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The Constitutional Federal Question in the Lower Federal Courts of the United States and Canada

By John T. Cross*

I. INTRODUCTION

In 1989, the province of British Columbia proposed that the Federal Court of Canada be merged into the provincial courts. Although couched in terms of a merger, the proposal was undeniably an attempt to dismantle the Federal Court as a separate political entity.1 Given Canada’s ongoing constitutional difficulties, the proposal has not received serious consideration to date and is unlikely to rise to the fore anytime soon. It nevertheless remains on the table. As Canada struggles to redefine the respective spheres of federal and provincial sovereignty, it is conceivable that abolition of the Federal Court could become one of the stakes in the negotiation. Indeed, British Columbia is not alone in its suggestion. Other, less partisan, sources have questioned whether Canada really needs the Federal Court.2

Any proposal to abolish the Federal Court of Canada may seem quite curious to observers in the United States. The federal district courts and courts of appeal are certainly a well-established part of United States federalism, having been in existence for almost the en-

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tire history of the United States. However, few would argue that lower federal courts are a *sine qua non* of a federal system. As the Australian experience demonstrates, operating a federal system without lower federal courts is certainly possible. Unlike a supreme court, which is probably necessary to act as the ultimate arbiter of important national issues, lower federal courts are in a sense redundant. In any true federal government, the regional governments operate their own court systems. These regional courts are perfectly capable of hearing all cases that may arise, regardless of whether they involve regional, national, or international law. Therefore, operating a system of lower federal courts to hear these same sorts of cases is in theory merely duplicative.

Nevertheless, a separate federal court system has proven to be quite important at certain critical junctures in United States history. Federal courts in the United States have above all served as guardians of the Constitution and federal law. United States federalism would be radically different today had lower federal courts not existed to implement Congress' various national programs. Controversial federal efforts such as school desegregation probably would not have succeeded had litigation been confined to the state courts. One widely held view is that state courts are either insensitive to—or indeed biased against—the aims of both the federal government and the nation as a whole. If this is true, a system of lower federal courts, although technically redundant, is necessary to preserve the supremacy of the federal government and its laws.

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3. As one of its first major acts, the first Congress established a system of lower federal courts. *Judiciary Act of 1789, 1 Stat. 73* (now codified at 28 U.S.C. § 1350 (1982)).

4. Although section 71 of the Australian Constitution authorizes the Australian federal Parliament to establish lower federal courts, the various courts that Parliament has established under this provision have been granted a relatively narrow jurisdiction. Since the system was revamped in 1976 with the passage of the *Federal Court of Australia Act*, Australia operates only two lower federal courts: (a) the Family Court, with jurisdiction over matters related to marriage, divorce, and annulment, and (b) the Federal Court, with original jurisdiction over certain commercial matters, and appellate jurisdiction from the state courts over certain other federal matters. *See 2 Kenneth R. Redden, Modern Legal Systems Cyclopaedia* 2.20.29-31 (1989); *Hogg, supra* note 2, at 19-20.

5. A "true" federal government is one that divides sovereignty between a national (federal) authority and several regional authorities in such a way that both the national and regional authorities may exercise direct control over individual action. *Peter Hogg, Constitutional Law of Canada* 80 (2d ed. 1985).

6. Because Canada and the United States refer to their regions by different names, this Article will use the generic term "region" when the discussion applies to both the provinces of Canada and the states of the United States. The term "region" does not include, however, federal territories or other enclaves governed by the federal authority.

7. *See, e.g., Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for*
Like the United States, Canada is a true federal system with significant powers vested in both the federal and provincial governments. How, then, can Canada consider abolishing the Federal Court? One must, of course, take into account the nature of Canadian federalism, which is different from the United States version in a number of important respects. Yet, there are many fundamental similarities between the systems. Canada has enacted a large body of federal law that governs a wide array of everyday activities. In addition, the Canadian Constitution guarantees certain basic rights and liberties. Because of the importance of the Constitution and federal law in Canada, it would seem to an American observer that a system of national courts would be necessary to administer that law.

This Article will compare the Canadian and American experience with using lower federal courts to interpret and enforce the constitutions and federal laws of the two nations. The Article first analyzes the scope of the constitutional provisions that govern federal court jurisdiction. Although the language of the two constitutions is very different, they have been interpreted in roughly the same manner. The primary role of federal courts in both countries is to administer federal law. Next, the Article explores certain problem areas that arise in applying this “federal question” jurisdiction, for example, cases involving claims governed by both federal and regional law. The


In more recent years, however, many have begun to question this claim, especially given that conservative Republicans held the presidency (and therefore the power to nominate federal judges) from 1981 to 1993. Today, state courts often prove more receptive to claims that certain activities are constitutionally protected. See, e.g., Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding that the right to privacy in the Kentucky Constitution extends to certain acts of sodomy, even though the United States Supreme Court had refused to protect such acts under the national Constitution); Erwin Chemerinsky, Ending the Parity Debate, 71 B.U. L. REV. 593 (1991); Michael E. Solimine & James L. Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 HASTINGS CONST. L.Q. 213 (1983).

8. For example, the federal Parliament has the exclusive power to enact criminal laws. CAN. CONST. (Constitution Act, 1867), § 91(27). Although the United States Congress may also enact criminal laws, these federal criminal statutes are specialized provisions that operate alongside the vast body of state criminal law.

9. For example, the Food and Drugs Act, R.S.C., ch. F-27 (1953)(Can.), establishes strict nationwide controls on the advertisement, labelling, and sale of foodstuffs and pharmaceuticals.

Canadian and United States courts have tended to diverge in these problem areas. Overall, the Canadian Supreme Court has taken a much narrower view of the constitutional authority of lower federal courts than has its American counterpart.

Drawing implications from this difference in jurisdiction is more troubling. The Canadian Federal Court certainly plays a more limited role in administering federal law than do the United States federal courts. However, this does not necessarily mean that the Canadian system fails to protect the federal interest in its federal laws. Significant differences exist between the Canadian and United States judicial systems that guarantee that the federal interests in any particular matter will be considered. The last part of the Article analyzes these structural differences and concludes that, taken as a whole, both judicial systems provide enough safeguards against local influence to ensure adequate consideration of the federal interest.

It should be emphasized at the outset that this Article is largely about potential. The main focus is the scope of the constitutional provisions authorizing federal court jurisdiction. The extent to which the federal courts may actually exercise this jurisdiction is subject to the whims of Parliament and Congress. Indeed, the current jurisdictional statutes of the two nations differ considerably in scope. Because the constitution ultimately defines the boundaries between federal and state sovereignty, discussion will be limited to the constitutional grant.

II. THE SCOPE OF THE CONSTITUTIONAL FEDERAL QUESTION

A. The Constitutional Grant of Jurisdiction

From both a political and a historical perspective, the constitutions of the United States and Canada are very different creatures.

11. Most notably, while Congress has given the federal courts "general" federal question jurisdiction over all cases that arise under federal law and are not specifically assigned to some other court, 28 U.S.C. § 1331 (1988), Parliament has confined the jurisdiction of the Federal Court to certain categories of cases. For federal claims that fall outside these categories, the Federal Court has jurisdiction only if no other constitutional court (a term that includes the provincial superior courts) may hear the case. Federal Court Act, R.S.C., ch. F-7, § 25 (1985) (Can.).

The existence of federal legislative control over federal jurisdiction is the main reason why Australia has been omitted from the discussion. Although section 71 of the Australian Constitution authorizes a system of lower federal courts at least on a par with the Canadian system, the Australian federal Parliament has never operated a lower federal court with broad jurisdiction. See supra note 4. Therefore, the Australian courts have not yet been forced to consider the outer limits of federal judicial power.
The United States Constitution was the product of a revolution. The framers were forced to create a new government from the ground up to replace the one they had ousted. They remembered quite well the abuses of power that occurred under British Imperial rule and created safeguards to prevent the new government from repeating those mistakes. In short, the United States Constitution is a self-contained instrument which creates and carefully regulates an entirely new system of government.

The Canadian experience has been quite different. First, it is difficult to pinpoint exactly what constitutes the Canadian "Constitution." The powers of the Canadian government have been established and modified by a series of acts and charters over the last 125 years. The main instruments, however, are the British North America Act of 1867 (BNA) and the Constitution Act, 1982, which together constitute the bulk of the Canadian Constitution. For the purposes of this Article, the BNA is the more important of the two. Like the United States Constitution, the BNA contains the basic allocation of power between the federal and provincial governments, including the respective judiciaries. Yet the BNA is quite different in kind from the United States Constitution. Although in a sense also the product of revolution, the BNA does not represent a

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12. The current United States Constitution was actually the second try at establishing a system of government for the newly independent colonies. The first was the short-lived Articles of Confederation, which was in effect from the end of the Revolution to 1783. Although the Articles proved to be unworkable for a variety of reasons, the main flaw was the extremely limited powers granted to the central government. The current Constitution was designed to allocate more powers to the central government while retaining certain critical controls in the states.


14. CAN. Const. (British North America Act of 1867). Although the Constitution Act, 1982 changed the name of the BNA Act to the Constitution Act, 1867, this Article will employ the old terminology, as it more readily allows the reader to distinguish between the two Constitution Acts.

15. CAN. Const. (Constitution Act, 1982). The Constitution Act, 1982 is set forth in Schedule B to the Canada Act, 1982, U.K. Stats., 1982, ch. 11. The 1982 Constitution did not replace the BNA (although it does amend certain provisions), but simply added to it. As noted *supra* in note 10, the Charter of Rights and Freedoms is one of the most significant parts of the Constitution Act, 1982. The flood of litigation generated by the Charter has had a dramatic impact on Canadian jurisprudence.

16. Technically, the Canadian Constitution comprises the Constitution Acts, 1867 and 1982, together with certain other listed acts and orders. CAN. Const. (Constitution Act, 1982), § 52(2).

17. Hard-handed British rule led to two rebellions in 1837, one in Lower Canada (now Québec) and the other in Upper Canada (now Ontario). Although these rebellions were ultimately unsuccessful, they did result in legislative union of Canada and a limited form of representative government. These interim changes created the impetus for the formal con-
break from another sovereign. Indeed, the BNA is a statute of the British Parliament, not the Canadian. It assumes the continued influence of Great Britain in Canadian affairs. The BNA is best perceived as a reallocation of powers within an existing framework rather than the establishment of a new government.

Nevertheless, there are certain basic similarities between the two constitutional superstructures, especially insofar as the topic of this Article is concerned. Both constitutions make provision for a supreme court to serve as the ultimate arbiter of disputes. In addition, both allow the national legislature to create a system of lower federal courts. These federal courts do not replace the courts of the regional governments, but serve alongside those courts. Moreover, the lower federal courts in both systems are courts of limited jurisdiction, with those limits set ultimately by their respective constitutions.

Although the basic structure is the same, the language concerning the federal judiciaries in the BNA and the United States Constitution differs significantly. Article III of the United States Constitution vests the federal “judicial power” in the federal courts. That judicial power is confined to nine categories of cases, three of which turn on the subject matter of the dispute, and six of which depend on the citizenship or status of the parties. For purposes of this Article, the most important category is the first: “[A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...” This language defines the “federal question” jurisdiction of the United States federal courts. However, Article III also gives Congress the

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18. The Constitution Act, 1982 was similarly a British statute. However, in sections 38-43 of that Act, the British Parliament ceded to Canada the power to enact future amendments to its Constitution, thereby removing a potentially significant source of British influence.

19. The United States Constitution creates the Supreme Court, reserving to Congress a limited power to regulate the Court. U.S. Const. art. III, § 1. The Canadian Constitution, by comparison, leaves it to Parliament both to establish the supreme court and to define its jurisdiction. CAN. CONST. (BNA), § 101.

20. Id.


22. Id. § 2.

23. Id.
ability to parcel out that jurisdiction to the federal courts as it sees fit.\textsuperscript{24}

The BNA is by comparison a model of simplicity. Section 101 allows Parliament to establish a general court of appeal and "any additional Courts for the better Administration of the Laws of Canada."\textsuperscript{25} Although it defines the purpose of the federal judiciary, the BNA does not carefully delineate the types of cases those courts may hear. Like the American Constitution, the BNA leaves it to Parliament to establish that jurisdiction.

Despite the differences in language, the Canadian and American courts have interpreted the general scope of these provisions in a remarkably similar fashion. First, Article III and section 101 are almost universally viewed as establishing the outer limits of federal jurisdiction. This interpretation flows naturally from section 101, which gives Parliament the power to create lower federal courts only for a specified purpose.\textsuperscript{26} On the other hand, Article III, section 2 could conceivably be read as a maximum, a minimum, or a precise definition of the jurisdiction of the lower federal courts.\textsuperscript{27} Since \textit{Marbury v. Madison}\textsuperscript{28} in 1803, however, the Supreme Court has consistently treated it as a maximum.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} The Constitution is admittedly not specific in this regard. Although Article III, section 2 allows Congress to make "exceptions" and "regulations" to the Supreme Court's jurisdiction (which Article III itself defines), nothing in Article III or the remainder of the Constitution explicitly gives Congress authority to control the jurisdiction of the lower federal courts. However, the courts have routinely held that the Congress' Article I, section 8 and Article III, section 2 powers to create a lower federal court include the power to specify the types of cases which that tribunal may hear. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).
\item \textsuperscript{25} CAN. CONST. (BNA), § 101.
\item \textsuperscript{26} The Supreme Court of Canada has struck down several provisions of the Federal Court Act because they purported to allocate jurisdiction beyond the limits of section 101. See McNamara Constr. (W.) Ltd. v. The Queen, [1977] 2 S.C.R. 654 (section 17(4)(a)) and Quebec N. Shore Paper Co. v. Canadian Pac. Ltd., [1977] 2 S.C.R. 1054 (section 23). Both cases are discussed in greater detail infra at text accompanying notes 65-73.
\item \textsuperscript{27} The plaintiff in \textit{Sheldon v. Sill} argued that Congress could not deprive the federal courts of jurisdiction over any category of case that fell within Article III. Peter W. Low & John C. Jeffries, Jr., \textit{FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS} 184 (2nd ed. 1989). Prior to \textit{Sheldon}, Justice Story advanced a similar, although more limited, theory in dictum in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326-31 (1816).
\item \textsuperscript{28} 5 U.S. (1 Cranch) 137 (1803).
\item \textsuperscript{29} In \textit{Marbury}, the Court invalidated a jurisdictional statute because it went beyond the nine categories of Article III. It is interesting to note that the Court has never struck down a jurisdictional statute on that basis since \textit{Marbury}. The closest the Court has come to invalidating a statute was its decision in National Mutual Insurance Company v. Tidewater Transfer Co., 337 U.S. 582 (1949), where although six Justices agreed upon the principle
More importantly, the parallel phrases "Laws of Canada" and "Laws of the United States" have been construed to include only federal law. Thus, although the province of Manitoba is certainly a part of Canada, Manitoba law is not part of the law of Canada for purposes of section 101. This limitation directly affects the ability of the federal court to hear claims that derive from sources other than a federal statute.

That interpretation also serves to define the basic role of the lower federal courts. Because the Federal Court of Canada has no jurisdiction other than federal question jurisdiction, it is mainly limited to construing federal law. The role of the federal courts in the United States is also primarily limited to interpreting federal law. Admittedly, federal courts in the United States, unlike their Canadian counterparts, may hear state-law cases under their "diversity" jurisdiction. However, the Rules of Decision Act and the Erie rule re-

that a jurisdictional statute that exceeded Article III would be invalid, two of the six interpreted the statute in a fashion that fit it within Article III diversity jurisdiction. In all other cases facing the question, the Court has either sidestepped the issue or fit the statute within one of the nine categories of Article III. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (breach of contract suit against foreign sovereign qualifies as a federal question because it would involve sovereign immunity, a defense governed by federal law); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) (jurisdictional statute requiring only "minimal" diversity among litigants in interpleader action comports with requirements of Article III diversity jurisdiction); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (breach of contract claims relating to organized labor governed by federal law).

In other contexts, the Court has allowed Congress to assign jurisdiction over cases falling outside Article III. When Congress creates courts for federal enclaves, it may grant them jurisdiction over all disputes, not merely those listed in Article III. See generally John Cross, Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy, 87 Nw. U. L. Rev. 1189 (1993). These courts, however, are not true constitutional courts, but "legislative" courts that Congress may make pursuant to its Article I powers.

In addition, it has on occasion been argued that Congress may in exceptional circumstances allocate jurisdiction over non-Article III matters even to Article III courts. For a critical discussion of these theories, see Carole E. Goldberg-Ambrose, The Protective Jurisdiction of the Federal Courts, 30 UCLA L. Rev. 542 (1983).


31. See infra text accompanying notes 35-45.


Federal courts may also hear state law claims that are brought in connection with a closely-related federal claim. 28 U.S.C. § 1367 (1988). The constitutional validity of this "supplemental" jurisdiction is discussed infra at text accompanying notes 96-100.
quire the federal courts to follow decisions of the state courts on state law. Because of these limitations, only in federal question cases do United States federal courts have any real say in the development of the law.

In a broad sense, then, lower federal courts in Canada and the United States serve the same basic function. The primary role of federal courts in each system is to interpret and apply federal law. That basic principle can at times prove to be somewhat ambiguous. When exactly does a case involve "federal" law? Does the power to interpret federal law give the court the authority either to interpret state law or to wrap up related state law claims? The next section of this Article will discuss how the courts have resolved these types of ambiguities.

B. Construing the Scope of the Constitutional Grant

The basic principle underlying federal question jurisdiction in both Canada and the United States is easy to state, but difficult to apply. First, the courts must discern exactly what bodies of law are "federal." Second, even when a given law is clearly "federal," there are a number of different ways in which that federal law may be relevant to a case. Not all of these necessarily qualify the case as a constitutional federal question. Issues of this sort have arisen with increasing frequency in both the Canadian and United States federal courts.

1. What is "Federal" Law?

A statute enacted by the national legislature clearly constitutes federal law. Were the courts to limit constitutional federal question jurisdiction to claims for relief explicitly provided by federal statute, the analysis of this first issue would be relatively simple. However, neither the Canadian nor the United States courts have confined federal question jurisdiction to claims under federal statutes. The guiding principle in both countries instead appears to be considerably broader. As a general rule, both Canadian and American courts rec-

34. The "Erie doctrine" is named after the seminal case of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court has refined that doctrine in a long string of cases. Among the more important cases are: Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Hanna v. Plumer, 380 U.S. 460 (1965); and Guaranty Trust Co. v. York, 326 U.S. 99 (1945). For an excellent summary of the many facets of the doctrine, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 260-75 (1989).
ognize the existence of constitutional federal question jurisdiction in cases in which federal law forms a necessary element. Both systems have struggled with many of the same issues in their attempt to define when this necessary federal element is present. The differences that have emerged generally reflect disagreements as to what bodies of law are federal and how dominant the federal element must be to fit the case within the constitutional grant.

(a) Claims under the Constitution

A constitution is clearly national law. Technically, however, it is not "federal" law. In the United States, the main body of the Constitution—Articles I to VII—predates the creation of the federal government. Further, although all of the amendments were approved by Congress, they were not effective until approved also by a certain percentage of the states. Therefore, as neither the original articles nor the amendments emanate solely from the federal government, the United States Constitution is not federal law.

Nevertheless, most of the cases involving significant constitutional issues are litigated in the federal courts. This is due in part to Article III itself, which explicitly extends the federal judicial power to cases arising under the Constitution. Therefore, the federal courts may exercise jurisdiction over claims brought directly under the Constitution.

These constitutional causes of action, however, represent only a small fraction of the cases in which federal courts construe the Constitution. Although the Supreme Court has recognized causes of action for violation of certain constitutional rights, it has refused to recognize such actions for other provisions. Most of the federal cases involv-

35. U.S. Const. art III, § 2. This section also extends federal jurisdiction to claims arising under treaties.
36. Interestingly, with one brief exception from 1801 to 1802, Congress did not assign the federal courts "general" federal question jurisdiction over federal and constitutional claims until 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331). That statute has remained in force largely unchanged to this day. The current version of the Act allows the federal courts to hear all suits "arising under the Constitution, laws, or treaties of the United States," regardless of the amount in controversy.
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ing the Constitution arise not under the Constitution itself, but under federal statutes. Congress has enacted a broad array of statutes providing a cause of action for certain violations of constitutional rights. Although these causes of action technically arise under federal law rather than the Constitution, they do give the federal courts the opportunity to interpret and enforce the Constitution on a regular basis.

The situation in Canada is more muddled. Unlike Article III, BNA section 101 does not explicitly allow federal jurisdiction over claims arising under the Constitution. And as in the United States, the Canadian Constitution is not "federal" law. All elements of the Canadian Constitution up to and including the Constitution Act, 1982 are statutes enacted by the British Parliament. Although the Constitution Act, 1982 relinquished to Canada the power to enact future amendments, any such amendments must be approved by specified percentages of provincial legislatures. Therefore, no part of the Canadian Constitution originates from the federal government.

This does not necessarily mean, however, that cases arising under the Canadian Constitution fall outside the constitutional jurisdiction of the Federal Court. The courts and commentators have suggested that there are actually two categories of these constitutional cases. First, a party may seek recovery against someone who violates one of her constitutional rights. Because the cause of action stems from the Constitution itself, these cases probably lie outside federal jurisdiction.

violation of the First Amendment). In the cases rejecting a cause of action, the Court has noted the existence of alternate forms of relief, either statutory or administrative.

38. The most significant of these in terms of sheer number of cases is undoubtedly 42 U.S.C. § 1983 (1988), which affords a cause of action against state officials who deprive constitutional rights while acting "under color of state law."

39. CAN. CONST. (Constitution Act, 1982), §§ 38-47 (governing the process of amendment).

Certain narrow amendments are exempt from the requirement of provincial approval. Constitution Act, 1982, § 44 gives Parliament a residual power to amend any constitutional provisions not explicitly listed in sections 41 and 42 that govern the executive power or the Senate and House. Although amendments enacted under this provision arguably would constitute federal law, it is unlikely that cases involving these provisions would come before the courts.

40. The vast majority of cases challenging government action in Canada are based upon rights granted by the Charter. For these cases, section 24 of the Charter explicitly recognizes a cause of action. Challenges to government action based upon other provisions of the Canadian Constitution can be brought in the form of a declaratory judgment action. See, e.g., Morgan v. Attorney Gen. of P.E.I., [1976] 2 S.C.R. 349.

The result may be different when the constitutional claim involves the validity of a federal statute. In *Northern Telecom Canada Ltd. v. Communication Workers*, the Supreme Court held that the Federal Court had jurisdiction to determine whether a federal statute was constitutional.42 The Federal Court's general section 101 power to administer the federal statute gave it the authority to consider the constitutional challenge to that statute. In *Northern Telecom*, however, the constitutional claim was brought as a defense in a proceeding to enforce the federal statute.43 Had the defendant instead brought an action to declare the federal statute invalid, it is unclear whether the Federal Court could have heard the case.44 As the complaint in that case would be based exclusively on rights established by the Constitution, not federal law, the better view is that the case would fall without section 101 jurisdiction.45

When compared to the situation prevailing in the United States, the Canadian Federal Court plays a significantly lesser role in enforcing the Canadian Constitution. Most constitutional cases in Canada will be decided by the provincial courts. Indeed, case law suggests that provincial courts are the main caretakers of the constitution.46


The statement in the text is qualified only because it has been suggested by at least one commentator that the Federal Court may have jurisdiction in cases brought under the Charter (Part I of the Constitution Act, 1982). Section 24(1) of the Charter allows anyone whose Charter rights have been violated to obtain a remedy in a "court of competent jurisdiction." *Federal Court Practice*, supra, at 9, can be read to suggest that the Federal Court is one of competent jurisdiction for purposes of that provision.


43. *Id.* at 741.
44. In addition, this analysis would not apply in the case where a party raises a constitutional defense to a provincial statute.
46. In *Canada (A.G.) v. Law Soc. of British Columbia*, [1982] 2 S.C.R. 307, the Supreme Court held that Parliament could not deprive the provincial superior courts of
This differs significantly from the situation in the United States, where federal courts are, at least today, generally recognized as bearing the primary responsibility for interpreting and applying the Constitution.  

(b) Federal statutes

The most straightforward example of a federal question, of course, is a claim arising under a federal statute. Federal courts in both Canada and the United States have undisputed constitutional authority to hear these claims. The real issue in cases involving a federal statute is determining when a claim actually "arises under" that statute. Not all federal statutes that prescribe a certain standard of conduct provide causes of action for individuals injured by infractions of that standard. If an injured party nevertheless brings suit based upon violation of the statute, the court must determine whether a cause of action can somehow be implied from the language of the legislation. If it can, the case presents a federal question.

The Canadian case of The Queen v. Saskatchewan Wheat Pool provides an excellent working example of this problem. In Saskatchewan Wheat Pool, the Canadian Wheat Board contracted to purchase wheat from a grain elevator. The wheat was infested with insects when delivered. Delivery of infested wheat clearly violated the Canada Grain Act, which establishes strict standards for grades of wheat. The Wheat Board, therefore, sued the elevator in Federal Court, claiming that the elevator had breached the contract by deliver-
erating wheat that fell below the federal standard. However, although the Grain Act provides criminal sanctions for violation of its provisions, it nowhere specifically states that an aggrieved purchaser may recover damages. In determining its jurisdiction, then, the Federal Court had to determine whether the mere fact that the Wheat Board's claim required interpretation of federal law meant that the lawsuit arose under federal law.

A case like Saskatchewan Wheat Pool actually presents two related issues when brought in a federal court. The first is whether the plaintiff may recover merely by showing a violation of the federal statutory standards. This is an issue of substantive law. Second, if the court concludes that a cause of action does exist for violating the federal statute, it must determine whether that claim is a federal claim within the authority of the Federal Court.

Conceptually, there are two ways for a court to approach the first issue. It can hold that the statute creates a cause of action by implication, notwithstanding any lack of explicit language in the statute. On the other hand, it can turn to the common law of torts and hold that the statute creates a "duty" that the defendant's actions have violated. Although both approaches may recognize a cause of action, they raise very different questions for purposes of federal jurisdiction. Most notably, only the first approach results in a federal statutory claim. Discussion of the second approach will therefore be reserved until the section of this Article dealing with the common law.52

Implying a cause of action from a statute undoubtedly involves a certain degree of judicial activism. A court must attempt to discern the legislature's intent when enacting the statute, often without any trustworthy evidence that the legislature even considered the issue. Perhaps because of this necessary activism, the Canadian and United States systems have approached the issue differently. Canadian courts will not imply a cause of action from a federal statute. Although some early cases suggested that a cause of action could be implied,53 the Canadian Supreme Court in Saskatchewan Wheat Pool expressly refused to look beyond the language of the Grain Act.54 Later cases have treated Saskatchewan Wheat Pool as a blanket prohibition

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52. See infra text accompanying notes 76-93.
53. See, e.g., Canadian Pac. Air Lines, Ltd. v. The Queen, [1979] 1 F.C. 39 (C.A.). The Court of Appeal's analysis was remarkably similar to the test for implied causes of action used in the United States, discussed infra at text accompanying notes 56-57.
against implying federal statutory causes of action.\textsuperscript{55} This certainly simplifies the Federal Court’s analysis of jurisdiction, as it need not engage in the difficult analysis necessary to determine Parliament’s intent.

Federal courts in the United States, on the other hand, regularly undertake this analysis. The Supreme Court has established a four-part test for determining when a private cause of action may be implied from a federal statute. That test considers Congress’ subjective intent together with certain objective factors.\textsuperscript{56} Although its more recent decisions still apply the four-part test, any evidence of Congressional intent is virtually controlling.\textsuperscript{57} Because United States federal courts may imply a cause of action from a federal statute, they play a more proactive role in enforcing federal statutes than the Federal Court of Canada. United States courts are not limited by the language chosen by Congress. Instead, they have limited power to enforce their perception of the federal mandate through the process of private civil litigation.


\textsuperscript{56} The Supreme Court originally set forth four factors for determining whether a federal statute creates a cause of action:

1. whether the plaintiff was “one of the class for whose especial benefit the statute was enacted,”
2. any evidence of legislative intent,
3. whether it would be “consistent with the underlying purposes of the legislative scheme” to find a private cause of action, and
4. whether the subject was one “traditionally relegated to state law, in an area basically the concern of the states.”


\textsuperscript{57} Thompson v. Thompson, 484 U.S. 174, 179 (1988) (no cause of action under the Parental Kidnapping Prevention Act). As Thompson itself demonstrates, the evidence of Congressional intent may show that Congress intended that there be no cause of action.

(c) The common law

The legal systems of Canada and the United States are historical cousins. Although the degree of kinship differs, both are direct descendants of the English system. One of the features that distinguishes the English system is the role of judicial precedent in shaping the law. Most of the rules of tort and contract, and to a lesser extent property, are “common law” rules crafted by judges in the context of an actual case.58 To this day, courts in the United States and Canada rely heavily on prior decisions when determining the rule of law to apply in a given case.

Like all bodies of law, the common law changes constantly. Although a legal system based upon the common law affords more deference to stability and tradition than many other systems, Anglo-American case reporters are filled with cases in which courts have refused to follow precedent, either by creating exceptions to the rule set forth in an earlier case or by discarding the prior rule altogether.59 These exceptions and disagreements also form part of the common law and are afforded deference by later courts. Accordingly, common law courts continually take part in defining the law.

Whether a federal court can involve itself in this process of refining the common law depends upon a number of factors. At the most basic level, it turns upon whether the court has jurisdiction to hear a case involving a common law claim. Without jurisdiction to hear the dispute, a federal court is powerless to declare the common law rule governing that dispute.

United States federal courts have had the authority to hear common law claims throughout their 200-year history.60 Diversity jurisdiction—which turns on the citizenship or status of the parties rather than the subject matter of the dispute—allows lower federal courts to

58. The common law as a jurisprudential body is not limited to that set of substantive rules laid down by the courts of common law. It also includes legal principles established by the courts of equity and admiralty. Those courts also follow precedent, although not always to the same degree.


60. Judiciary Act of 1789, 1 Stat. 73, §§ 11 (diversity of citizenship), 12 (removal of cases involving diverse citizens from state courts).
hear assorted common law cases. However, this diversity jurisdiction by itself does not give the federal courts any significant influence over the development of the common law. First, most tort and breach of contract cases involve litigants from the same state and, therefore, fall outside diversity jurisdiction. In most cases, then, federal judicial power will exist only if the common law can be deemed "federal." Moreover, a federal court's influence is not that great even when diversity is present. A federal court adjudicating a common law claim in a diversity case has no independent authority to determine the common law, but must instead attempt to replicate the outcome that the parties would obtain in the appropriate state court.

The issue of whether the common law is "federal" is even more important to the Federal Court of Canada because of its lack of diversity jurisdiction. The ability of the Canadian Federal Court to participate in refining the common law accordingly turns entirely on whether the common law is federal law for purposes of the Canadian Constitution.

The Supreme Courts of both Canada and the United States have reached surprisingly similar answers to this core question. Both have concluded that most common law claims do not arise under federal law. On the other hand, each Court has also recognized that certain types of common law claims do qualify as constitutional federal questions. In order to make sense of this apparent contradiction, a closer examination of the leading decisions rendered by each Supreme Court on the general issue of the common law and the federal courts is necessary.

Why the common law generally is not "federal" law? The Supreme Courts of both Canada and the United States have followed very different paths in concluding that a garden variety common-law claim does not arise under federal law. In fact, the lines of cases in the two countries appear at first glance to be completely disanalogous.

61. There would be certain cases, however, that would still lie outside the federal jurisdiction. For example, the Eleventh Amendment prevents a federal court from hearing a suit brought against a state by a citizen of another state, even if that action otherwise falls into one or more of the Article III categories of jurisdiction. Although Congress may abrogate a state's immunity by creating new statutory causes of action, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), the amendment would bar federal common-law actions that fell within its ambit.

62. See infra text accompanying notes 74-75.

63. See infra text accompanying notes 68-73.

64. See infra text accompanying notes 76-85.
primarily because the issue has presented itself in two entirely different contexts.

In Canada, the question of whether the common law is federal law arises, quite logically, in the context of a challenge to the Federal Court's jurisdiction. The leading two cases in this area are the Supreme Court's 1977 decisions in McNamara Construction (W.) Ltd. v. The Queen and Quebec North Shore Paper Co. v. Canadian Pacific Ltd. The Court in each case faced a constitutional challenge to a provision of the Federal Courts Act of 1970. The defendant in each case argued that notwithstanding the provisions of the Federal Court Act, the Federal Court could not hear the matter because it fell outside section 101 of the BNA.

Quebec North Shore involved a claim between private parties for breach of a contract to build a rail car marine terminal. The contract stipulated that it was to be governed by the laws of Quebec. The Supreme Court held that there was no federal jurisdiction over the breach of contract claim, basing its holding on both the Federal Court Act and section 101. In construing the constitutional provisions, the Supreme Court held that a case does not fall within section 101 unless it is based upon "applicable and existing federal law."

Quebec North Shore was an easy case from the standpoint of federal jurisdiction. Because plaintiff's claim was governed by the law of Quebec—a separate and distinct body of law in force only in that province—the Court naturally concluded that the case did not involve the "laws of Canada" as required by section 101. McNamara presents a more troubling situation. The breach of contract claim in McNamara was governed by the common law, which is in force in all prov-

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69. Id. at 1064.
70. Plaintiff based its jurisdictional claim upon section 23 of the Federal Court Act, alleging that the rail terminal fit within the class of "works and undertakings connecting a province with any other province or extending beyond the limits of a province." The Supreme Court noted, however, that the statute also required that the claim arise "under an Act of Parliament or otherwise." Recognizing that a construction of section 23 that included non-federal claims could conflict with BNA section 101, the Court interpreted the phrase "or otherwise" to include non-statutory federal law. Id. at 1063.
71. Id. at 1065-66. Although the Court has expanded the constitutional analysis into a three-part question, see ITO-Int'l Terminal Operators Ltd. v. Miida Elecs. Ltd., [1986] 1 S.C.R. 752, 766, the fundamental requirement to this day is that the case involve a claim under federal law.
The Constitutional Federal Question

The case, therefore, squarely presented the issue of whether that body of national law was a law of Canada.

The Court in *McNamara* applied the "applicable and existing federal law" test of *Quebec North Shore* and concluded that the breach of contract claim did not arise under federal law. *McNamara* therefore establishes the general principle that a standard common law contract claim between private parties does not involve federal law. Accordingly, the Federal Court has no jurisdiction over such claims. As a result of *McNamara*, the provincial courts (and the Supreme Court of Canada on appeal) have the primary authority to shape the common law in Canada.

The United States Supreme Court has resolved the issue of whether the common law is federal in an entirely different fashion. The Court's well-known decision in *Erie R.R. Co. v. Tompkins* establishes that the common law is ordinarily state, rather than federal, law. But *Erie* is fundamentally different from *Quebec North Shore* and *McNamara*. Unlike the Canadian cases, *Erie* does not approach the issue as a question of jurisdiction. It instead treats the issue as a choice-of-law problem. The Supreme Court's opinion mandates that lower federal courts hearing a common law claim follow state court precedents in determining the content of the common law rule.

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74. 304 U.S. 64 (1938). Justice Brandeis, the author of the majority opinion, stated the matter precisely in his often quoted (and misquoted) phrase, "[t]here is no federal general common law." *Id.* at 78.

75. The *Erie* Court posed the question as whether a federal district court is bound to apply the common law rules recognized by the courts in the state in which the district court sits, or whether it may independently determine the appropriate rule. In holding that the federal courts are obligated to follow the state court decisions, the Supreme Court overturned a longstanding federal custom of ignoring state precedent.

The difference in the way in which the issue reached the Canadian and American Supreme Courts is attributable to the differences in lower federal court jurisdiction. Because the Federal Court may hear only federal questions, the issue of whether a common law claim is federal quite naturally arose as a challenge to the Federal Court's jurisdiction. The diversity jurisdiction of the United States federal courts, however, allows them to hear non-federal claims. Because the federal and state court systems are parallel, the courts often disagreed as to the appropriate rule of law. The Supreme Court decision in *Erie* was therefore an attempt to reconcile that dispute by assigning authority over the common law to one of the two competing systems.
herent in this general rule is the notion that federal courts have no innate power to determine the legal rule to apply to garden variety common law claims. Although they may adjudicate common law claims, they must act as a state court when selecting the governing rule of law.

The Canadian and United States approaches are obviously quite different, yet they have a similar practical effect from the standpoint of the thesis of this Article. Both Erie and McNamara strip the lower federal courts of any meaningful role in shaping the general body of common law. The Canadian cases do so directly, by simply denying federal jurisdiction over such claims. Erie's approach is more indirect, for it requires the federal courts to mirror the outcome of state courts. Nevertheless, both lines of cases give the state and provincial courts the primary responsibility for developing most of the common law.

Can common-law claims ever be "federal"? Both the United States and Canada have expressly rejected the argument that the common law is generally federal law. However, this blanket rule is not without its exceptions. While Erie and McNamara rejected the notion that the common law as a whole is federal, other decisions of both Supreme Courts have recognized specific common-law claims that do qualify as federal.76 Identifying the scope of this "federal common law"—and finding a basis for that doctrine in the American and Canadian Constitutions—has troubled judges and scholars in both countries.77

Given the many differences between the court systems, there are a number of interesting similarities between the concepts of federal common law in the United States and Canada. First, the doctrines evolved in roughly the same way. Both Supreme Courts recognized the existence of a specific "federal" common law at the same moment as they declared that the general common law was not federal.78 Sec-

76. See cases cited infra in notes 79-85.
78. In McNamara itself, the Canadian Supreme Court recognized that the outcome of the case might have been different if suit had been brought against the Crown; for the case would have then involved "federal" common law. McNamara, [1977] 2 S.C.R. at 662-63.
ond, the Canadian and American courts have found federal common law in many of the same categories of cases. At the risk of oversimplification, federal common law exists in both countries in the following types of cases: suits involving the liability of the federal government,\(^79\) admiralty and maritime suits,\(^80\) suits directly affecting interstate/interprovincial or international relations,\(^81\) suits affecting the relationship

See infra note 79 for further discussion of this "Crown" law. Similarly, in a case decided on the same day as \textit{Erie}, the United States Supreme Court applied a rule it labelled federal common law to resolve a dispute over the allocation of water in an interstate stream. \textit{Hinderlider v. La Plata River & Cherry Creek Ditch Co.}, 304 U.S. 92, 110 (1938). The Court's opinion in this case was authored by Justice Brandeis, who also wrote the majority opinion in \textit{Erie}.


The U.S. Supreme Court has also found federal common law in cases brought by the federal government to enforce a right. \textit{United States v. Little Lake Misere Land Co.}, 412 U.S. 580 (1973); \textit{D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.}, 315 U.S. 447 (1942). The Canadian Supreme Court has suggested that Canadian federal common law applies only in cases in which the Crown is a defendant. \textit{McNamara}, [1977] 2 S.C.R. at 662. Yet, in \textit{Rhine v. The Queen}, 116 D.L.R.3d 385 (S.C.C. 1980), the Court applied federal common law to claims by the Crown to recover on student loans. It is difficult to reconcile \textit{Rhine} with the general rule stated in \textit{McNamara}. Although the Court noted that the federal statutes regulating the loans governed every aspect of the lender/borrower relationship, it also acknowledged that those statutes did not create the right to recover on the loan. For additional notes on \textit{Rhine}, see infra note 83. \textit{See also St.-Aubin}, [1984] 2 F.C. 209 (court assumes, without discussion, that it has jurisdiction over claim brought by the Crown); \textit{Marquis v. The Queen}, [1986] 10 F.T.R. 28 (T.D.) (federal common law governs Crown's claim for set-off under a contract in an action brought under a federal statute).


between the government and recognized aboriginal groups,\textsuperscript{82} common law claims in which a federal statute helps to define the underlying relationship between the litigants,\textsuperscript{83} and questions concerning the practice and procedure in the federal courts.\textsuperscript{84} In addition, the federal legislature in each country has the authority to federalize a portion of the common law by passing specific legislation.\textsuperscript{85}


83. These cases typically involve tort or contract claims based upon the violation of a standard of conduct created by federal law. In Canada, for example, see *Rhine*, 116 D.L.R.3d 385 (breach of contract for federally-regulated student loan program); *Kigowa*, [1990] 1 F.C. 804 (claim of illegal arrest when Immigration Act sets forth the basic right to be free); Oag v. Canada, [1987] 2 F.C. 511 (C.A.) (claim of false imprisonment when right to freedom set forth in the Penitentiary Act). In the United States, for example, see United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (property claim involving land designated as a federal wilderness area); Illinois v. City of Milwaukee, 406 U.S. 91 (nuisance claim relating to waters regulated by Clean Water Act). But see Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) (products liability claim for labeling drugs in violation of Federal Food, Drug, and Cosmetic Act is not governed by federal common law.) They accordingly present many of the same sorts of issues that arise in the implied cause of action cases discussed *supra* at text accompanying notes 45-54. However, the issue in these cases is whether violation of the federal standard may be used to satisfy one or more of the elements of the tort or contract claim, not whether a cause of action lies under the statute itself. The two situations are therefore distinct.

The common-law cases can be divided into two categories for purposes of analysis. In the first, exemplified by *Oag, Kigowa, Little Lake Misere*, and *Merrell Dow*, federal law establishes the underlying duty or obligation that has allegedly been breached. Although this theory has on rare occasion been extended to its breaking point, see The Queen v. Montreal Urban Community Transit Comm’n, [1980] 2 F.C. 151 (C.A.) (federal statute subrogating the Crown to worker’s injury transforms suit against tortfeasor into a federal question); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (pre-Erie suit), it is logical to label the cause of action “federal” where the defendant would owe no duty absent federal law. *Accord Federal Court Practice,* *supra* note 41, at 10-13.

In the second category, federal law, although not controlling on the act at issue, so “fills up” the field that all common-law claims in that area are deemed federal. This theory underlies both *Rhine and Illinois v. City of Milwaukee.* The second category is considerably more difficult to justify as a pure matter of federal jurisdiction than the first.


85. The Canadian maritime decisions appear to be based upon the theory that Parliament incorporated the maritime law as federal law in the provisions of the Federal Court Act. *ITO-Int’l Terminal Operators,* [1986] 1 S.C.R. at 774. The Canadian decision in *Rhine* (Parliament may federalize common law contract claims by passing a statute which, although silent on the particular issue, is intended to “govern every aspect” of the question), discussed *supra* at note 79, is also based in part upon this theory. In the United States, see Illinois v. City of Milwaukee, 406 U.S. 91 (because the federal environmental
Third, classifying a claim as federal common law gives the federal courts the potential authority to hear it. In both Canada and the United States, a federal common law claim is a constitutional federal question.\textsuperscript{66} This classification expands, albeit to a limited extent, the power of the lower federal courts to define the contours of the common law. In addition, because most of the categories of federal common law are cases in which the federal government has a significant interest, federal common law gives federal courts the ability to protect that interest.

However, assuming that the existence of federal common law increases the role of the Canadian and United States federal courts to the same extent would be a mistake. At least two factors may limit the practical effect of federal common law. First, United States federal courts have always had the ability to adjudicate common-law claims under their diversity jurisdiction\textsuperscript{87} Therefore, the addition of a limited class of federal common-law claims to their jurisdiction does not represent that great an addition to their role. For Canadian courts, on the other hand, the recognition of federal common law puts an entirely new category of cases within their purview.

Second, notwithstanding the facial similarities, there are some very real differences between the Canadian and American notions of federal common law. The disagreement turns not merely on the true nature of the narrow realm of federal common law, but on the nature of the common law itself. Largely as a result of \textit{Erie}, both federal and state courts in the United States have come to view the common law as “judge-made” law.\textsuperscript{88} “Federal” common law is simply a body of law that federal judges have the power to create. The substantive rules of federal common law can and often do differ from the common-law rules created by the state courts.

\begin{itemize}
  \item \textit{laws “fill up the area,” a common law nuisance claim based upon water pollution is governed by federal common law).}
  \item \textit{Kigowa, [1990] 1 F.C. 804; Illinois v. City of Milwaukee, 406 U.S. at 99.}
  \item \textit{The doctrine of ancillary jurisdiction, discussed \textit{infra} at text accompanying notes 93-97, also allows federal courts to hear common law claims.}
  \item \textit{Erie proceeds from the premise that law is something made by—not merely interpreted by—judges. As the Supreme Court itself later described the case, “[Erie] overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a ‘brooding omnipresence’ of Reason, of which decisions were merely evidence and not themselves the controlling foundation.” Guaranty Trust Co. v. York, 326 U.S. 99, 101-02 (1945). \textit{Erie’s “balkanized” view of the common law, although technically applicable only to the federal courts, has pervaded the entire body of United States jurisprudence.}}
\end{itemize}
Canada, however, still follows the original view of the common law, under which the common law is a universal body of natural law applicable in all common law nations. The role of a judge in this system is not to make law, but instead to determine the appropriate natural law rule to apply in a given case. Canadian federal common law fits into this general jurisprudential framework. Federal common law in Canada is not a parallel body of federal judge-made law that competes with the common law applied by provincial courts. Rather, federal common law is merely a part of the overall common law. The only distinction between federal and non-federal common law is that federal common law happens to lie within the jurisdiction of the Federal Court under Section 101 of the BNA.

This difference is more than semantic. Because federal common law in the United States can easily differ from state law, the federal courts have an independent power to craft the rules of law as they see fit. In Canada, however, the federal judge in a federal common law case must act as any other common law judge, looking to the precedent established by both federal and provincial judges on the subject. The actual substance of federal common law in Canada does not appear to differ to any appreciable extent from the substance of regular common law. This may restrict the ability of the Federal Court to

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90. Federal common law can, however, conflict with the terms of a state statute. There is at least some indication that the Canadian courts in these circumstances will afford paramountcy to the federal common law. In Bisaillon v. Keable, [1983] 2 S.C.R. 60, 108, Justice Beetz indicated in dictum that a rule of federal common law would take precedence over a state statute. Professor Peter Hogg challenges this statement, arguing that the doctrine of “paramountcy” should be confined to legislative acts. Hogg, supra note 5, at 354 n.7.

91. Professor Stephen Scott has argued that certain portions of the common law fall within section 101. He maintains that those rules of the English common law that were continued in Canada under BNA section 129 should be considered “laws of Canada.” Stephen Scott, Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction, 27 McGill L.J. 137 (1982). His argument, however, is based upon the legislative competency theory, an approach rejected by the Supreme Court in McNamara. [1977] 2 S.C.R. at 1064-65.

92. Comparing the Canadian and American views of federal common law helps to expose the logical flaws in each. For example, neither approach satisfactorily explains exactly why the common law of contract is magically transformed into “federal” law in a case involving the contractual obligations of the federal government. A full exposition of the problems with the notion of federal common law, however, is beyond the scope of this Article.

93. In none of the main Canadian cases involving federal common law is there any indication that the governing rule of law is in any way different than the rule that would apply in an ordinary civil dispute.
incorporate the federal interest into the special body of federal com-
mon law. Federal common law certainly allows both Canadian and
American courts some influence over the development of the law in
areas touching directly upon important interests of the federal govern-
ment. However, exactly how significant that influence may be in prac-
tice is unclear because of the differences in the nature of federal
common law in each country.

2. Must a Case Deal Exclusively with Federal Law to State a
Federal Question?

The preceding section analyzed whether various types of claims
constitute federal questions for purposes of section 101 of the BNA
and Article III of the United States Constitution. Although that basic
analysis is fundamental to understanding federal question jurisdiction,
it certainly does not exhaust all of the issues that may arise. Many, if
not most, lawsuits involve more than one claim. The liberal joinder
rules in force in both the United States and Canada allow a plaintiff to
join several claims into a single suit. In addition, defendants may add
issues of substantive law to a case by asserting a defense to plaintiff's
allegations or by filing a counterclaim seeking affirmative relief. Fi-
nally, the joinder rules allow additional parties to join or be added to a
lawsuit, further increasing the number of claims that a court may adju-
dicate. Accordingly, a single case may involve a wide variety of issues.

When all of the substantive rights involved in a case are federal,
the federal courts in both Canada and the United States clearly have
constitutional federal question jurisdiction. The more difficult case is
when a lawsuit involves both federal and non-federal substantive
rights. Courts in both countries have struggled with determining
whether these hybrid cases may be litigated as a unitary action in the
federal courts.

The natural starting point, of course, must be the text of the con-
stitutions. However, a literal reading of the relevant constitutional
language proves remarkably deceptive. Article III of the United
States Constitution extends federal jurisdiction to "cases and contro-
versies . . . arising under" federal law.94 Taken literally, this language
appears to exclude hybrid cases, for these cases "arise under" both
federal and non-federal law. By contrast, section 101 allows a federal
court to hear any case that involves the "administration" of federal
law. A case involving both federal and state law claims could certainly

affect the administration of federal law. Therefore, a literal reading of section 101 would extend federal jurisdiction to these hybrid cases.

The actual interpretations of these provisions, however, have been just the opposite. United States courts have interpreted Article III quite broadly. Instead of limiting federal jurisdiction to lawsuits involving solely federal claims, the courts have allowed federal question jurisdiction in hybrid cases in which a federal substantive right forms a core element of the cause of action. Provided the federal core is present, the federal right and all related state law rights form a single “case.” Because this case arises at least in part under federal law, it qualifies for Article III federal question jurisdiction. This form of jurisdiction over non-federal claims is commonly referred to as ancillary jurisdiction. Federal courts have relied upon this ancillary jurisdiction as the basis for adjudicating a wide variety of state law matters. Indeed, the doctrine allows federal courts to adjudicate the state law matters even if they rule against the claimant on the federal claim.

The Canadian opinions suggest a narrower view. In the early years of the Federal Court, several cases used a doctrine akin to ancil-

95. Of course, in order for its decision to affect federal law, the court would have to pass on the federal law issue. This notion underlies the United States Supreme Court's "adequate and independent state ground" doctrine, under which it will not review a state court's ruling on a federal issue if there is an alternate state-law basis supporting the state court's holding. See, e.g., Parker v. North Carolina, 397 U.S. 790 (1970); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

96. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The federal right may either form part of the underlying claim, or a defense to a state-law claim. Although Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) held that a federal question must form an essential element of plaintiff's complaint in order to invoke federal jurisdiction, that holding is generally viewed as limited to the language of the general federal question jurisdiction statute (28 U.S.C. § 1331) instead of Article III. Thus, in Mesa v. California, 489 U.S. 121 (1989), the Supreme Court upheld a statute that allows an action based upon state law to be removed to federal court as long as the defendant interposed a federal defense.


98. The doctrine of ancillary jurisdiction, and the closely-related doctrine of "pendent" jurisdiction, are primarily court-created doctrines that received constitutional imprimatur in Gibbs. Since Gibbs, Congress has codified these concepts in 28 U.S.C. § 1367 under the name "supplemental" jurisdiction. Because this Article focuses on the constitutional limits on federal jurisdiction, it will use the older term "ancillary" jurisdiction to distinguish the constitutional doctrine set forth in Gibbs from the statutory grant of section 1367. The statute sets significant limits on federal jurisdiction over certain types of state-law claims. See, e.g., 28 U.S.C. § 1367(b) (precluding supplemental jurisdiction over certain non-federal claims asserted by plaintiffs).


100. Gibbs, 383 U.S. at 726.
lary jurisdiction to exercise jurisdiction over provincial or common law claims that were “intertwined” with a federal claim.\textsuperscript{101} In 1988, however, the Federal Court of Appeal expressly rejected this intertwining approach in \textit{Varnam v. Canada}.\textsuperscript{102} The \textit{Varnam} court criticized the intertwining approach as “altogether too vague and elastic a standard” to determine federal jurisdiction.\textsuperscript{103} One year later, the Supreme Court in \textit{Roberts v. Canada} declined to rule on a party’s attempted use of the approach, choosing instead to sustain jurisdiction on another basis.\textsuperscript{104} Many have concluded, based upon \textit{Varnam} and \textit{Roberts}, that section 101 does not allow Federal Court jurisdiction over non-federal claims, regardless of how closely they may be related to the federal claim.\textsuperscript{105} The Federal Court today will hear a given claim only if it can “stand alone” as a federal question. It accordingly has no jurisdiction over non-federal claims or defenses.\textsuperscript{106}

However, ancillary jurisdiction may not be completely dead in Canada. First, the Supreme Court has not yet issued a definitive ruling on the issue. More importantly, even the Federal Court of Appeal’s discussion in \textit{Varnam} rejecting the intertwining approach is confined to the jurisdictional statute at issue, section 17(a) of the Federal Court Act.\textsuperscript{107} Section 101 uses different wording and, therefore, need not be interpreted so narrowly.\textsuperscript{108} In addition, the policy justifi-


\textsuperscript{103} [1988] 2 F.C. at 461.

\textsuperscript{104} \textit{Roberts v. Canada}, [1989] 1 S.C.R. 322, 334. \textit{Roberts} was a dispute between two Indian bands concerning which band had a superior right to use a given parcel of land. The Supreme Court held that federal common law governed the dispute and that the case was therefore a clear federal question.

\textsuperscript{105} \textit{Fort Alexander Indian Band v. Canada}, 121 N.R. 237 (Fed. C.A. 1991); \textit{Federal Court Practice}, \textit{supra} note 41, at 16; Hogg, \textit{supra} note 5, at 146-47. Professor Hogg has on another occasion criticized this ruling, arguing that the Canadian courts could make use of the doctrine. Hogg, \textit{supra} note 2, at 22-24.

\textsuperscript{106} A number of federal cases had applied the “stand alone” test prior to \textit{Varnam}. \textit{See}, \textit{e.g.}, \textit{Stephens v. The Queen}, [1982] 26 C.P.C. 1 (C.A.); \textit{Beauvais v. The Queen}, [1982] 1 F.C. 171.

\textsuperscript{107} The Court’s discussion limits its ruling to the terms of section 17(a). \textit{Varnam}, [1988] 2 F.C. at 461.

\textsuperscript{108} The court in \textit{Varnam} concluded that the use of the term “case” in section 17(1) of the Federal Court Act includes only federal claims for relief, not affiliated provincial law claims. \textit{Varnam}, [1988] 2 F.C. at 455. Section 101 of the BNA does not employ the term
cations cited by the Court in interpreting the jurisdictional statute do not apply to section 101. Because section 17(1) conferred exclusive jurisdiction on the Federal Court, the Court was rightly concerned with whether the intertwining approach would cause confusion among litigants as to where they should sue upon these hybrid cases. If federal jurisdiction is not exclusive, a party in doubt may always elect to sue in a provincial superior court. Finally, even after Varnam, the Federal Court has the authority to adjudicate non-federal claims and issues in certain limited contexts. Recognizing federal jurisdiction over a non-federal issue is a de facto acknowledgment of at least a limited form of ancillary jurisdiction.

The widespread use of ancillary jurisdiction makes the scope of the constitutional federal question much greater in the United States than it is in Canada. In addition, for purely practical reasons it means that a federal court is more likely to become involved in lawsuits that involve at least one claim under federal law. Because litigation is costly, parties are much more inclined to sue in a given court if they are assured that that court can hear all of their related claims. If a federal forum is unavailable, parties will tend to litigate their claims—non-federal and federal alike—in state or provincial court. Thus, ancillary jurisdiction may increase the percentage of federal claims and defenses that are actually heard in the United States federal courts.

"case"; rather, it allows federal jurisdiction "for the better administration of the laws of Canada." CAN. CONST. (BNA), § 101.

109. Varnam, [1988] 2 F.C. at 461. Section 17(1) was amended in 1990 to make federal jurisdiction concurrent. See infra note 114.

110. These cases can be divided into two categories. First, the Supreme Court has indicated that the Federal Court may decide issues of provincial or common law that are incidental to a claim arising under federal law. ITO-Int'l Terminal Operators, [1986] 1 S.C.R. at 781-82 (per J. McIntyre). Although this decision predates Varnam, there is nothing to indicate that the Supreme Court would change its views in light of Varnam. See also FEDERAL COURT PRACTICE, supra note 41, at 13-14; Laskin & Sharpe, supra note 2, at 294-95. If the rule still stands, it means that the Federal Court may decide issues governed by non-federal law. Cf. De Sylva v. Ballentine, 351 U.S. 570 (1956) (Congress meant for a federal court to look to state law when interpreting the term "children" in the Copyright Act).

Second, in a few cases the Federal Court has recognized federal jurisdiction even over non-federal claims. The Federal Court has indicated that it has jurisdiction to hear proceedings brought to enforce one of its judgments. Standal Estate v. Swecan Int'l L'td, 34 C.P.R.3d 37, 40 F.T.R. 272 (1990); National Bank of Canada v. Granda, [1984] 2 F.C. 157. Traditionally, a suit brought to enforce a judgment is an action at common law. However, these cases may be fit into the existing jurisdictional scheme if claims brought to enforce a federal judgment comprise an additional class of federal common law.
III. OBSERVATIONS ON THE DIFFERENT SCOPE OF FEDERAL QUESTION JURISDICTION

The above discussion points out a number of significant differences in the scope of constitutional federal question jurisdiction in the United States and Canada. In most respects, the jurisdiction of the United States federal courts is more encompassing. First, the definition of federal law is broader in the United States. In addition, United States federal courts may exercise ancillary jurisdiction over cases presenting both federal and state law claims.

Some of these differences in the scope of jurisdiction are attributable to the different language used in the United States and Canadian constitutions. Unlike the BNA, for example, the United States Constitution gives the federal courts undisputed jurisdiction over constitutional claims. Based upon this clear constitutional allocation of federal judicial authority, Americans have naturally come to view the federal courts as the primary guardians of constitutional rights and liberties. In Canada, by contrast, the absence of federal jurisdiction by default thrusts the provincial courts into this role.

But the variations in wording between section 101 and Article III alone do not explain all of the differences. For example, it is entirely plausible to interpret section 101 to authorize the Federal Court of Canada to take cognizance of a case presenting both federal and provincial law claims. In addition, a literal reading of the constitutions cannot explain why American federal courts have shown greater willingness to infer a cause of action from a federal statute or regulatory scheme. The narrower Canadian view of federal question jurisdiction cannot be explained by the language of the BNA alone, but must be due to certain additional factors.

Given the similarity in the overall court structure and the constitutional language in the two nations, the notable differences in the breadth of federal question jurisdiction give rise to two questions. First, what factors have prompted the Canadian courts to take a more restrictive view of federal question jurisdiction? Second, does the more limited jurisdiction of the Federal Court of Canada result in less protection for any federal interest in the outcome of a given lawsuit? These questions can be addressed in turn.

A. Possible Reasons for the Differences in Jurisdiction

Any study of federalism is inherently imprecise. To the newcomer, the field may appear to be overwhelmingly technical and
fraught with narrow rules and arcane distinctions. Over time, however, it becomes apparent that any real understanding of federalism involves a great deal more than sorting out the morass of rules. The core issues in any study of federalism are fundamentally political. This general principle carries over into the field of federal jurisdiction. Deciding that the federal courts have jurisdiction to decide a particular issue by definition augments the power of the federal judiciary at the expense of both the regional governments and the other branches of the federal government. Many of the technical rules of federal jurisdiction are therefore means to a particular end, namely, an acceptable balance of power among the various components of government in a federal system. A complete understanding of federal jurisdiction, therefore, requires considerable grounding in the nature of the relevant political system.

First, it is necessary to understand the underlying paradigm of federalism envisioned by the constitutional framers. That basic paradigm will set the limits on the powers of each branch of government, but the analysis should not stop there. It is equally important to analyze the structure employed by those framers to achieve that goal. Over time, the original paradigm and the structure prove to be symbiotic. The underlying view of federalism obviously dictates the types of institutions created to run the government. Perhaps less well understood, however, is that the structure of government can over time affect society's perception of the proper roles of federal and regional governments in a federal system. Understanding the differences in the scope of federal question jurisdiction in the Canadian and United States systems therefore requires an analysis of the theoretical and structural differences between the two nations.

It is impossible to catalogue all of the differences between Canadian and United States federalism in a work of this scope. Nevertheless, certain broad themes stand out when reviewing the basic constitutional structure and the leading cases in the Canadian and United States jurisprudence of federal jurisdiction. These factors, working in concert, have caused the Canadian courts to take a significantly narrower view of the proper scope of federal question jurisdiction.

1. The Nature of Canadian Federalism

At the outset, one should be wary about attempting to draw too many comparisons between the Canadian and United States systems. Even though the systems are in many ways functional equivalents, a
number of subtle differences exist that can significantly affect the allocation of powers. Most fundamentally, there is a real difference in the underlying concept of federalism in the two systems—a difference that is bound to affect directly the way in which the courts interpret the authority of the Federal Court.

Canada today certainly exhibits a less centralized form of federalism than the United States, although the original intent of the respective constitutional framers may have been just the opposite. In many respects, the provinces have more authority in the operation of government than do the states. This decentralization is perhaps nowhere better evidenced than in the provincial judiciaries. Parliament has assigned very few matters exclusively to the Federal Court, choosing instead to make most federal jurisdiction concurrent. Indeed, there are constitutional restrictions on Parliament's ability to deprive the provincial courts of jurisdiction over certain types of cases. This limitation reflects the general view of the constitutional framers that the provincial courts would be the primary court system, while the lower federal courts created under section 101 would be specialized courts that should hear only matters of uniquely federal—as opposed to national—concern. This underlying perception may have led the courts to constrict the scope of federal jurisdiction in order to keep from stripping the provincial courts of their perceived role.

2. **Historical Differences**

The history of lower federal courts in the United States and Canada only reinforces this basic paradigm. Lower federal courts in the United States have a rich history. Congress exercised its Article III prerogative to establish lower federal courts during its very first term

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111. In a recent article surveying the historical background of the two systems, Professor Calvin Massey argues that the framers of the Canadian system intended a more centralized federalism than that existing in the United States. Massey, supra note 17.

112. See infra text accompanying notes 124-28.


114. This spirit also underlies a recent amendment to the Federal Court Act that greatly diminished the exclusive jurisdiction of the Federal Court. An Act to Amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act, and other Acts in consequence thereof, 38 Eliz. II, ch. 8 (1990). Prior to that enactment, the Federal Court had exclusive jurisdiction over a wide variety of actions, including most significantly actions against the federal Crown. For an interesting discussion of these amendments, see Bridge, *supra* note 41.
and has maintained and built upon the system since then. More importantly, with the exception of the original thirteen colonies, there were federal territorial courts in each of the states prior to their incorporation into the Union. Thus, the United States legal system has grown accustomed to a parallel court system.

The Canadian Federal Court is by comparison somewhat of an interloper. The Court was not established until 1970 and became operational in 1971, over one hundred years after section 101 of the BNA authorized their creation. During that period, the provincial courts operated largely without competition. Canadians naturally became accustomed to looking to the provincial courts for all judicial relief, even in suits involving federal law. Expecting a new parallel court system to supplant this longstanding tradition in a twenty-year time span would be somewhat unrealistic, especially given the significant statutory limitations that Parliament has placed on the Federal Court’s jurisdiction. Canadians, therefore, still view the provincial courts as the primary court system and tend to perceive the Federal Court as a court to be used only in certain specialized cases.

3. Statutory Differences in Jurisdiction

The statutory limitations imposed on federal jurisdiction by Congress and Parliament also affect the perception of the two court systems. Congress has given the American federal courts virtually all of the Article III federal question jurisdiction. A federal court may hear all cases in which the plaintiff raises a federal question regardless of the amount in controversy or the existence of affiliated state law.

115. The Judiciary Act of 1789, 1 Stat. 73, established a system of district and circuit courts for each of the original states.

116. Of course, Canada has operated a system of lower federal courts since it established the Exchequer in 1875. However, until the establishment of the Federal Court in 1970, these courts had a very limited jurisdiction over certain specialized categories of cases; a jurisdiction that was largely exclusive of that of the provincial courts. Thus, the pre-1970 lower federal courts did not compete with the provincial courts. For a concise history of lower federal courts in Canada, see F. Iacobucci, The Federal Court of Canada: Some Comments on its Origin, Traditions and Evolution, 11 Advoc. Q. 318 (1990).

In addition, the federal government to this day operates a court system for the territories. Although these courts are not created under section 101, see Scott, supra note 91, at 189-90, they do qualify as federal courts. However, because there are no provincial courts in the territories, these territorial courts do not compete with provincial courts.

117. There is one notable exception to this general rule. Congress has never given the Supreme Court jurisdiction to hear appeals from decisions of state courts involving nonfederal claims between parties of diverse citizenship, although Article III would allow it.
The Constitutional Federal Question

claim.\textsuperscript{118} Parliament, on the other hand, has never even come close to granting all of the jurisdiction authorized by section 101. The Canadian Federal Court has no general federal question jurisdiction. Rather, the Federal Court Act confines its jurisdiction to certain specific categories of cases, leaving other federal cases to be litigated in the provincial courts.\textsuperscript{119} Because the Federal Court is unavailable for many, if not most, federal statutory claims, Canadians have never come to view the Federal Court as the primary guardian of federal law.

The two systems also differ significantly in the extent to which federal jurisdiction is exclusive. The United States federal courts have exclusive jurisdiction in a wide variety of matters, including the commonly-litigated areas of admiralty and maritime,\textsuperscript{120} bankruptcy,\textsuperscript{121} patent, plant variety protection, and copyright,\textsuperscript{122} and suits against the United States.\textsuperscript{123} State courts accordingly have little control over these areas of the law. By contrast, the exclusive jurisdiction of the Canadian Federal Court is limited to actions challenging the acts of federal agencies,\textsuperscript{124} citizenship appeals,\textsuperscript{125} and certain narrow issues under the patent, copyright, and trademark laws.\textsuperscript{126} Provincial courts in Canada, therefore, have authority to adjudicate matters that are both governed by federal law and in which there is a strong federal

\begin{footnotes}
\item[118] 28 U.S.C. § 1331. Congress has also enacted a number of jurisdictional statutes covering specific types of cases, e.g., 28 U.S.C. §§ 1334 (bankruptcy), 1338 (patents, trademarks, and copyrights), and 1343 (civil rights cases). Prior to 1980, section 1331 required that the case involve an amount in controversy of at least $10,000.

\item[119] Under section 25 of the Federal Court Act, the Federal Court may hear all cases arising under federal law in which no provincial court could exercise jurisdiction. R.S.C., ch. F-7, § 25 (1985) (Can.). However, due to the broad scope of provincial superior court jurisdiction, section 25 is not likely to apply in many cases.


\item[124] Federal Court Act, R.S.C., ch. F-7, § 18 (1985) (Can.).

\item[125] Id. § 21.

\item[126] Id. § 20. Unlike the United States courts—which have jurisdiction over most patent and copyright infringement actions—the jurisdiction of the Federal Court of Canada is limited to conflicting applications and proceedings brought to cancel registrations.
\end{footnotes}
interest, such as suits against the federal sovereign and maritime cases. This sharing of jurisdiction gives provincial courts significant power in administering federal law and strengthens the perception that federal law is not the exclusive prerogative of the courts created by Parliament.

Other features of the Canadian federal jurisdictional statutes reinforce this perception. As noted above, the Federal Court's rejection of "intertwining" jurisdiction over related provincial or common law claims may prompt many plaintiffs to litigate their cases in provincial courts out of considerations of efficiency. In addition, although the criminal law in Canada is primarily federal, the adjudication of criminal matters is reserved to the provincial courts. This similarly suggests that provincial courts are equal partners with the Federal Court in the interpretation of federal law.

4. The Nature of the Supreme Courts

Although both Canada and the United States have a Supreme Court, the courts differ in one important respect. The Supreme Court of Canada is truly a "supreme" court. It may review all cases from both the provincial courts and the Federal Court regardless of the subject matter of the dispute. This broad appellate jurisdiction allows the Supreme Court of Canada to be equally involved in the development of federal and non-federal law.

Judged by the Canadian standard, the United States Supreme Court is misnamed. The United States Supreme Court is actually only

127. Suits against the federal government were originally within the exclusive jurisdiction of the Federal Court. As noted supra in note 114, the Federal Court Act was amended in 1990 (Bill C-38) to make jurisdiction over such suits concurrent.

Allowing provincial courts to hear claims against the federal sovereign raises a number of interesting questions that are unfortunately beyond the scope of this Article. For example, one author has suggested that litigants will shop between the provincial and Federal courts for a more favorable forum. Bridge, supra note 41, at 117. In addition, as the liability of the federal Crown is governed by federal common law, it will be interesting to see whether disputes will arise between the Federal and provincial courts concerning the substantive rules of this Crown law.

128. Although the provincial courts have jurisdiction over these claims, it is unlikely that litigants will prosecute maritime claims in the provincial courts. One advantage of federal jurisdiction in maritime is the availability of in rem jurisdiction. Federal Court Act, R.S.C., ch. F-7, § 22 (1985) (Can.).

129. The BNA gives Parliament exclusive authority over "[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." CAN. CONST. (BNA), § 91(27).

a supreme federal court. Like the lower federal courts, the Supreme Court may hear only cases falling into the nine categories of Article III. Therefore, the United States Supreme Court is powerless to hear appeals involving state law claims from the state courts, unless a party claims that the state law is somehow inconsistent with the Constitution or a federal statute.\footnote{131}

This difference in the nature of the Supreme Courts may indirectly affect the way in which each Court interprets the constitutional provisions governing federal jurisdiction. Because it is a federal court of limited jurisdiction itself, the United States Supreme Court has an incentive to interpret Article III as broadly as possible. Any decision narrowing the scope of Article III affects not only the lower federal courts, but also serves to curtail the jurisdiction and therefore the influence of the Supreme Court.\footnote{132} The Canadian Supreme Court, on the other hand, has no ascertainable interest in the balance of jurisdictional authority between the provincial and lower federal courts. Because the Supreme Court may hear a matter regardless of whether it fits within the section 101 definition of a federal question,\footnote{133} any limitations that it places on that definition do not affect its authority.

This structural difference may also affect the general perception of the role of the federal judiciary in the two countries. The Supreme Courts of both Canada and the United States are "federal" courts, for both are created by the national legislature pursuant to an explicit constitutional grant. However, the Supreme Court of Canada does not look like the lower federal courts when it hears appeals from the provincial courts. The federal Supreme Court may reverse the provincial courts on any mistake of law, federal or non-federal. Thus, Canadians do not think of the Supreme Court and the other section 101 federal courts in the same context.

\footnote{131} In theory, the Supreme Court could review such cases if the parties were of diverse citizenship. However, none of the jurisdictional statutes enacted by Congress over the years have given the Court jurisdiction over such cases. The Supreme Court today may hear cases from a state's highest court only where (i) the state court has ruled on a right created by the Constitution, a treaty, or federal law, or (ii) the constitutional validity of either state or federal law is drawn into question. 28 U.S.C. § 1257 (1988).

\footnote{132} Indeed, in several of its major decisions dealing with the jurisdiction of the United States District Courts, the Supreme Court has carefully confined its holding to the jurisdictional statute in question, not Article III. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) ("face of the complaint" rule for 28 U.S.C. § 1331); Strawbridge v. Curtiss, 7 U.S. 267 (1806) ("complete diversity" rule for current 28 U.S.C. § 1332).

\footnote{133} The BNA carefully distinguishes between Parliament's authority to create a "General Court of Appeal" and its ability to establish "additional Courts for the better Administration of the Laws of Canada." CAN. CONSt. (BNA), § 101.
The United States Supreme Court, on the other hand, may reverse state courts only on issues of federal or constitutional law. This not only accentuates the Supreme Court's status as a federal court, but also reinforces the notion that the main role of the federal courts is interpreting federal law. Stated differently, the United States approach allows federal courts to disturb state court holdings only when the state court has erroneously interpreted the constitution or federal law. This limitation certainly accentuates the federal nature of federal review.

B. Effects of the Differences in Jurisdiction on the Federal Interest

The above discussion by no means exhausts all of the factors that have caused the Canadian courts to interpret section 101 more narrowly than the United States courts have interpreted Article III. However, it does reflect certain basic themes set forth in the case law and literature. For a wide variety of reasons, Canada has not chosen to make the Federal Court the predominant authority on federal law. Rather, it has spread that responsibility between the Federal Court and the provincial courts, with ultimate authority in the Supreme Court.

But at what price? Congress and Parliament both have a strong interest in seeing their legislation enforced to the fullest extent. In the United States, Congress has generally been able to rely upon the federal judiciary to effectuate Congressional intent. At certain critical junctures in American history such as the period following the Civil War the federal courts played a crucial role in this process. Parliament does not always have a federal forum available to try cases involving federal law. Accordingly, the Canadian approach may fail to protect the federal interest in federal legislation.

That conclusion, however, is built upon the assumption that federal courts are somehow better able to protect the federal interest than regional courts. That assumption may indeed be true in the United States. If the United States were to abolish the lower federal courts, there would in all likelihood be a significant impact on the influence of federal legislation. Although state judges are generally quite competent and impartial, they are subject to several pressures that do not affect federal judges. Foremost among these is the electoral process. State judges are often elected to office, and typically serve limited terms. These localized pressures may make a state judge
less willing to enforce controversial federal legislation. On the other hand, because the federal judiciary is relatively immune from influence from both the electoral process and state governments, it has been able to carry out a number of controversial federal statutes, such as the environmental, antitrust, and civil rights laws.

Canada certainly gives the provincial courts considerably more authority in the enforcement of federal law than the United States gives the states. However, the efficacy of federal law has probably not suffered. Just as there are structural factors explaining the diminished importance of the Federal Court of Canada, there are other factors that minimize the likelihood of any bias against the federal interest.

First, the judges of the provincial superior courts are not elected, but appointed by the national government. They may serve until age 75, unless removed for improper behavior. These rules immediately remove perhaps the most potent local influence on those judges, namely, the regional electoral process. If anything, provincial superior court judges are more likely to reflect the national interest than the parochial interest of their province.

Second, the nature of the Supreme Court of Canada, while perhaps diminishing the authority of the Federal Court, also serves to protect the national interest. Because it is a general court of appeal, the Supreme Court may review all cases in the provincial courts. Unlike the United States Supreme Court, the Supreme Court of Canada may review any provincial court interpretation of local or common law that impairs the federal interest in any matter. Also, because the Supreme Court is relatively immune from local pressures, it has every incentive to preserve that federal interest.

Overall, then, the Canadian and American judicial systems would appear to protect the federal interest in federal law to approximately the same degree. The United States has relied primarily upon the federal courts for this purpose. Yet, this certainly is not the only way to protect the federal interest. Canada has been able to protect the federal interest without expanding the authority of its Federal Court. Certain subtle structural differences between the systems—primarily the greater independence of the provincial and Supreme courts from

134. As noted supra in note 7, this trend has probably reversed over the last few years as Republican Presidents have stacked the federal judiciary with conservative judges. Over most of this century, however, the federal judiciary has proven more willing to enforce national programs.
135. CAN. CONST. (BNA), § 96.
136. Id. § 99.
local influence—have enabled Parliament to use the existing provincial judiciaries to enforce federal statutes.

The Federal Court of Canada serves a more limited function in its system. Because Parliament has other tools at its disposal to protect the federal interest, it operates the Federal Court primarily to ensure some degree of uniformity in the interpretation and application of federal law. Although Parliament has significantly undermined this role in recent years, the Federal Court is still the main judicial tribunal in certain specialized areas of the law such as maritime, citizenship, and the review of federal agency action. This more limited role suggests that the success of the Federal Court of Canada should be measured not by the extent to which it protects Parliament's interests, but to the degree that its decisions foster uniformity in these uniquely federal areas of Canadian law.

IV. CONCLUSION

The British Columbia proposal to abolish the Federal Court of Canada may appear strange to observers accustomed to the United States paradigm of federal and state courts. Viewed from the Canadian perspective, however, the proposal is much less controversial. Unlike the lower federal courts in the United States, the Federal Court of Canada does not play an indispensable role in the administration of Canadian federalism. Instead, Canadians have long been accustomed to resorting to the provincial courts to enforce federal statutes. Abolishing the Federal Court may even serve to remove a needless redundancy in the Canadian system.

Furthermore, removing that redundancy would not impair the authority of the federal government. The Canadian federal government has a significantly greater ability to control the actions of provincial courts than the United States federal government has over the state courts. Although operating an independent federal court system may provide some intangible boost to federal authority, Parliament certainly has other ways to assert and protect its position in the scheme of Canadian federalism. It is, therefore, fitting that the final decision

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137. Professor John Evans suggests that this is the main function of the Federal Court. John Evans, Comment: Federal Jurisdiction—A Lamentable Situation, 59 CAN. B. REV. 124, 142 n.55 (1981). This also helps to explain certain structural characteristics of the Federal Court, for example, why the Court is a unitary court with trial and appellate divisions instead of a system of multiple regional courts as in the United States.

concerning whether to keep the Federal Court will eventually be made in the complex Canadian political system, for the factors that should guide the decision are essentially political, not legal.