alone could determine (or, of course, delegate to the Supreme Court to determine) the rights of appeal to the Supreme Court, and the conditions which must be met to launch an appeal. This power extended to allowing an appeal in purely provincial matters, even though by provincial legislation the judgments of the highest provincial court were declared to be final and not subject to further appeal.[15] Briefly stated, the Parliament of Canada can endow the Canadian Supreme Court with the widest appellate authority in all Canadian causes, whether arising from federal or provincial legislation, and it is, of course, now the final appellate court.

There is no constitutional provision in Canada, as there is in the United States, to empower the Supreme Court to exercise original jurisdiction in disputes

10. See the discussion in Laskin, Canadian Constitutional Law 821-22 (3d ed. 1966). *Cf.* Mason v. United States, 260 U.S. 545 (1923).

11. Supreme Court Act, Can. Rev. Stat. c. 259 (1952), as amended, Can. Rev. Stat. c. 335 (1952), [1956] Can. Stat. c. 48.

12. B.N.A. Act, § 101.

13. Until the passing of this statute by the United Kingdom, Canada could not validly exclude the application thereto of British legislation, such as the Privy Council Appeal Acts of 1833 and 1844, which applied to British colonies; there was also some doubt prior to 1931 whether Canada could validly enact extraterritorial legislation. On the question of Privy Council appeals, see British Coal Corp. v. The King, [1935] A.C. 500 [1935] 3 D.L.R. 401; Attorney-Gen. for Ontario v. Attorney-Gen. for Canada, [1947] A.C. 127, [1947] 1 D.L.R. 80.

14. Prior to such abolition by federal legislation, it was open to litigants to go directly to the Privy Council from provincial appellate courts, either as of right or by special leave.

15. See Crown Grain Co. v. Day, [1908] A.C. 504.

between the local units.[16] To some extent this deficiency has been overcome through resort to the "reference," but only so far as constitutional issues between Canada and one or more of the provinces are concerned.[17] There is a dormant statutory jurisdiction by consent in the Exchequer Court of Canada to entertain disputes between Canada and a province or between two provinces.[18] It does not appear that the absence of such a provision as appears in Article III, section 2, of the Constitution of the United States, defining the jurisdictional power of the United States Supreme Court, has given rise to any difficulties in Canada.

Like the American Supreme Court, the Canadian Court consists of nine Judges. They are, of course, federal appointees, and both statute and convention dictate their selection. By statute, at least three must be from the Bar of Quebec;[19] by convention no less than three come from the Bar of Ontario. Of the remaining three places, two are filled by appointees from the bars of the four provinces west of Ontario, and one is filled by a person from the bars of the four Atlantic provinces east of Quebec.

The Supreme Court of the United States always sits in hearings on the merits as a full Court of nine (unless by reason of illness or self-disqualification the number is reduced in particular cases). The Canadian Supreme Court may sit as a bench of five or seven or nine, depending on how the Chief Justice (presumably in consultation with his colleagues) decides to deploy his manpower. Five is a quorum, and most cases are heard by five-judge courts.[20] In capital and constitutional cases the likelihood is that the full bench will sit or at least a seven-judge court will be set up, but this has not been invariably true. Unlike the case in the United States Supreme Court, there is great latitude of oral argument in the Supreme Court of Canada (as, indeed, there is in all provincial appellate courts). There is no predetermined time limit. Although written factums ("briefs" in the literal sense) are required in appellate proceedings, they are not so much fully-fleshed arguments as they are succinct statements of the facts and terse assertions of the law intended to be argued, reinforced by citation of authorities without much elaboration or quotation, if any. In many cases, judgment will be given from the bench at the conclusion of the argument or after a short recess for deliberation. If judgment is to be reserved, counsel are so told, and reasons are handed down in due course, as happens in the Supreme Court of the United States. There is no open reading of the opinions as in the United States Supreme Court.

The Judges of the Supreme Court of Canada do their own work, unaided by law clerks who are so much a part of the judicial forces in the appellate courts

16. See the discussion in Ontario v. Canada, 42 Can. Sup. Ct. 1, 118-19 (1909), *aff'd*, [1910] A.C. 637.

17. Supreme Court Act, Can. Rev. Stat. c. 259, § 55 (1952). The "reference" authority goes beyond constitutional issues but has not, by and large, been utilized beyond them.

18. Exchequer Court Act, Can. Rev. Stat. c. 98, § 30 (1952).

19. Supreme Court Act, Can. Rev. Stat. c. 259, § 6 (1952).

20. Supreme Court Act, Can. Rev. Stat. c. 259, § 25 (1952).

of the United States. In the court of which I am a member, consisting of ten appeal judges who sit in panels of three or five, but never in a larger number, there is one law clerk to serve the members of the court. Of course, sitting in panels as we do, we usually have two three-judge courts sitting concurrently each week, and in this way have been able to dispose of, roughly, close to 600 cases (civil and criminal) per year. In order to survive, it is necessary that we deliver judgment from the bench orally at the conclusion of argument (or very soon after) in the substantial majority of the cases heard. Because oral argument by counsel is not limited in advance, we can explore quite freely and deeply the ramifications of a case by question and answer; and in this way we try to ensure that justice is done albeit disposition may be made on the spot. I should add that the effectiveness of this mode of operation depends on previous preparation by the Appeal Court Judges; there is no surcease from homework during the periods of sitting.

I am told, but the story may be apocryphal, that Professor Paul Freund was wont to tell his classes that if the mythical man from Mars came to Earth and sought a quick run-down on life in the United States, he should properly be directed to a Justice of the United States Supreme Court. I am not certain that there is any office holder in Canada, judicial or other, to whom I could direct him. I use this illustration to emphasize my impression of the extent to which issues in American social and economic life are justiciable. We are just as law-ridden as you are, but we are not as subject to the judicial ordering of our lives. A *Baker v. Carr*[21] reapportionment direction could not occur in Canada under our present Constitution; nor would our judiciary be able to strike down provincial poll tax legislation applicable to provincial and municipal elections;[22] it could construe but not destroy. There is no constitutional Bill of Rights in Canada to support such exercise of judicial power.

I come then to consider the ways in which our respective countries and, especially our respective national Supreme Courts, deal with civil liberties issues. In Canada, we espouse the British tradition, modfied only by the scheme of distribution of legislative power between the Dominion as a whole and the provinces and by a few limited constitutional guarantees; for example, in respect of separate schools and the use of the French as well as the English language in the federal legislature and courts and in the legislature and courts of Quebec.[23] The British tradition in connection with civil liberties (and I speak mainly of the political freedoms) has a political and a legal component. The political component rests on a conventional development which produced a tradition of freedom, and it is reinforced by the proposition that conduct or activity needs no previous justification where there is no legal prohibition. Alongside is the legal component, the supremacy of Parliament, which means that civil liberties are at the mercy of contrary legislation; but the battle here would be fought on

21. 369 U.S. 186 (1962); see also Reynolds v. Sims, 377 U.S. 533 (1964).
22. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
23. B.N.A. Act, §§ 93, 133.

the political front; the courts' role is the limited one of construction of the legislation. There is no such doctrine in Canada as there is in the United States that certain kinds of governmental or other official action, whether federal or state, may be struck down as unconstitutional because offensive to the Bill of Rights in the American Constitution. In Canada, the legal question is, in general, which level of government (local or national) has the constitutional power to deal with civil liberty matters. It follows, of course, that just as a particular level of government may limit, equally it may reinforce or protect civil liberties.

I propose to take some examples based on the equal protection clause of the United States Constitution.[24] The right to counsel in Canada must depend on affirmative legislation, not on constitutional obligation;[25] or, at the most, would depend on the courts' conception of the proprieties of the administration of justice where there was no directing legislation on the matter. There is not as yet, nor is there likely to be in Canada, any such constitutionally-based legal rule as was announced in *Miranda v. Arizona*,[26] conditioning the admissibility of confessions to the police on the availability of the advice of counsel prior to interrogation. Such a rule could conceivably come as a common law development but not as a constitutional imperative; and even if it came, it could be abrogated by legislation or, at least modified, as was done with the common law rule against self-crimination.[27] In Canada, we still have the rule, contrary to some of the search and seizure cases in your country, that evidence in a criminal case is admissible if relevant, no matter how illegally obtained.[28] It is subject only to the qualification of the trial judge's discretion in dealing with the admissibility of evidence; but, even so, legislation could validly control that discretion. I have already indicated that in Canada there is no constitutional barrier to poll tax legislation. The struggle against it would have to be waged on the political front, not on any legal front.

The free speech area offers similar contrasts. With us, punishable obscenity, for example, depends on statutory definition alone, not on constitutional appraisal which must safeguard the guarantee of freedom of speech.[29] So too with respect to prayers in public schools and flag salutes.[30] Here, however, a caveat is necessary because of a developing line of decision which points to federal jurisdiction in relation to religious observance, and perhaps also in relation to prescription of religious exercises;[31] but, despite this, there may still be room for the exercise of provincial power relative to education which may competently

24. I do not, of course, ignore the associated relevance of the due process clause.
25. See Gideon v. Wainwright, 372 U.S. 335 (1962).
26. 384 U.S. 436 (1966).
27. See Canada Evidence Act, Can. Rev. Stat. c. 307, § 5 (1952).
28. See Rex v. Honan, 26 Ont. L.R. 484, 6 D.L.R. 276 (Ct. App. 1912).
29. *Compare* Roth v. United States, 354 U.S. 476 (1957), *with* Brodie v. The Queen, [1962] Can. Sup. Ct. 681, 32 D.L.R.2d 507.
30. *Compare* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *with* Donald v. Hamilton Bd. of Educ., [1945] Ont. 518, [1945] 3 D.L.R. 424 (Ct. App.).
31. See Henry Birks & Sons (Montreal) Ltd. v. Montreal, [1955] Can. Sup Ct. 799, [1955] 5 D.L.R. 321.

cover those matters, at least in the absence of preclusive federal legislation. The separation of church and state is in Canada a matter of political tradition which may at any time be modified or even evaded completely by legislation. As in other matters, the constitutional question here concerns the determination only of the level of government by which such legislation may be commanded. The same comment may be made in respect of racial discrimination. In particular aspects or connections, it may be a matter for both Parliament and the provincial legislatures; for example, for the former as a possible subject of the criminal law and for the latter as a focus of fair employment practices governing businesses within provincial regulatory control.[32]

Canada has had a Bill of Rights since 1960.[33] It is purely statutory: a federal measure at once declaratory or hortatory, and operating as a direction to the courts to interpret federal legislation consistently with due regard for the traditional political and legal freedoms (as spelled out in the enactment), and also admonishing Parliament itself not to pass legislation in derogation of its terms. It has, in the main, been regarded by the courts, in experience to date, as expressing a rule of construction and thus ineffective to modify legislation which is enacted in contrary terms.[34] A recent judgment of the Supreme Court of Canada, *Robertson & Rosetanni v. The Queen*,[35] proceeded on the view that it could have a superseding effect upon existing legislation offensive to its terms, but (with one Judge dissenting) the Court avoided this effect by a narrow reading of freedom of religion.

The case is worth a brief discussion. It involved a prosecution of a bowling alley operator for carrying on his business in breach of The Lord's Day Act, a federal statute enacted in 1906. The Act is posited on Christian tenets and, with certain exceptions, prohibits the carrying on of business on Sunday. Its constitutional underpinning was the federal criminal law power, interpreted to embrace prohibitory legislation to ensure respect for religious profession.[36] Under the present course of constitutional decision in Canada, the federal Parliament would not be competent to enact general Sunday observance legislation on the basis of a secular purpose of repose and recreation. In other words, the grounds on which the recent line of cases on state Sunday observance legislation were determined by the United States Supreme Court[37] could not be used for a federal Sunday observance measure in Canada. (It is possibly open to the provinces to enact such legislation on such a basis, but it would be safer to make it part of a more comprehensive regulatory statute fixing days or hours of work in enterprises

32. There are now eight provinces with both fair employment practices legislation and fair accommodation practices legislation. The Parliament of Canada is presently considering criminal legislation to implement the Dep't of Justice of Canada, *Report of a Special Committee on Hate Propaganda in Canada* (1966 Doc. No. 1590).

33. [1960] Can. Stat. c. 44.

34. See generally Tarnopolsky, The Canadian Bill of Rights (1966).

35. [1963] Can. Sup. Ct. 651, 41 D.L.R.2d 485.

36. See Attorney-Gen. for Ontario v. Hamilton St. Ry., [1903] A.C. 524; *In re* Legislation Respecting Abstention From Labour on Sunday, 35 Can. Supt. Ct. 581 (1905).

37. See McGowan v. Maryland, 366 U.S. 420 (1961).

under provincial jurisdiction.)[38] Therefore, given the fact that the Lord's Day Act had a sectarian object, could it stand in the face of the injunction in the Canadian Bill of Rights that federal legislation should be "construed and applied" so as not to abridge, *inter alia*, freedom of religion? Because the Supreme Court majority found the two measures compatible it did not, strictly speaking, have to decide the legal consequence of their incompatibility. Reconciliation of the two enactments was based substantially on the view that freedom of religion under the Canadian Bill of Rights would be abridged only by federal legislation imposing religious observances on unwilling persons or restraining them in professing their own faith. Conceding that the Lord's Day Act safeguarded the sanctity of Sunday as a Christian tenet, the Supreme Court majority saw it as having merely a secular business consequence on those who did not believe in Sunday observance. To a degree, the Supreme Court majority rested on one of the two parts of the American constitutional guarantee of religious freedom. It appears that the Canadian Bill of Rights does not touch federal legislation respecting "an establishment of religion" but only federal legislation "prohibiting the free exercise thereof."[39] If so, this view runs counter to an earlier expression of opinion in the Supreme Court (albeit made in another context) that "all religions are on an equal footing."[40]

I come, finally, to consider the way in which national and local law-making powers interact in our two countries; and I propose to concentrate on the respective commerce powers of our national governments. They are significant not only in themselves as a base for national social and economic policies, but they also represent (apart from the Bill of Rights in each of our two countries) the starkest contrasts in our operating federalisms. Under the Canadian Constitution, federal power is exclusive in relation to "the regulation of trade and commerce."[41] These words, taken alone, are wider in their import than the terms in which the Congress is vested with the comparable authority, namely, commerce among the states and with foreign countries. It was noted quite early in Canadian constitutional adjudication that no distinction was made under the commerce power between intraprovincial and extraprovincial transactions in trade or commerce;[42] but the actual course of interpretation has resulted in that distinction being drawn very severely; so severely, indeed, as to preclude any effective exercise of the power on any total market or business basis; intraprovincial transactions in goods or intraprovincial business relations could not be swept into federal jurisdiction even if they constituted the minutest percentage of an otherwise wholly interprovincial or international operation.[43] No such theory as the flow of commerce or of activity affecting commerce has obtained in Canada

38. See Lieberman v. The Queen, [1963] Can. Sup. Ct. 643, 41 D.L.R.2d 125.
39. See generally Barron, *Sunday in North America*, 79 Harv. L. Rev. 42 (1965); Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962).
40. Chaput v. Romain, [1955] Can. Sup. Ct. 834, 840, 1 D.L.R.2d 241, 246.
41. B.N.A. Act, § 91(2).
42. Severn v. The Queen, 2 Can. Sup. Ct. 70, 104 (1878).
43. See generally Smith, The Commerce Power in Canada and the United States (1963).

as it has in the United States. There is no *NLRB v. Jones & Laughlin Steel Corp.*[44] principle in Canada respecting federal regulatory control over labor relations; no *United States v. South-Eastern Underwriters Ass'n* [45] doctrine to support federal regulation of insurance; no *Electric Bond & Share Co. v. Securities & Exch. Comm'n*[46] case to provide a basis for federal regulation of the securities business; no *United States v. Darby*[47] doctrine to justify general federal fair labor standards legislation; no such constitutional support for an agricultural policy covering both the interstate and interrelated local market as was supplied for the United States by such cases as *United States v. Wrightwood Dairy Co.*[48] and *Wickard v. Filburn.*[49] In short, we are in Canada very far from the conception of a commerce power which the late Justice Murphy said was "as broad as the economic needs of the nation."[50]

This is not the occasion for considering whether the very wide interpretation of the commerce clause by your Supreme Court has not created strains for your federalism as acute as the narrow interpretation of our commerce clause has created for our brand of federalism. We would on such a consideration be trading views whether it is healthier that the center be very strong or very weak or whether, overall, judicial interpretation in our respective countries has divined the proper balance between local and national authority. It is much too large a subject, in any event, to intrude in this sketch. I think it more desirable that I place the judicial interpretation of the Canadian commerce power in context, lest I leave a misleading picture of an utterly weak federal government.

One of the reasons for the attenuated view taken of our commerce power has been the presence in our Constitution of other specified federal powers which in your country have been treated as aspects of your commerce power; for example, banks and banking, bankruptcy and insolvency, patents and copyrights, navigation and shipping, interprovincial and international transport and communication.[51] These specifics produced the "collocation" argument for a reduction in the literal reach of the words "the regulation of trade and commerce."[52] The argument was fed also by a common law disposition towards the words "property and civil rights in the Province," being one of the main heads of exclusive power assigned to the provincial legislatures.[53] Nonetheless, there are some recent indications of judicial inclination to expand the hitherto narrow

44. 301 U.S. 1 (1937).
45. 322 U.S. 533 (1944).
46. 303 U.S. 419 (1938).
47. 312 U.S. 100 (1941).
48. 315 U.S. 110 (1942).
49. 317 U.S. 111 (1942).
50. American Power & Light Co. v. Securities & Exch. Comm'n, 329 U.S. 90, 104 (1946).
51. I do not wish to be misunderstood as saying that in the United States all these matters rest solely on the commerce power; see, *e.g.*, First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966) (banking); U.S. Const. art. I, § 8, cl. 8 (patents and copyrights).
52. See Citizens Ins. Co. v. Parsons, 7 App. Cas. 96, 112 (1881).
53. See, *e.g.*, Shannon v. Lower Mainland Dairy Prod. Bd., [1938] A. C. 708, 719, [1938] 4 D.L.R. 81, 85.

scope of the Canadian commerce power.[54] These indications have come in decisions on provincial legislation because federal initiative has not been bold, owing to a long history of frustration. The national government found it more expedient to rely on its transportation and communication authority, on its banking power, on its criminal law power, and particularly on its ample taxing (and concomitant spending) power to promote national social and economic policies not realizable directly through its commerce power.

Wide as these powers are, either individually or collectively, they do not add up to displacement of primary provincial regulatory authority in social welfare and in education.[55] These are fields which must be heavily financed; and, understandably, the main strain in Dominion-provincial relations today, aside from the special problems raised by the aspirations of Quebec, is in conflicting views on taxing powers and proper division of tax revenues.[56] A Royal Commission report on these and related matters is imminent.[57] In the meantime, insistence by Quebec and other provinces that they be left alone to discharge their constitutional responsibilities, without federal intrusion through the use of conditional grants, has resulted in the dismantling of some federal-provincial cooperative arrangements and in consequential claims by the provinces for more unearmarked grants.

A particular illustration comes from the field of higher education. There is no national office of education in Canada as there is in the United States, but the national government had been making per capita grants to universities, using the Association of the Universities and Colleges of Canada as the distributing agency, except in Quebec where a different formula of support was worked out some years ago.[58] Recently the general policy was changed. The national government has now abandoned its role of direct support by reducing the federal tax bite and yielding the money to the provinces for their use for education in such manner as they see fit. There is still some federal support for research; but what has been done in withdrawal of direct support for higher education appears to be founded on the principle that the Dominion should not use its taxing and spending power as a means of indirect regulation of fields in which constitutionally it has no direct regulatory authority. This is a political, not a legal constitu-

54. Regina v. Klassen, 20 D.L.R.2d 406 (Man. Ct. App.); *leave to appeal denied*, [1959] Can. Sup. Ct. ix; Reader's Digest Ass'n (Canada) Ltd. v. Attorney-Gen. for Canada, 59 D.L.R.2d 54 (Que. Q.B. 1965).

55. B.N.A. Act, §§ 92(13), (16), 93.

56. Federal taxing power is expressed in the B.N.A. Act, § 91(3) in these terms: "The raising of money by any mode or system of taxation"; provincial taxing power is expressed in § 92(2) in these terms: "Direct taxation within the Province in order to the raising of a revenue for provincial purposes." By § 92(9) the Provinces are also given power in relation to "shop, saloon tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes." Without going into detail, it is enough to say that the federal taxing power is dominant because of its unlimited scope.

57. The Royal Commission on Taxation (The Carter Commission) was established in September, 1962. It has issued a report since this article went to press.

58. In order to satisfy Quebec's claim to minister to universities therein without direct federal grants, the level of corporation taxes exacted by the federal government was reduced one per cent in Quebec so as to allow the province to add this to its own exactions.

tional principle, but it is no less significant on that account.[59] It would be overdrawing the Canadian situation to find a comparison between Canadian federal reliance on its taxing and spending power for positive social welfare policies and the power of Congress to tax and spend for the general welfare.[60] The Canadian power, however fully exercised, could not, on present constitutional doctrine, underpin a national social security system in the way in which this has been done by the Congress.

I have painted with bold strokes and have made little allowance for the shadings which a more detailed picture of our Constitution would show; and I have probably done equal violence to your Constitution in making the comparisons that I have presented. But despite this, there can be no gainsaying the differences in our respective approaches to federalism which my comparisons have highlighted.

59. There have been judicial warnings against "colourable" use of the federal taxing power but the constitutional power to tax simpliciter is undeniable; and subsequent spending on a variety of objects has not given rise to legal difficulties: see Laskin, Constitutional Law 666-67 (3d ed. 1966).

60. U.S. Const. art. I, § 8, cl. 1; see also Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).