1990

The Locus of Sovereignty Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States

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THE LOCUS OF SOVEREIGNTY: JUDICIAL REVIEW, LEGISLATIVE SUPREMACY, AND FEDERALISM IN THE CONSTITUTIONAL TRADITIONS OF CANADA AND THE UNITED STATES

CALVIN R. MASSEY*

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INTRODUCTION

Every federal system of government must grapple with the defining element of federalism—the apportionment of authority between the central government and the constituent elements that make up the federal arrangement. Every representative democracy committed to written constitutional limits upon legislative power must resolve the tension between enforcement of those limits through the relatively unrepresentative institution of judicial review and reliance upon the self-restraint of legislators. The performance of these central tasks in the federal constitutional systems of Canada and the United States is a study in irony. The Canadian founders intended to create a strong central government with plenary authority over all matters not expressly delegated to the provinces.¹ By contrast, the American founders sought to create a central government supreme within certain delegated spheres, with the states left in possession of plenary authority over all matters not assigned to the

1. See *infra* notes 44-48 & 141-51 and accompanying text.

central government.² Both countries have seen their original visions of federalism reversed. In the reversal, Canada implicitly adopted major aspects of the rejected American theory of federal union developed primarily by antebellum southerners, particularly John C. Calhoun.³ Judicial review of the constitutional legitimacy of legislative action has a long history in the United States, but judicial review with respect to a broad range of explicitly guaranteed constitutionally-based individual rights is less than a decade old in Canada. Although Americans debated but generally accepted the legitimacy of judicial review, Canadians embraced the concept far more gingerly.

Canadian visions of federalism and judicial review are vividly reflected in the "notwithstanding clause" of Canada's 1982 Constitution,⁴ which permits either Parliament or a provincial legislature to declare that its legislation supersedes the fundamental legal rights and freedoms guaranteed under the Constitution's Charter of Rights and Freedoms.⁵

2. It is, of course, always dangerous to generalize about original intentions. As Professor Powell has pointed out, one cannot assume that a consensus existed among the founders on any particular issue. Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 684 (1987). Nor is it possible to divine one single original meaning, for history often "justifies plausible but opposing interpretations." *Id.* at 688. Given the sharp differences of opinion that quickly surfaced about the appropriate limits of federal power, it is evident that any consensus which existed evaporated like morning dew. Jefferson's and Hamilton's opinions provided to President Washington concerning the constitutionality of the first Bank of the United States furnish a clear illustration of these differences. See 19 T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 275-282 (J. Boyd ed. 1974); 3 A. HAMILTON, *THE WORKS OF ALEXANDER HAMILTON* 179 (H. Lodge ed. 1885). Moreover, there was hardly consensus on ratification of the Constitution. The votes in the important state ratifying conventions were close, and the delegates were selected in a fashion that biased the conventions toward ratification. See Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 307-09 (1987) [hereinafter Massey, *Federalism*]. Anti-ratification pressure spawned the first ten amendments, numbers nine and ten of which were attempts to limit the central government's power to invade unspecified individual liberties and to reserve to the states all residual sovereignty not constitutionally delegated to the central government. See Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-[] KENT L. REV. 987 (1988) [hereinafter Massey, *Antifederalism*]. Given the divisions of opinion, about all we can be sure of is that some measure of agreement was mustered as to the text of the constitution. Even that agreement, however, is tempered by the federalist character of the 1787 text and the anti-federalist flavor of the 1791 amendments.

3. See *infra* notes 93-130 and accompanying text.

4. Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), ch. 11 [hereinafter CONSTITUTION ACT, 1982]. By this Act of the United Kingdom Parliament, Canada obtained both a new Constitution and full legal authority to amend its Constitution without further approval of the U.K. parliament.

5. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, pt. 1 of the CONSTITUTION ACT, 1982 [hereinafter CANADIAN CHARTER]. Section 33 of the Canadian Charter is the "notwithstanding clause." Action under the notwithstanding clause, whether by provincial legislatures or Parliament, is limited in its effectiveness for five years, but a provincial legislature or Parliament may reenact a declaration under the notwithstanding clause for an unlimited number of successive five year terms. Thus, if a federal or provincial majority feel strongly enough about a matter, guaranteed human liberties may be eliminated in perpetuity.

The fundamental rights enumerated in the Charter include "freedom of conscience and religion,"⁶ free expression,⁷ peaceful assembly,⁸ free association,⁹ due process,¹⁰ freedom from unreasonable searches and seizures,¹¹ the right to counsel,¹² the right against self-incrimination,¹³ the presumption of innocence,¹⁴ the right to reasonable bail,¹⁵ the protection against cruel and unusual punishment,¹⁶ and the right against double jeopardy.¹⁷ Given the importance of these substantive rights, an American is apt to regard this legislative power to override them with a mixture of fascination and horror. It is thus surprising that American constitutional law contains a number of rough analogues to the Canadian legislative override contained in the notwithstanding clause. It might be argued that the legislative override, whether explicit (as in Canada) or implicit (as in the United States) is merely a straightforward resurrection of Calhoun's doctrine of the concurrent majority.¹⁸ Yet this explanation would be much too simplistic. The origins and functions of the Canadian notwithstanding clause are considerably more complex; the clause represents a response to an established constitutional tradition of parliamentary supremacy, a more recent tradition of provincial autonomy, and the felt political necessities surrounding patriation of the Canadian Constitution.¹⁹

6. CANADIAN CHARTER § 2(a).

7. *Id.* § 2(b).

8. *Id.* § 2(c).

9. *Id.* § 2(d).

10. *Id.* § 7. Section 7 states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

11. *Id.* § 8.

12. *Id.* § 10(b).

13. *Id.* § 11(c).

14. *Id.* § 11(d).

15. *Id.* § 11(e).

16. *Id.* § 12.

17. *Id.* § 11(h).

18. Calhoun employed the term "concurrent majority" to describe two conditions, both of which must be met in order for the actions of the central government in a federal system to be valid: the assent of a majority of the representatives of the entire people composing the federal society and the assent of each constituent unit of the federal system. A noneconsenting unit would not be bound. See *infra* text accompanying notes 107-30.

19. See, e.g., M. MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* 9-34 (1989) (contending that the Charter was an expedient measure to counter authoritarian threats by placing control over individual rights in the hands of the judiciary rather than in an elected Parliament); see also Tassé, *Application of the Canadian Charter of Rights and Freedoms*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 102-03 (G. Beaudoin & E. Ratushny 2d ed. 1989). For additional discussion, see *infra* text accompanying notes 199-205 (patriation of Constitution in Canada was a response to traditions of parliamentary supremacy, provincial autonomy, and constitutionally and judicially secured individual liberties).

Explanation of the American analogues to the Canadian legislative override power also is diffuse. It is commonplace to observe that while the nationalistic imprint of Chief Justice John Marshall altered the course of American constitutional law toward a strong central government, contemporaneous theories of coequal or supreme state sovereignty bloomed in the American South. Conventional wisdom avers that the legacy they left soured amid the bloody social upheaval of the Civil War²⁰ and resulted in the permanent establishment of the American central government as the supreme locus of American sovereignty. But as is so often the case, the conventional wisdom imperfectly describes contemporary reality. Despite American centralization of legislative authority in Congress and constitutional authority in the United States Supreme Court, two contrapuntal themes remain in American constitutional law. One theme emphasizes the role of the states as independent sovereigns within the federal union; the other emphasizes the importance of relying upon democratic institutions to decide legal policy issues. The American version responds to both aspects of this counterpoint. Its existence is an illustration of the organic character of both federalism and constitutional judicial review. To make the point more concrete, I will describe briefly the American analogues to the Canadian legislative override.

In a number of areas, American constitutional law permits the states to prescribe the limits of federal constitutional rights. The result is a functional cousin of the provincial legislative override aspect of Canada's notwithstanding clause. The effect of this state override is visible in at least five areas of American law. In the privacy rights arena, *Webster v. Reproductive Health Services*²¹ provides such an example. Although *Webster* reaffirmed both the existence of a privacy right in the United States Constitution²² and a woman's right to choose to terminate pregnancy as part of that right,²³ the impact of the plurality's decision is likely to be that the federal constitutional right to choose abortion will derive its content from the states, and thus assume a different shape in each state.²⁴ A second example derives from eighth amendment jurispru-

20. Even the pervasive use of the term "Civil War" carries an endorsement of the idea that the locus of sovereignty is vested in the national government (or, alternatively, the people of the whole nation who are represented as one in the national government). The outmoded term "War Between the States" suggests as strongly that the conflict was between independent sovereigns. I prefer to use the unconventional "War for Southern Independence," since it is descriptive without carrying a commitment to either sovereignty viewpoint. Nevertheless, to avoid confusion I have bowed to convention and employed the familiar term "Civil War" throughout this Article.

21. 109 S. Ct. 3040 (1989).

22. See *id.* at 3057-58.

23. See *id.* at 3058.

24. States may *expand* the limits of federal constitutional rights by construing an identically-worded right under the state's constitution to be broader in scope than its federal counterpart, but

dence. Even though no state may impose "cruel and unusual punishments,"²⁵ the definition of practices that come within the prohibition increasingly has become a decision for the states.²⁶ The free speech guarantee provides a third example. Since *Miller v. California*,²⁷ separation of constitutionally unprotected obscenity from constitutionally protected speech has turned upon "contemporary community standards."²⁸ Because such expression "is one of those areas in which there is great diversity among the States. . . . the Supreme Court has displayed great reluctance to expand Federal constitutional protections, holding instead that this is a matter essentially governed by community standards."²⁹ Local option thus determines the boundaries of the federal constitutional speech right.³⁰ Due process jurisprudence is the source of a fourth example. In defining "property" and some aspects of "liberty" for purposes of determining the scope of the procedural protections afforded by the due

the process may not work in reverse. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state is free "to exercise its . . . sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"). In any case, when such expansion occurs, the rights involved are not federal but state constitutional rights. I have argued in an earlier essay that the ninth amendment ought to make effective, as a matter of federal constitutional law, liberties rooted in state constitutions. See Massey, *Antifederalism*, *supra* note 2; see also Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229. Both of these circumstances are radically different from the position apparently taken by the *Webster* Court that, although a woman's right to choose to terminate her pregnancy is part of the federal constitutional right to privacy, states have wide latitude in determining the actual circumstances under which a woman may make this choice. See *Webster*, 109 S. Ct. at 3058 (O'Connor, J., concurring). It is this apparent virtual state veto on the exercise of federal constitutional rights that makes the *Webster* decision so important. For an extended discussion, see *infra* Part III(A)(1).

25. U.S. CONST. amend. VIII. This prohibition has been extended to the states via the incorporation doctrine, derived from judicial interpretation of the fourteenth amendment's due process clause. See *Robinson v. California*, 370 U.S. 660 (1962).

26. Compare *Furman v. Georgia*, 408 U.S. 238 (1972) (imposition of the death penalty to state murder and rape statutes was "cruel and unusual" and thus violates the eighth and fourteenth amendments) and *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia death penalty statute; capital punishment not *per se* "cruel and unusual") with *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989) (states can impose the death penalty upon minors) and *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (allowing state legislatures to decide whether to impose the death penalty upon mentally retarded persons). See *infra* Part III(A)(3).

27. 413 U.S. 15 (1973).

28. *Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

29. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986). The degree of local control is underscored by the fact that states and localities restricting obscenity are not required as a matter of federal constitutional law to establish obscenity of the matter in issue beyond a reasonable doubt. See *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981) (*per curiam*).

30. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 912-13 (2d ed. 1988). Tribe describes this development in the following fashion: "[E]ach jury, in each town and city, may be a law unto itself, applying what might represent not any widely-shared sense of value but merely an average of local extremes." This judgment is appropriate so long as it is that of a "reasonable person." *Pope v. Illinois*, 481 U.S. 497 (1987). See *infra* Part III(A)(2).

process clauses, the Supreme Court concluded that "the sufficiency of the claim of entitlement must be decided by reference to state law."³¹ Moreover, state legislative judgments about what process is due, although not dispositive, are entitled to great deference.³² The first amendment's guarantee of the free exercise of religion furnishes a fifth example. Until the Court's decision in *Employment Division v. Smith*,³³ state laws that imposed a substantial burden on religious practices required a showing of a compelling governmental interest. But the *Smith* decision permits states freely to impinge on religious practices, so long as the impingement is generally applicable and facially neutral with respect to religious practices. Most generally, the various formulae that permit states to assert some interest which, if sufficiently weighty, will trump the asserted constitutional right, operate to vest in the states enormous latitude to invent justifications for limiting federal constitutional rights.³⁴

Limitation upon federal constitutional rights does not merely rest within the domain of the states; Congress at least theoretically possesses powerful, if blunt, weaponry to use ordinary legislation to alter the effective content of federal constitutional rights. Three examples, albeit of differing operation, are the congressional power to regulate the jurisdiction of federal courts, the doctrine of congressional consent to otherwise invalid state regulation of interstate commerce, and the consignment to Congress of the power to define many of the interests that merit procedural due process protection.³⁵

The first example of a congressional tool that approximates the power of the Canadian notwithstanding clause is the power to regulate federal court jurisdiction. If one reads the exceptions and regulations clause of article III³⁶ as conferring plenary authority upon Congress to limit the appellate jurisdiction of the Supreme Court and all jurisdiction of the inferior federal courts, then Congress could override constitutional decisions of the Supreme Court by enacting a statute that contained both

31. *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

32. See *infra* text accompanying notes 279-89.

33. 110 S. Ct. 1595 (1990).

34. It is true, of course, that the weighing process occurs in the courts. Yet, if legislative declarations of interest are subjected only to minimum, or "rational relationship," scrutiny, something akin to the importation of a notwithstanding clause has occurred. To the extent that the scrutiny is more demanding, the analogue is probably closer to the "justification" limitation upon the rights preserved by the Canadian Charter of Rights and Freedoms: "The [Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CANADIAN CHARTER § 1. See also *R. v. Oakes* [1986] 1 S.C.R. 103 (establishing the test for determining justification).

35. See *infra* Part III(B).

36. U.S. CONST. art. III, § 2, cl. 2. ("In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make."). See *infra* Part III(B)(1).

a contrary substantive rule and a provision that stripped the federal courts of jurisdiction over the matter.³⁷ This power is not strictly analogous to parliamentary exercise of the notwithstanding clause, however, because even though such an action may be initiated by Congress, the result would be to leave the constitutional issue for resolution in the state courts. Unlike Parliament, Congress could not mandate a uniform result contrary to the Supreme Court's interpretation of the Constitution; it could only leave the issue for state by state resolution. This American version of the notwithstanding clause is thus a hybrid of both the federal and provincial exercise of the notwithstanding clause with the added wrinkle that state control of federal constitutional interpretation would be vested in state courts rather than state legislatures.

A second form of congressional override is housed in the commerce clause.³⁸ For many years it was a staple of American constitutional law that the commerce clause conferred some zone of exclusive power upon Congress. Congress could "adopt" existing state law and make it federal, but it could not "delegate" its exclusive legislative authority to the states.³⁹ Although this doctrinal asymmetry has been dissolved by treat-

37. Strong arguments can be made that the exceptions and regulations clause does not vest Congress with authority to strip *all* article III courts of jurisdiction over issues arising under the Constitution. See *infra* notes 317-28 and accompanying text (views of Professor Amar). Moreover, even if the clause confers plenary authority upon Congress to limit the jurisdiction of article III courts, the Constitution may impose other limits, independent of the exceptions and regulations clause, upon congressional power to limit jurisdiction. See, e.g., M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 41-52 (2d ed. 1990) (discussing the limitations which the separation of powers and the due process clause place on Congress' power to regulate jurisdiction); Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 263-66 (1973) (suggesting that the Bill of Rights and other parts of the Constitution function as a set of affirmative restrictions on the exceptions power of Congress).

38. U.S. CONST. art. I, § 8, cl. 2 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). See *infra* Part III(B)(2).

39. The distinction between "adoption" and "delegation" originated with Chief Justice John Marshall's dicta to this effect in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207-09 (1824). Marshall's framework was solidly entrenched by the time the Court issued its opinion in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), but it has been abandoned in favor of the view that Congress has plenary power to regulate commerce, including the power to validate state laws that would otherwise be struck down by the Court as impermissible burdens on interstate commerce. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (upholding Congress' authorization of state regulation and taxation of insurance). See generally Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983) (arguing in favor of Congress' ability to approve of state laws otherwise unconstitutional when Congress is not prohibited from adopting the same policy).

The adoption/delegation doctrine was most dramatically evident in the states pre-prohibition attempts to impose temperance. For example, in *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court struck down Iowa's attempt to prohibit the sale of beer imported from out-of-state and offered for sale in its original package. Congress reacted by passage of the Wilson Act (Original Packages Act), ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (1988)), which explicitly stated

ing congressional power over commerce as plenary, and thus encompassing the power to confer regulatory authority upon the states,⁴⁰ the practical result remains the same. The Court may interpret the "dormant" aspect of the commerce clause to foreclose certain state regulation, but Congress may override that judgment and vest such power in the state legislatures. Moreover, those congressional judgments may effectively insulate state regulation from certain types of challenges under the fourteenth amendment's equal protection clause.⁴¹ Congress is free—under its power to confer regulatory authority over commerce upon the states—to eviscerate federal constitutional rights of equality, at least insofar as those rights are asserted in a wholly economic context.⁴² Congressional judgments in the realm of the commerce clause trump those of the Court. The only item in dispute may be the degree to which the congressional judgment is entitled to displace other, independent, sources of constitutional entitlement.

that liquor imported into a state "shall upon arrival . . . be subject to [local laws] . . . and shall not be exempt therefrom by reason of being . . . in original packages." *Id.* The Court subsequently upheld this congressional reversal of its *Leisy* decision, dodging the thorny problem of congressional power to countermand the constitutional grant of exclusive federal regulatory power by concluding that Congress had done no more than "divest" imported liquor of its interstate character. *See In re Rahrer*, 140 U.S. 545, 562, 564 (1891).

40. *See, e.g., Prudential*, 328 U.S. at 564 (Congress could "simply remove[] an impediment to the enforcement of the state laws"); Cohen, *supra* note 39 at 406 (Congress can "consent" to unconstitutional state laws to give them effect).

41. *Compare* *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (invalidating under the equal protection clause an Alabama tax that discriminated against out-of-state insurers despite delegation to the states of plenary regulatory authority over insurance by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988)) with *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985) (upholding state bank acquisition statutes, MASS. GEN. L. ch. 167A, § 2 (1987) and CONN. GEN. STAT. ANN. §§ 36-552 to 36-554 (West 1987), which discriminated against banks outside the six-state New England region). Professor Tribe, however, dismisses *Metropolitan Life* "as an aberration." L. TRIBE, *supra* note 30, § 6-33, at 526 n.34. For professor Cohen's criticism of *Metropolitan Life*, see Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Ins. Co. v. Ward*, 38 STAN. L. REV. 1 (1985). Cohen's criticism flows naturally from his earlier stated belief that "Congress can consent to state laws where constitutional restrictions bind the states but not Congress." Cohen, *supra* note 39, at 406. Thus, because

Congress has the power, under the commerce clause, to favor local economic interests at the expense of a national interest in free trade . . . [it has] the power to consent to state laws that favor in-state companies over their out-of-state competitors . . . [without regard to] whether the constitutional objection to the state law would have been made under the commerce clause or under the "rational relation to legitimate state interest" formula of the equal protection clause.

Id. at 412 (footnote omitted).

42. The decision in *Northeast Bancorp* was founded upon the conclusion that the state regulations at issue "meet the traditional rational basis for judging equal protection claims." 472 U.S. at 178. Justice O'Connor's concurrence noted that the decision was "consistent with the longstanding doctrine that the Equal Protection Clause permits economic regulation that distinguishes between groups that are legitimately different—as local institutions so often are—in ways relevant to the proper goals of the State." *Id.* at 180 (O'Connor, J., concurring).

Congress, no less than the states, has the power to define statutorily the property (and some liberty) interests that deserve due process protection. This provides a third example of the congressional version of the override. This phenomenon of defining the interests to which due process attaches is best observed when the interest asserted is rooted in a continuation of some governmental largesse, but has begun to invade other predicates for the invocation of due process.⁴³ In those areas in which the phenomenon applies, the Court's deference to congressional judgment is hardly different from recognizing a congressional power to ignore constitutional limits.

By contrast, the Canadian legislative override power is expressly contained in the 1982 Charter. At least some of its roots, however, can be traced both to the original structure of Canadian federalism and its subsequent judicial interpretation. When Canadians pondered Confederation in the 1860s, they were keenly aware of the price Americans were then paying for their political differences over the supremacy of state or national government. The principal luminary of the Confederation movement, Sir John A. Macdonald, was unequivocal in his intent to centralize authority in the newly established central government.⁴⁴ When

43. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976) (suggesting that some liberty interests may be susceptible to dispositive legislative definition). Moreover, cases such as *Ingraham v. Wright*, 430 U.S. 651 (1977), which seem to treat post-deprivation state tort remedies as equivalent to pre-deprivation hearings for purposes of conformity to the due process clause, permit the legislative choice of procedure—pre-deprivation hearing or post-deprivation suit for damages—to control. See *infra* Part III(B)(3).

44. During the Quebec Conference of October 1864, which set the basis for Canadian union, Macdonald declared:

The various States of the adjoining Republic had always acted as separate sovereignties. [They] . . . had no sympathies in common. They were thirteen individual sovereignties, quite distinct the one from the other. The primary error at the formation of their constitution was that each state reserved to itself all sovereign rights, save the small portion delegated. We must reverse this process by strengthening the General Government and conferring on the Provincial bodies only such powers as may be required for local purposes. . . . Thus we shall have a strong and lasting government under which we can work out constitutional liberty as opposed to democracy, and be able to protect the minority by having a powerful central government.

CONFEDERATION: THE BRITISH NORTH AMERICA ACT 54-55 (J. Pope ed. 1895); see F. SCOTT, *Political Nationalism and Confederation*, in *ESSAYS ON THE CONSTITUTION* 18 (1977) [hereinafter F. SCOTT, *ESSAYS*].

When Chandler of New Brunswick urged that the central government be confined to enumerated powers, vesting residuary powers in the provinces, Macdonald again was the principal champion of a vigorous central government:

I think the whole affair would fail, and the system be a failure if we adopted Mr Chandler's views. It would be adopting the worst features of the United States. We should concentrate the power in the Federal Government, and not adopt the decentralization of the United States. Mr Chandler would give sovereign power to the Local Legislatures, just where the United States failed

Id. at 19.

When the Quebec Resolutions were debated in the colonial Canadian parliament, Macdonald was even more emphatic:

Confederation became reality with the passage of the Constitution Act of 1867,⁴⁵ Macdonald certainly thought his vision of a strong central government was in place. Section 92 of the Act enumerated sixteen heads of provincial power (including a general residual power confined to local matters); and section 91 vested in the central government twenty-nine original heads of legislative power⁴⁶ and all remaining residual powers of government.⁴⁷ Just as Macdonald intended, the 1867 Act sought to reverse the pattern established by the American allocation of residual authority to the states through the tenth amendment. But Macdonald's vision suffered a fate similar to that of the American Antifederalists: Judicial decision undermined and then reversed Macdonald's notion of the proper balance of federal and provincial power. Although John Marshall enabled the American national government, premised upon enumerated and limited powers, to assume larger authority, the judges of the Judicial

Ever since the [American] union was formed the difficulty of what is called 'State Rights' has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their Constitution that each state was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the Constitution were conferred upon the General Government and Congress. Here we have adopted a different system. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States.

Id. at 19-20 (quoting PARLIAMENTARY DEBATES ON THE SUBJECT OF CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES 33 (Quebec 1865)).

45. 30 & 31 Vict., ch. 3, reprinted in R.S.C. 1985, app. II [hereinafter CONSTITUTION ACT, 1867] (formerly British North American Act). With the passage of the Canada Act in 1982, the British North America Act of 1867 was simply renamed the "Constitution Act, 1867." See CONSTITUTION ACT, 1982, § 60.

46. With subsequent amendments, these enumerated heads of federal legislative power now number 32. See An Act Respecting the Establishment of Provinces in the Dominion of Canada (U.K.), 34 & 35 Vict., ch. 28, §§ 2-4.

47. Based upon the 29th Quebec Resolution, section 91 empowered Parliament "to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." (emphasis deleted). CONSTITUTION ACT, 1867, § 91; see also *Quebec Conference Resolutions*, reprinted in SENATE OF CANADA, REPORT ON B.N.A. ACT 1867, at 49, 51-52 (1937) [hereinafter *Resolutions*]. Section 92, modeled after the 43rd Quebec Resolution, see *Resolutions*, *supra*, at 54, contained a list of powers exclusively assigned to the provincial legislatures, ending with "[g]enerally all Matters of a merely local or private Nature in the Province." CONSTITUTION ACT, 1867, § 92. Thus, both the provinces and the national government possessed residual powers under the Constitution Act, 1867. Significantly, however, the provincial residuary power was confined to matters of purely local concern, while the national residuary power included all matters of "general" or national implication. These sections gave Parliament jurisdiction over all general matters (including but not limited to those specifically enumerated in section 91) and the provincial legislatures jurisdiction over all local matters (including but not limited to those enumerated in section 92). Unfortunately for committed centralists, the division of matters between local and general proved not to be so neat as the authors of the Quebec Resolutions may have expected.

Committee of the Privy Council shrank the authority of the Canadian central government.⁴⁸

This judicial gloss on the texts of the American and Canadian constitutions produced an ironic result. Americans of 1789 likely would have regarded their respective states as the guarantors of individual liberty,⁴⁹ but modern Americans are likely to greet with displeasure and disbelief the idea that any state could define the content of the Bill of Rights. Canadians of 1867 would have had some uncertainty as to whether the new Confederation government or their provincial government was the principal guarantor of individual liberty.⁵⁰ This uncertainty persists for modern Canadians. Although the Charter provides a powerful federal guarantee of rights and freedoms, contemporary Canadians are confronted with the reality that provinces possess and actually exercise the power to override Charter guarantees.⁵¹ Another ironic twist is that, as the United States enters its third century of constitutional judicial review, the legitimacy of the enterprise is under considerable attack,⁵² resulting in the development of doctrines analogous to the Canadian notwithstanding clause which promise to deliver significant chunks of the substance of the Constitution into the hands of state legislatures and Congress.

This story of how constitutional practice has diverged from text also serves to buttress some salient, but often forgotten, features of federalism and judicial review. Champions of national power or regional autonomy are often, perhaps almost always, driven by expedient political aspirations.⁵³ Text can often be manipulated to serve instrumental ends. Thus,

48. See *infra* notes 157-91 and accompanying text. For an argument that the Judicial Committee of the Privy Counsel's decisions were based on sound jurisprudence, see G.P. BROWNE, *THE JUDICIAL COMMITTEE AND THE BRITISH NORTH AMERICA ACT* 153 (1967).

49. For example, Oliver Ellsworth declared at the Federal Convention of 1787 that he trusted "for the preservation of his rights to the State Govts. From these alone he could derive the greatest happiness he expects in this life." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 492 (M. Farrand ed. 1911) [hereinafter *RECORDS*]. For similar reasons, Roger Sherman recommended against inclusion of a Bill of Rights in the embryonic federal constitution: "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." 2 *id.* at 588.

50. The conclusion cannot be offered with any certainty because the Constitution Act, 1867, gave the provinces exclusive authority over "Property and Civil Rights in the Province." *CONSTITUTION ACT, 1867*, § 92(13).

51. See, e.g., *Ford v. Quebec*, [1988] 2 S.C.R. 712, 714 (upholding Quebec's omnibus use of the override power to insulate all Quebec legislation from the Charter). For additional discussion, see *infra* text accompanying notes 206-22.

52. See, e.g., R. BORK, *THE TEMPTING OF AMERICA* 15-132 (1990) (arguing that the judicial process has become over-politicized).

53. See, e.g., Cairns, *The Judicial Committee and Its Critics*, 4 *CAN. J. POL. SCI.* 301, 315 (1971) ("A necessary consequence of a federal system is that each organized interest will seek to transform the most sympathetic level of government into the main decisionmaker in matters which concern it.").

and more significantly, no necessary linkage exists between the structural arrangements of federalism and any given set of policy biases or outcomes. This latter observation is frequently ignored or forgotten, particularly in the United States where, for the past half-century, it has been considered almost axiomatic that the national government is the best equipped, most sagacious, and preferred organ of government for the solution of political issues.

The pressures of expediency are not confined to the proper allocation of legislative authority between the central government and the constituent members of a federal union. Federal systems that employ judicial review offer even more complicated options for the resolution of policy issues that are at once political and legal. Both legislative and judicial power must be allocated between the central government and the constituent members of the federal system. The matrix of competing claimants for decisional authority thus includes the legislative and judicial arms of both the central government and its constituent member states. Given the expedient fashion in which these nodes of decisional authority are sought to be manipulated, it is not surprising that the actual disposition of authority and divergence of practice from text has, over time, been chaotic. The patterns presented today are not immutable, and it is my purpose to offer some modest normative observations concerning the future of federalism and judicial review within both Canada and the United States.

In Parts I and II, I demonstrate that the current Canadian solution to the federal dilemma, embodied by the notwithstanding clause, is highly reminiscent of the political theory of John C. Calhoun, perhaps the foremost exponent of the state-sovereignty theories advanced by antebellum American southerners. I also speculate whether Calhoun's principles of federal union have found an unintended but lasting home in Canada. In Part III, I establish the existence of American analogues to the notwithstanding clause. Part IV establishes certain principles of federal union that foster the ideals of decentralization⁵⁴ and of maximum individual liberty. I briefly assess the performance of the Canadian and American federal systems with reference to these principles and offer

54. I do not intend to make the case for decentralization. That is a lengthy exercise fraught with controversy. Rather, I will assume that some decentralization is a worthy goal, primarily because it offers the prospect of local control of local issues. Of course, the optimal extent of decentralization is highly debatable, and one community's sense of a local issue may very well be regarded as national by other communities. For example, limitations upon the burning of high-sulphur coal may be seen as a national issue by those concerned with acid rain or global warming, but might well be regarded as a local issue by West Virginia coal miners whose work opportunities would be reduced by such regulation.

some normative suggestions for the future of both federalism and judicial review.

I. CALHOUN'S CONCURRENT MAJORITY AND THE EXPEDIENCY OF SOVEREIGNTY DOCTRINE IN ANTEBELLUM AMERICA

The political theory of John C. Calhoun represents the fullest expression of the decentralized, state-focused view of the American federal union. Although this attitude often is associated with antebellum Southern agrarians,⁵⁵ it was by no means unique to the South. It is an established American political pastime to manipulate state sovereignty principles in order to achieve immediate political objectives. What makes Calhoun remarkable is that his theory was perhaps the best reasoned and most thoughtful of the genre, albeit no less instrumental. A brief look at the development of American state sovereignty principles provides contextual understanding of Calhoun's political philosophy and a basis for comparison with the development of Canadian principles of provincial autonomy.

A. *The Alien and Sedition Acts*

The Alien and Sedition Acts,⁵⁶ and the American reaction to them, cannot be fully understood without an appreciation of the international strife that spawned them. The French Revolution of 1789 quickly transformed a purely domestic upheaval into an international conflict as the new French Republic sought to export its revolutionary notions to its neighbors. By 1793 this policy produced war with Great Britain and a

55. See *infra* note 108.

56. There were three Alien Acts. The Alien Enemies Act of July 6, 1798, ch. 66, 1 Stat. 577, provided for the detention of enemy aliens during war. The Naturalization Act, ch. 54, 1 Stat. 566 (1798), provided that aspiring citizens must have resided in the United States for 14 years. The Alien Enemies Act of July 25, 1798, ch. 58, 1 Stat. 570, gave the President the power to deport any aliens he considered inimical to the welfare of the country.

The Sedition Act, ch. 74, 1 Stat. 596 (1798), attempted to revive the English law of seditious libel by criminalizing the writing, speaking, printing, or dissemination of any "false, scandalous, or malicious" matter with the intent to bring the government of the United States into "contempt or disrepute." That the Sedition Act was itself a crass political maneuver may be seen by its expiration date: March 3, 1801, the date of the next presidential inauguration. The Act would last long enough to stifle Republican criticism of the Adams administration, yet if the Republicans should prevail in the 1800 election, its expiration would permit full-voiced Federalist criticism of the newly installed Republicans. The Sedition Act was employed vigorously against Republican newspaper editors. See M. HORSNELL, SPENCER ROANE: JUDICIAL ADVOCATE OF JEFFERSONIAN PRINCIPLES 58 n.19 (1986); J. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 176-87 (1956). For the view that enforcement of the Sedition Act was "a natural . . . reaction . . . to end the campaign of calculated lying that had been organized against" the Federalists, see 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 767 (1953).

sharp division of public opinion in the United States. Americans who were aghast at the bloody excesses of the Reign of Terror sympathized with Britain, where a familiar constitutional government prevailed.⁵⁷ These Americans, mostly Federalists, preferred George III, however odious, to the crimson-tinctured hands of the French Directorate. Loyalty to France was paramount for Republicans, who either were loath to admit that the bright and shining idea of revolution could tarnish so badly or who felt a debt of honor to France, incurred during the recent successful American Revolution.⁵⁸ In the midst of this schism, Citizen Genet, the French minister, arrived in the United States and promptly sought to convert the American populace to French revolutionary ideals. Genet's gambit backfired; neither Federalists nor Republicans were pleased with his tactic of speaking directly to the American people and ignoring their elected representatives.⁵⁹

At the same time, John Jay negotiated a treaty with Great Britain to settle a number of sore points that remained after the final peace treaty of 1783.⁶⁰ When the Senate considered Jay's Treaty of 1794 for ratification, the French were outraged. They regarded Jay's Treaty as a hostile act, since the 1778 alliance between France and the rebellious American colonies "stated that neither France nor the United States would make a treaty agreement with Britain without consulting the other power on the terms of the agreement."⁶¹

French pique was long lasting. In 1797, the John Adams Administration dispatched three ministers⁶² to negotiate a new treaty that declared Franco-American friendship. The French Directorate, apparently of the belief that broken honor could be repaired with cash, demanded a

57. See M. HORSNELL, *supra* note 56, at 36; J. SMITH, *supra* note 56, at 11-12.

58. Republicans, like Thomas Jefferson, argued that the debt was more than one of honor. In this view, the United States and France were allies, bound by their treaty of 1778. See M. HORSNELL, *supra* note 56, at 36; D. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 73-79 (1962).

59. See, e.g., D. MALONE, *supra* note 58, at 90-131; 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 28-29, 301-02 (1916); M. HORSNELL, *supra* note 56, at 37.

60. A provisional peace treaty had been concluded on November 30, 1782. See Provisional Articles, Nov. 30, 1782, United States-Great Britain, 8 Stat. 54, T.S. No. 102. For the final Treaty of Paris, see Definitive Treaty of Peace, Sept. 3, 1783, United States-Great Britain, 8 Stat. 80, T.S. No. 104. Jay's Treaty of 1794 settled a number of thorny issues raised by the propensity of American states to enact legislation that emasculated the claims of British creditors in America. See Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105. See generally S. BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (1962). Jay's Treaty remained an object of controversy in the United States because it did nothing to settle the Canadian boundary nor to compensate southerners for the value of slaves carried off by departing Britishers. *Id.* at xi.

61. M. HORSNELL, *supra* note 56, at 37.

62. The three ministers were Charles C. Pinckney of South Carolina, John Marshall of Virginia, and Elbridge Gerry of Massachusetts. See H. FLANDERS, *THE LIFE OF JOHN MARSHALL* 76-77 (1904).

bribe as a prerequisite for such negotiations.⁶³ When the details of this so-called XYZ Affair became public in the United States, calls for war with France were rampant.⁶⁴ Because the Jeffersonian Republicans were sympathetic to the revolutionary movement in France, Republican criticism of Adams and his Federalist administration's bellicose stance towards France "was extremely unpopular."⁶⁵ In the midst of this fever pitch of anti-French feeling, the Adams administration persuaded Congress to pass the Alien and Sedition Acts.⁶⁶

The Alien and Sedition Acts were a Federalist attempt "to discredit the Republicans and to reduce them to political impotence by associating them with foreign influence and by attacking their loyalty, ideology, and morality. . . . The XYZ affair was not so much the cause, as the occasion, for striking at political opposition."⁶⁷ It was, in short, an opportunity for Federalists "to equate opposition to the government's policy with sedition and near treason."⁶⁸ Although Adams may have thought that the Acts were a sufficient sop to outraged Federalists, Republicans such as Madison and Jefferson proclaimed them unconstitutional because they went beyond the proper sphere of congressional power, impaired free speech and the right to trial by jury, and contravened the constitutional principle of separation of powers.⁶⁹

Jefferson's rhetorical denunciation of the Acts was a deft political statement. He composed the 1798 Kentucky Resolutions, which declared that the federal union, as a compact among the states, enabled each state to decide for itself when and whether the national government had exceeded its constitutional authority. Jefferson's Kentucky Resolutions even suggested that a state might declare null and void a federal law that it believed to infringe upon its state sovereignty.⁷⁰ But this was not a statement of grand principle; it was a calculated bit of political posturing. In a letter to James Madison, Jefferson admitted that:

[W]e should distinctly affirm all the important principles . . . [the Resolutions] contain, so as to hold that ground in the future, and leave the matter in such a train as that we may not be committed absolutely to

63. See 2 A. BEVERIDGE, *supra* note 59, at 259.

64. See J. SMITH, *supra* note 56, at 7-9.

65. *Id.* at 10.

66. For a discussion of these Acts, see *supra* note 56.

67. See J. SMITH, *supra* note 56, at 21.

68. *Id.*

69. See D. MALONE, *supra* note 58, at 390-94, 402-06.

70. See A. KELLY, W. HARBISON & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 136-41 (6th ed. 1983).

push the matter to extremities, and yet may be free to push as far as events may render prudent.⁷¹

More circumspect, Madison's Virginia Resolutions reaffirmed the compact theory of union and declared that the constituent states "have the right and are in duty bound to interpose, for the arresting the progress of evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them."⁷² Madison did not go so far as to suggest that a state possessed the unilateral power of nullification of federal law. But Madison did deliver an implied endorsement of this corollary to the compact theory of federal union in his collateral *Virginia Report* adopted by the Virginia Legislature: "[T]here can be no tribunal above their [the states'] authority, to decide in the last resort, whether the compact made by them be violated"⁷³ It was not immediately evident whether this meant that the states possessed the unilateral right to nullify federal law they deemed unconstitutional, or only that, in the years prior to *Martin v. Hunter's Lessee*,⁷⁴ Madison thought the United States Supreme Court lacked the constitutional authority to review the actions of the states.⁷⁵

Even though Madison's position, more fully stated in the *Virginia Report*, suggested that the Virginia Resolutions might have arisen from bedrock principles of constitutional union, the *Report* contained other evidence that belied the suggestion. Madison admitted to the Virginia House of Delegates that the Resolutions "were designed merely to be an expression of opinion, 'unaccompanied by any other effect than what they may produce on opinion by exciting reflection.'"⁷⁶ This frank admission, coupled with Jefferson's equally candid letter to Madison,⁷⁷ indicate that these early statements of state sovereignty within the federal system of the United States primarily may have been propaganda designed to foster Republican victory in 1800. Rather than thoughtful statements of the political theory of federalism, these statements were

71. Letter from Thomas Jefferson to James Madison (November 17, 1798), reprinted in 7 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 288 (P. Ford ed. 1896).

72. THE VIRGINIA REPORT OF 1799-1800 TOGETHER WITH THE RESOLUTIONS OF DECEMBER 21, 1798, 22 (1850) [hereinafter VIRGINIA REPORT]; see also M. HORSNELL, *supra* note 56, at 41.

73. VIRGINIA REPORT, *supra* note 72, at 192.

74. 14 U.S. (1 Wheat.) 304 (1816).

75. The distinction is probably not important, for if states could act in contravention of federal law, and the United States Supreme Court was powerless to review these actions, nullification was a *de facto* doctrine, if not *de jure*.

76. M. HORSNELL, *supra* note 56, at 44 (quoting VIRGINIA REPORT, *supra* note 72, at 190-91).

77. See *supra* note 71 and accompanying text.

campaign position papers.⁷⁸ Whatever their origin, they left a lasting imprint on later debate concerning the nature of federal union.

B. *The Hartford Convention and New England Secession*

Sectional differences concerning the wisdom of the War of 1812 provide an early example of the alacrity with which regions of the American federal union began to employ state sovereignty principles for instrumental ends. When the United States declared war upon Great Britain in 1812, the New England states found themselves saddled with an unwanted war that seriously threatened their commercial interests. The American national legislative majority, composed of southerners and westerners, not only declared war but also proceeded to enact embargo legislation that devastated the New England shipping and commercial sectors. New England responded to its position as a sectional minority by considering reformation of or departure from the federal union. In October 1814, the Massachusetts legislature called for a convention of New England states to consider their common plight. During December 1814 and January 1815, twenty-six delegates met in Hartford and adopted resolutions that called for constitutional amendments to restrict the power of the congressional majority. Implicit in these actions was the threat to secede from the federal compact if the proposed amendments were not adopted.⁷⁹ Massachusetts and Connecticut quickly adopted the Hartford Convention's report. Peace followed, and after the Treaty of Ghent, nothing more was heard from New Englanders about constitutional reform or secession until the southerners adopted a similar strategy. This silence, as well as New England's later denunciation of the compact theory of union and its corollary principle of secession, attests eloquently to the wholly expedient nature of the Hartford Convention's exercise in formulating a sectional brake upon the national majority. It also served as a confirming example, oft-used by secessionist southerners, that the right of secession from the federal compact initially had been accepted by the entire nation, North and South.

78. For a brief and perceptive account of the political nature of the Virginia and Kentucky Resolutions, see R. RUTLAND, *JAMES MADISON: THE FOUNDING FATHER* 156-64 (1987).

79. See generally J. BANNER, *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815*, at 337-43 (1970). The report accompanying the proposed amendments urged the states to take moderate political action. The stated purpose of the amendments, however, contained a veiled threat of disunion: The amendments were said to be "essential . . . to strengthen, and *if possible* perpetuate, the union of the states." *Id.* at 341 (emphasis added). See also T. DWIGHT, *HISTORY OF THE HARTFORD CONVENTION: WITH A REVIEW OF THE POLICY OF THE UNITED STATES GOVERNMENT, WHICH LED TO THE WAR OF 1812* (1833) (written by the Secretary of the Convention, who argued that only the resolve of the New England states prevented a wholesale violation of states' rights).

C. Northern Response to the Fugitive Slave Act of 1850

Federal attempts to enforce the fugitive slave clause⁸⁰ and Northern resistance to those efforts serve as an even more vivid example of instrumental manipulation of state sovereignty principles. Shortly after constitutional union, Congress enacted the Fugitive Slave Act of 1793,⁸¹ which created legal procedures for reclaiming fugitive slaves. The 1793 Act gave concurrent jurisdiction to the state or federal courts to hear such claims and render judgments on returning the apprehended fugitive to slave status.⁸² As slavery became a bitterly divisive issue, the constitutional legitimacy of the 1793 Act came under attack.⁸³ This divisiveness culminated in *Prigg v. Pennsylvania*,⁸⁴ which upheld congressional power to enact the 1793 Act and concluded that such legislative power was exclusively federal.⁸⁵

Northern abolitionists reacted to *Prigg* by enacting so-called "personal liberty laws"⁸⁶ that stripped state magistrates of any authority to hear claims for delivery of fugitives. Thus, even though the newly-legitimized 1793 Act vested state courts with jurisdiction to hear such claims, the Northern States refused to permit their courts to exercise jurisdiction. As a practical matter, a southerner seeking return of a slave from Vermont would be forced to assert his claim in the Vermont federal court. Because these courts were inconvenient and sparsely staffed, delay frequently resulted. Accordingly, the Southern-dominated Congress passed the Fugitive Slave Act of 1850.⁸⁷ This Act granted the federal courts exclusive jurisdiction over claims for the return of fugitive slaves. To make the process effective, the 1850 Act provided for the appointment of commissioners in each district court who would hear only these

80. U.S. CONST. art. IV, § 2, cl. 3. The clause states that,

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

81. Chapter 7, 1 Stat. 302 (1793).

82. See generally Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921) (discussing the constitutional flaws of the 1793 Act and attempts to correct those flaws in 1850). For an account of the operation of the 1793 Act in the Massachusetts courts, see L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 72-85 (1957).

83. See W. WIECEK, *SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 99 (1977); L. LEVY, *supra* note 82, at 74-75.

84. 41 U.S. (16 Pet.) 539 (1842).

85. *Id.* at 622-26.

86. See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 110 (1982). The personal liberty laws enacted after *Prigg* were in response to that decision but also represented a continuation of a trend in Northern States, commenced well before *Prigg*, to enact personal liberty laws. See W. WIECEK, *supra* note 83, at 156-59, 196-201.

87. Chapter 15, 9 Stat. 462.

claims and eliminated the right to a jury trial for the apprehended fugitive.⁸⁸

Abolitionists reacted with predictable outrage, which they soon communicated to the courts. Perhaps the most visible case involved the Wisconsin abolitionist, Sherman Booth. Booth led a mob that freed apprehended fugitive slave Joshua Glover from the custody of the U.S. Marshal. Under the terms of the 1850 Act, Booth was prosecuted for his interference with the federal judicial machinery, which was in the process of sending Glover back to slavery in Missouri. Booth then sought and obtained a writ of habeas corpus from the Wisconsin courts. The Wisconsin Supreme Court upheld the lower court's issuance of the writ and, in the course of the proceedings, unequivocally declared that the federal courts had no power to review state court grants of habeas corpus to petitioners seeking freedom from federal custody.⁸⁹ In *Ableman v. Booth*,⁹⁰ the Supreme Court firmly rejected this frontal assault on the principle of *Martin v. Hunter's Lessee*,⁹¹ albeit by an opinion that inexplicably failed to mention the keystone holding of *Martin*. A definitive pronouncement of the Supreme Court meant little, however, to impassioned abolitionists who continued to proceed as before.⁹²

On the eve of the Civil War, northerners denounced southerners who proclaimed the constitutional entitlement of states to secede. It is ironic that these same northerners simultaneously asserted that the federal government lacked any authority to enforce its legislation in states unwilling to submit to it. The abolitionist response to the 1850 Fugitive Slave Act was yet another example of the instrumental manipulation of state sovereignty principles. When stripped of the emotional fever pitch that accompanied the abolition movement, the Northern and Southern positions on state's rights were identical.

D. Calhoun, Nullification, and the Concurrent Majority

To many casual observers, John Calhoun was the most prominent and extreme Southern proponent of state sovereignty in antebellum America. His linkage with the Nullification Crisis of 1832 seems to support that view as well as the related conclusion that Calhoun was as equally instrumental in his use of state sovereignty as the most zealous

88. *See id.*

89. *In re Booth*, 3 Wis. 1, 157 (1854).

90. 62 U.S. (21 How.) 506 (1859).

91. 14 U.S. (1 Wheat.) 304 (1816).

92. *See Ex parte Bushnell*, 9 Ohio St. 77 (1859) (*Oberlin Rescue Cases*). For a more complete account of both the Booth litigation and the attitude of Northern extremists toward the use of state sovereignty as a veto upon national power employed in furtherance of slavery, see 3 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 42-79 (1923).

abolitionist in Wisconsin. Although there is at least a kernel of truth in this view, the kernel no more resembles the entire story than the acorn resembles the oak. Calhoun developed his view of the federal system as a compact among independent states only gradually, reluctantly, partly in response to sectional political pressures, and partly as an expedient measure to support Southern self-interest. Yet, when he finally did so, he produced an extraordinarily thoughtful and fully developed theory of decentralized federal union. The merits of the theory have been obscured by its association with Calhoun.

During his early political career, Calhoun exhibited the traits of a committed nationalist. He entered the national political scene at age twenty-eight by election to the House of Representatives in 1810. In the House, Calhoun quickly joined forces with his later nemesis Henry Clay in urging war with Great Britain.⁹³ Following the War of 1812, Calhoun supported nationalistic measures for improved military establishments, national funds for roads and other internal improvements, and even modest protective tariffs.⁹⁴ Calhoun's nationalism bolstered his political career. He served as Secretary of War under President Monroe and began his first term as Vice President in 1824, following an unsuccessful attempt to obtain the Presidential nomination. Calhoun continued as Vice President from 1828 to 1832, during Andrew Jackson's first term. During this period Calhoun's nationalism evaporated, leaving a distinctly sectional residue.

As early as 1823, in debates over protective tariff legislation desired by northerners and westerners who saw their sectional interests furthered by tariff protection, southerners raised the compact theory of union as a principle to support unilateral opposition by Southern States to any protective tariff enacted by Congress. South Carolina's Senator Robert Y. Hayne forcefully expressed this view when he stated on the floor of the Senate: "Gentlemen surely forget that the supreme power is not in the Government of the United States. They do not remember that the several States are free and independent sovereignties, and that all power not expressly granted to the Federal Government is reserved to the people of those sovereignties."⁹⁵

Calhoun did not then agree with these emphatic announcements of state sovereignty. In an 1824 letter to Robert S. Garnett, Calhoun expressed his belief in a flexible interpretation of the Constitution's distri-

93. See J. NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION 34-42 (1988); A. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN 15 (1951).

94. See J. NIVEN, *supra* note 93, at 43-57; A. SPAIN, *supra* note 93, at 15.

95. 41 ANNALS OF CONG. 648 (1829); see also D. HOUSTON, A CRITICAL STUDY OF NULLIFICATION IN SOUTH CAROLINA 55 (1896).

bution of power between the states and the national government, and he expressly rejected the argument advanced by Hayne "that the construction [of the Constitution] ought to be invariably rigid against the power of the general Government."⁹⁶ To Calhoun, that view

allows no discretion, but must be applied with equal severity to any portion of the Constitution,—to that which delegates power acknowledged by all to be essential to the safety of the nation, and to that which provides checks against the abuse of such power. I feel confident that such an application of the rule . . . must lead into perpetual difficulty and contradiction [A]ny doubtful portion of the Constitution must be construed by itself in reference to the true meaning and intent of the framers of the instrument; and consequently that the construction must, in each part, be more or less rigid, as may be necessary to effect the intention.⁹⁷

Four years later, following the passage of the Tariff of 1828,⁹⁸ Calhoun succumbed to intense pressure from his native South Carolina to formulate a constitutional theory to justify South Carolina's unilateral refusal to conform to its terms. Although Calhoun still served as Andrew Jackson's Vice President, and was thus politically disabled from open championship of such theories, he covertly created the nullification doctrine expressed in the South Carolina legislature's Exposition of 1828.⁹⁹ In this document, Calhoun reiterated the compact theory of union and drew the conclusion that "[t]he general government is only the joint agent of two distinct sovereignties."¹⁰⁰ To Calhoun, federal union was "a union of States as communities, and not a union of individuals."¹⁰¹ It followed that, in cases of conflict between the joint agent and one of its state principals, the wishes of the state principals ought to prevail. To assure this result, Calhoun posited that the citizens of a state, acting through a convention called for the purpose, ought to be free to nullify an objectionable act of the joint agent. If three-fourths of the allied states disagreed and explicitly conferred the disputed power upon the federal joint agent by constitutional amendment, then the nullifying state would be forced to submit or secede from the compact.

Calhoun contended that denying the states the power to strip the federal joint agent of its delegated powers would give the national government the practical ability, if not the constitutional authority, to as-

96. Letter from John C. Calhoun to Robert S. Garnett (July 3, 1824), reprinted in J. CALHOUN, CORRESPONDENCE 219-23 (1900).

97. D. HOUSTON, *supra* note 95, at 144-45.

98. Ch. 55, 4 Stat. 270 (1828).

99. See C. BOUCHER, THE NULLIFICATION CONTROVERSY 36 (1968); D. HOUSTON, *supra* note 95, at 86.

100. D. HOUSTON, *supra* note 95, at 82.

101. *Id.*

sume all the powers the Constitution reserved to the states.¹⁰² Although the states might abuse the nullification right, Calhoun thought the possibility slight, given the necessity of concerted action and the diverse national pressures that operated on the states.¹⁰³ Nullification was simply one of those general reserved powers. Because the national government's powers were enumerated and because the states' powers were reserved in general terms, it seemed an ineluctable conclusion that the general reservation of state powers included inferred rights.¹⁰⁴ The Supreme Court also had no role in allocating powers between the national and state governments, since to do so would concede definition of the scope of state powers to a numerical majority of the entire nation, without reference to the states. To Calhoun, the judiciary was merely the appointive agent of that undifferentiated people, acting through the national government.¹⁰⁵

The Exposition of 1828 was pure theory, but by 1832, opposition to high protective tariffs grew so substantially that South Carolinians elected a convention that adopted an ordinance of nullification, declaring the federal tariff inoperative in South Carolina.¹⁰⁶ This brought theory into the realm of action and, in that milieu, nullification was a total failure. Under pressure from an adamant President Jackson, who made plain his willingness to use force to collect federal tariff revenues in South Carolina, the nullification proponents capitulated. As the nullification tide receded, two political driftlogs remained: One, the idea of state sovereignty as a device to check federal power; the other, a practical observation, was the recognition that this theoretical power could not be used without acquiescence by the other states. The theory underlying nullification remained alive, and in the years ahead was burnished to a new brilliance by Calhoun. The practical observation was largely ignored, and that miscalculation proved fatal to Southern hopes for a separate national identity as the Confederate States of America.

Calhoun continued to refine the theory of state sovereignty and left a final exposition in *A Disquisition on Government*,¹⁰⁷ first published in

102. See 6 J. CALHOUN, WORKS OF JOHN C. CALHOUN 160 (R. Crallé ed. 1855); D. HOUSTON, *supra* note 95, at 83.

103. See D. HOUSTON, *supra* note 95, at 83-84. It is ironic that Calhoun thus prefigured an obverse form of the process theory that led Jesse Choper to conclude that states must rely solely upon their elected representatives in Congress to maintain state sovereignty. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176-77 (1980); see also *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

104. See J. CALHOUN, *supra* note 102, at 45-46; D. HOUSTON, *supra* note 95, at 84.

105. See J. CALHOUN, *supra* note 102, at 162; D. HOUSTON, *supra* note 95, at 84.

106. See *An Ordinance*, reprinted in STATE PAPERS ON NULLIFICATION 28-33 (1834); D. HOUSTON, *supra* note 95, at 106-33.

107. J. CALHOUN, A DISQUISITION ON GOVERNMENT (1853) [hereinafter J. CALHOUN, DISQUISITION].

1853, three years after his death. In the tradition of his agrarian Republican predecessors¹⁰⁸ and Enlightenment thinkers such as John Locke, Calhoun conceded the need for government due to the human tendency to advance self-interest at the expense of others.¹⁰⁹ But since governments could only act through individuals, governments possessed the same dangerous tendency toward selfish injustice and oppression. Accordingly, to restrain governments it was necessary to devise arrangements to prevent those natural, illiberal tendencies from coming to fruition. Structural limitations upon government were what Calhoun meant by the term "constitution."¹¹⁰ Thus, "constitution stands to government, as government stands to society; and, as the end for which society is ordained, would be defeated without government, so that for which government is ordained would, in a great measure, be defeated without constitution."¹¹¹ This constitution should be such "as will furnish the means by which resistance may be systematically and peaceably made on

108. In addition to Thomas Jefferson and James Madison, the patron saints of agrarian Republicanism, such able southerners as St. George Tucker, Spencer Roane, John Taylor of Caroline, and Abel Upshur could be classified as agrarian Republicans.

Tucker was a judge of the Supreme Court of Errors of Virginia and a law professor at William & Mary. His 1803 annotated edition of *Blackstone's Commentaries* on the Laws of England—containing over 1,000 footnotes and 800 pages of appendices—touch upon a wide variety of American constitutional and common law subjects. "[A] confirmed Jeffersonian, . . . [h]is work exudes a reformist and libertarian vitality unthinkable in a Kent, a Story, or a Dane." Cover, Book Review, 70 COLUM. L. REV. 1475, 1475 (1970).

Spencer Roane may be best known for his adamant opposition to John Marshall's assertion of the Supreme Court's power to review the final decisions of state courts. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812). Roane was no mere agrarian localist; he was a firm believer in the principle that the best means for preserving liberty and authority in a democratic society was to balance central with local authority. See generally M. HORSNELL, *supra* note 56, at 96-97.

John Taylor was a Virginia planter whose well-developed political theories were "inextricably enmeshed in the life and mind of the early republic." R. SHALHOPE, *JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN* 7 (1980). He believed that "a republican society depended entirely upon the moral character of its people. A virtuous citizenry willing to subordinate self-interest to the greater common good constituted good republican stock. . . . [T]he social cohesion required to maintain an organic state emerged naturally from an agrarian community." *Id.* at 1. The political authority to manage such a localized economy was necessarily removed from the central government. See J. TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* (1823); J. TAYLOR, *TYRANNY UNMASKED* (1822); J. TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* (1814). Although political events passed Taylor by, he undoubtedly had a great effect on Calhoun.

For the contributions of Abel Upshur, a Virginia commentator, to the localist theory of federal union, see A. UPSHUR, *A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT* (1840).

109. See J. CALHOUN, *DISQUISITION*, *supra* note 107, at 1-4.

110. *Id.* at 7.

111. *Id.* (emphasis omitted).

the part of the ruled, to the oppression and abuse of power on the part of the rulers."¹¹²

In considering how to resist governmental tyranny, Calhoun admitted that the vote was "indispensable" but thought "it would be a great and dangerous mistake to suppose . . . that it is, of itself, sufficient."¹¹³ Governmental accountability to voters was insufficient because of voters' different interests; action can aid certain sectors of the electorate at the expense of others.¹¹⁴ Calhoun thought that this system encouraged the formation of allied interest groups, who would band together to form a voting majority that could operate to redistribute resources from the minority to the majority.¹¹⁵ Calhoun thus prefigured much of modern public choice theory;¹¹⁶ and, like public choice theorists, he sought to curb political rent-seekers, desirous of "using the powers of government to aggrandize . . . [themselves] at the expense of the others."¹¹⁷

Calhoun posited generally that, in addition to governmental accountability to the voters of the entire body politic, the validity of governmental action should be conditioned upon "taking the sense of each interest or portion of the community, which may be unequally or injuriously affected by the action of the government, separately, through its own majority . . . and to require the consent of each interest."¹¹⁸ In order to accomplish this goal, Calhoun thought it necessary to divide and distribute the powers of government to give "each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution."¹¹⁹ These two elements, a majority of the entire community and the separate, concurrent majority of each segment of the community, constituted for Calhoun the essence of constitutional government.¹²⁰ In short, Calhoun believed that two conditions must be met for actions of the central government in a federal system to be valid. First, a majority of the political representatives of the people of the entire nation (e.g., Congress) must consent to the action. Second, a majority of the political representatives of the people of each constituent member of the federal system (e.g., the state legislatures)

112. *Id.* at 12.

113. *Id.* at 13.

114. *See id.* at 14.

115. *See id.* at 15-24.

116. *See, e.g.,* J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 283-94 (1962) (overview of public choice theory); *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (J. Buchanan, R. Tollison & G. Tullock eds. 1980) (collection of papers analyzing the concept of "rent-seeking").

117. J. CALHOUN, *DISQUISITION*, *supra* note 107, at 24.

118. *Id.* at 25.

119. *Id.*

120. *See id.*

must also consent. Non-consenting states would not be bound by the action.

Calhoun thought these principles complemented one another. The purpose of the vote was "to collect the sense of the community,"¹²¹ but he thought there were

two different modes in which the sense of the community may be taken; one, simply by the right of suffrage, unaided; the other, by the right through a proper organism. Each collects the sense of the majority. But one regards numbers only, and considers the whole community as a unit, having but one common interest throughout; and collects the sense of the greater number of the whole, as that of the community. The other, on the contrary, regards interests as well as numbers;—considering the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each, through its majority or appropriate organ, and the united sense of all, as the sense of the entire community. The former of these I shall call the numerical, or absolute majority; and the latter, the concurrent, or constitutional majority.¹²²

Calhoun thought the concurrent majority of interests to be the "constitutional majority" for two reasons. First, he assumed representative democracy was an attempt to come as close as possible to the "perfect [democratic] government . . . which would embrace the consent of every citizen or member of the community."¹²³ From this Lockean ideal he concluded that reliance upon the numerical majority was not popular constitutional government because it inevitably involved governance by the major portion of the people over the minor portion.¹²⁴ Only the employment of the concurrent (or constitutional) majority enabled the minor portion to have a voice in the councils of government. Second, however salutary the guarantees of a written constitution, a government would be hobbled by parchment barriers only to the extent tolerated by the numerical majority. The elasticity of language and the juristic creativity of an appointed Supreme Court would combine to render the guarantees of a written constitution hollow to the minority.¹²⁵

The envisioned structural check for minorities was simple: "[E]ach interest or portion of the community [should have] a negative on the others."¹²⁶ This was the core of the matter: "[I]t is this negative power,—the power of preventing or arresting the action of the government,—be it called by what term it may,—veto, interposition, nullifica-

121. *Id.* at 27.

122. *Id.* at 28.

123. *Id.* at 29.

124. *Id.* at 30.

125. *Id.* at 31-34.

126. *Id.* at 35.

tion, check, or balance of power,—which, in fact, forms the constitution.”¹²⁷ In a federal system of states united in compact, Calhoun believed that the constituent states would exercise this negative power upon the national government.¹²⁸

Calhoun considered this negative power not only necessary but desirable. In absolute governments, the operative principle of governance is sheer force, but in popular constitutional democracies it is compromise. The desired compromise could be accomplished by requiring the assent of affected minorities through the negative power of the concurrent majority.¹²⁹ By contrast, relying exclusively on the numerical majority would risk degeneration into the illegitimate use of force to impose majoritarian will upon a resistant but powerless minority. Thus, the concurrent majority was a truly conservative principle, calculated to preserve the consent of the governed that formed the soul of popular democratic government.

Calhoun's theory never was given an opportunity to succeed in the United States. Advanced unsuccessfully in the tariff and nullification crises of 1828 and 1832, radical southerners abandoned Calhoun's concurrent majority principle and embraced the more dramatic and inflammatory idea of secession. With secession discredited amid the ashes and grief of a post-Civil War America there was little likelihood that the political theories of John Calhoun—whose portrait graced Confederate currency and postage stamps and whose ideas were blamed by northerners for secession itself¹³⁰—would receive an eager reading. Although the concurrent majority concept never took root in the United States, it may well have found fertile soil in Canada.

II. THE DEVELOPMENT OF CANADIAN FEDERALISM: FROM CARTIER TO THE CHARTER

The principles of Canadian federal union took root in a political, cultural, and historical soil that nourished the growth of structural concepts analogous to Calhoun's concurrent majority. A brief review of the development of Canadian federalism illustrates both the establishment of

127. *Id.*

128. Calhoun did not indicate whether each “interest or portion” within a state community should have a negative. If so, one is left to speculate upon whether Calhoun would have conceded an *individual* veto, which is nothing more than Lockean consent to the social compact in its purest form. Since Calhoun envisioned the concurrent majority as a substitute for Lockean consent, it is not likely that he would have conceded an individual veto. But Calhoun did not provide us with a principle for determining where the concurrent majority ends and ordinary principles of the numerical majority begin.

129. J. CALHOUN, *DISQUISITION*, *supra* note 107, at 37-45.

130. See M. PETERSON, *THE GREAT TRIUMVIRATE* 496 (1987).

principles akin to the concurrent majority and the connection between these Calhounesque structural concepts and the notwithstanding clause.

A. Before Confederation: Two Cultures, One Sovereign

A defining fact of the Canadian experience has been French exploration and settlement. From 1541, when Jacques Cartier established the first French settlement in North America, until 1763, when, by the Treaty of Paris, France ceded to Britain its North American possessions, French hegemony extended to vast portions of today's Ontario, Quebec, and Atlantic Canada.¹³¹ The initial British inclination after the defeat of the French in North America was to Anglicize its newly acquired French colony. To that end, George III issued a proclamation that established British law throughout Quebec and required the Governor to convene an elected General Assembly to create "laws, statutes, and ordinances for the public peace, welfare, and good government of [Quebec] . . . as near as may be agreeable to the laws of England."¹³² Because British law forbade Roman Catholics from holding office and the prior French policy discouraged Protestant Huguenot immigration to New France, the elected Quebec General Assembly inevitably would have consisted of a handful of English Anglicans governing some 65,000 French Catholics. The newly appointed Governor, James Murray, sensing this danger, refused to call elections for a General Assembly and permitted French legal practices to continue. British colonists and entrepreneurs in Quebec reacted bitterly and demanded Murray's removal.¹³³ In 1768, Murray was removed and replaced by General Guy Carleton, who assessed the situation no differently from Murray. On Carleton's recommenda-

131. See generally C. WITKE, A HISTORY OF CANADA 13-41 (1928); Perkins, *The Peace of Paris: Patterns and Legacies*, in PEACE AND THE PEACEMAKERS (R. Hoffman & P. Albert eds. 1986).

132. The Royal Proclamation, 1763, reprinted in R.S.C. 1985, app.II, No.1, reprinted in 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA 163 (A. Shortt & A. Doughty eds. 1907) [hereinafter SHORTT & DOUGHTY].

133. See, e.g., Petition of the Quebec Traders to King George III (1764-1765), reprinted in SHORTT & DOUGHTY, *supra* note 132, at 232, in which the British interests in Quebec asked the King to remove Governor Murray because of his alleged partiality to French language, the Roman Catholic religion, and his indifference to British interests. For his part, Murray characterized the petitioners as

Licentious Fanatics [who desired] the expulsion of the Canadians who are perhaps the bravest and the best race upon the Globe, a Race, who cou'd they be indulged with a few privileges wch the Laws of England deny to Roman Catholicks at home, wou'd soon get the better of every National Antipathy to their Conquerors and become the most faithful and most useful set of Men in this American Empire.

Letter from Governor Murray to the Lords of Trade (October 29, 1764), reprinted in SHORTT & DOUGHTY, *supra* note 132, at 231.

tions, the Quebec Act¹³⁴ was enacted in 1774. The Act replaced the General Assembly with an appointive council on which Catholics might serve. The statute also guaranteed the continuation of the French civil law and land tenure systems and expanded the borders of the colony to include the more temperate and fertile lands of the Ohio River valley. This was the first of the many accommodations made in Canada to the French cultural, religious, and linguistic minority.

When in 1791 the Constitutional Act¹³⁵ divided the province of Quebec into Upper and Lower Canada,¹³⁶ all of the pre-1791 laws of Quebec remained in force in both regions until repealed or amended by the legislature of the province.¹³⁷ Predictably, the first act of the predominantly English legislature of Upper Canada was to repeal the portion of the Quebec Act that had made the French civil law applicable, providing instead that "in all matters of controversy relative to Property and Civil Rights, resort shall be had to the Laws of England, as the rule of decision of the same."¹³⁸ Thus, from 1792 forward Quebec maintained its French-derived law, altered to suit local custom; the remainder of Canada developed its legal institutions in the English common law tradition. Quebec's autonomy on this point became so established that, in 1840, when the Union Act¹³⁹ reunited Upper and Lower Canada, the Act provided for the continuation of the pre-1840 laws of each province. The result was that, even in a single, united province, two distinct bodies of private law existed. In the twenty-seven year period before Confederation, the United Province of Canada thus displayed a highly developed form of regional and cultural autonomy without the necessity of a federal system of union.¹⁴⁰

B. *Confederation: Sir John A. Macdonald's Vision of Federalism*

During the process of Confederation, Sir John A. Macdonald was outspoken in his intent to create a quasi-unitary state controlled by a single, national Parliament. Even though he envisioned a provincial role that encompassed some autonomy in defined areas, he eagerly sought to reverse the American federal scheme and vest the residual powers of sov-

134. 14 Geo. III, ch. 83 (1774), reprinted in R.S.C. 1985, app. II, no. 2, and in SHORTT & DOUGHTY, *supra* note 132, at 570.

135. 31 Geo. III, ch. 31 [hereinafter CONSTITUTION ACT, 1791], reprinted in R.S.C. 1985, app. II, No.3, and in SHORTT & DOUGHTY, *supra* note 132, at 1031.

136. Upper Canada is now known as Ontario; Quebec is the present version of Lower Canada.

137. CONSTITUTION ACT, 1791, § 32.

138. An Act Introducing English Civil Law Into Upper Canada, 32 Geo. III, ch. 1, § 3.

139. 3-4 Vict., ch. 35 (1840), reprinted in R.S.C. 1985, app. II, No.4.

140. It is true that the English element in the Union Parliament predominated and thus, with Confederation, Quebec achieved "a partial escape from centralized control." F. SCOTT, *Centralization and Decentralization*, in ESSAYS, *supra* note 44, at 252.

ereignty in the national government.¹⁴¹ To this end, Macdonald—aware that his drive toward centralization was not warmly embraced by his French-speaking countrymen—confessed in a private letter written in 1865 that “[i]f Confederation goes on, you . . . will see both local Parliaments and Governments absorbed in the General Power Of course, it does not do to adopt that point of view in discussing the subject in Lower Canada.”¹⁴²

The fruit of confederation, the Constitution Act of 1867, reflects both Macdonald’s centralizing bias and the demands of French Canadians that security be provided for the autonomous development of a separate cultural and linguistic identity within the confederated union.¹⁴³ Provisions such as section 90 sought to create a strong national government by vesting in the Governor General the power to disallow provincial legislation.¹⁴⁴ Section 91 vested in the national Parliament the power “to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not . . . assigned exclusively to the Legislatures of the Provinces”¹⁴⁵ The Act explicitly directed that, with respect to matters over which the provinces and the national government possessed concurrent jurisdiction, federal law prevailed over conflicting provincial legislation.¹⁴⁶ The Act provided for the federal appointment of provincial judges,¹⁴⁷ and it gave the Supreme Court of Canada the power

141. See *id.* at 263 (quoting Macdonald at the Confederation debates: “[W]e have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the Central Government and Legislature.”).

142. Patenaude, *The Right to Flourish According to One’s Own Culture*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: THE CONSTITUTION AND THE FUTURE OF CANADA 39 (1978) (quoting Letter from John Macdonald to Cameron (December 19, 1865)).

143. See CONSTITUTION ACT, 1867, §§ 93, 94, 129, 133. Section 93 guaranteed the continuation of Catholic schools; section 94 excluded Quebec from potential uniform national legislation on property and civil rights; section 129 preserved the local laws of the provinces; and section 133 guaranteed the continued use of French as an official language.

144. This was in fact a frequently exercised power in the early years of Confederation. See E. FORSEY, FREEDOM & ORDER 177-91 (1974); Forsey, *Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors Since 1867*, 4 CAN. J. ECON. & POL. SCI. 47 (1938). But “[i]ts use today would provoke intense resentment on the part of the provinces.” P. HOGG, CONSTITUTIONAL LAW OF CANADA 90 (2d ed. 1985). Its contemporary vitality is thus virtually the same as the power vested in the Queen and the Governor General, by section 55 of the Constitution Act, 1867, to withhold royal assent to legislation of the national Parliament, and, by section 56, to disallow a federal Canadian statute. By the imperial conference of 1930 a constitutional convention was established that the royal powers of reservation and disallowance must never be exercised. See *id.* at 13, 202.

145. CONSTITUTION ACT, 1867, § 91.

146. *Id.* § 95.

147. *Id.* § 96.

of final review over questions of provincial and federal law.¹⁴⁸ Moreover, the Act limited the provincial taxation power¹⁴⁹ and provided for the lifetime appointment, by the federal government, of the provinces' representatives in the national Senate.¹⁵⁰ The protections afforded French autonomy centered around maintaining Roman Catholic schools, securing the continued use of French as an official language, and continuing the French civil law in Quebec.¹⁵¹

C. *After Confederation: Judicial Allocation of the Powers of Government*

One would expect, as did Macdonald, the development of a strong central government to follow from these beginnings, but that assumption proved false: "Since 1867 the jurisdiction of the central government has relatively decreased, and that of the provinces increased, to such an extent that in the opinion of many authorities the intentions of the Fathers of Confederation have been frustrated."¹⁵² Frustration of Macdonald's goal resulted from diverse sources: the sheer enormity of Canada and the diverse economic activities of its separated regions; the bicultural heritage of French-Catholic and British-Protestant Canada; and the distribution of a small population along a narrow band of territory that stretches 4000 miles across six time zones.¹⁵³ The principal influence, however, was judicial.¹⁵⁴

The judiciary, in reinterpreting Macdonald's vision of the Canadian state, focused on two clauses of the 1867 Constitution Act. Section 91 of the 1867 Constitution Act confers a number of enumerated powers exclusively upon the federal Parliament and contains a grant of residual legislative authority on matters pertaining to the "peace, order, and good government" of Canada. Section 92 confers a number of enumerated powers exclusively upon the provincial legislatures, including a residual

148. *Id.* § 101. Although section 101 authorized the establishment of a court, the court did not actually come into existence until 1875. However, criminal appeals from the Supreme Court of Canada to the Privy Council continued until 1935, and civil appeals to the Privy Council did not come to an end until 1949. For criminal appeals, see *British Coal Corp. v. The King*, 1935 App. Cas. 500 (P.C.) (Can.); P. HOGG, *supra* note 144, at 167. For civil appeals, see Act of Dec. 10, 1949, ch. 37, § 3, 1949, 2d Sess., Can. Stat. 247, 249-50; see also P. HOGG, *supra* note 144, at 167-68.

149. CONSTITUTION ACT, 1867, § 92.

150. *Id.* §§ 24, 29.

151. *Id.* §§ 93, 129, 133.

152. F. SCOTT, *supra* note 44, at 259.

153. R. SIMEON & I. ROBINSON, *STATE, SOCIETY, AND THE DEVELOPMENT OF CANADIAN FEDERALISM* 19-57 (1990).

154. *But see id.* at 339 (contending that "[t]he changing economic and social roles of the state have . . . [altered] the essential character of Canadian federalism. . . . [F]ederal form follows state function.").

power to legislate on "all Matters of a merely local or private Nature in the Province."¹⁵⁵ The extent of these residual powers and their apparently overlapping nature has proved to be a vexing judicial question throughout the post-Confederation period. The development and resolution of this issue provides a revealing portrait of the process of Canadian federalism. From the 1867 Constitution Act itself, and Macdonald's vision of the federal union created by it, one might expect that the courts would start from the presumption that section 91 vests general legislative authority in Parliament, with the judicial interpretive task reserved for determination of the discrete aspects of provincial authority carved out of the general grant to Parliament. Instead, as will be seen, the outcome is entirely reversed.

1. "*A Matter of National Concern*": *The Intersection of Federal and Provincial Residual Power*. Until 1949, the Judicial Committee of the Privy Council was the final court of appeal for Canada.¹⁵⁶ Although it no longer serves that function, its legacy continues as long as *stare decisis* is observed. By 1896, the Privy Council effectively had emasculated the idea that section 91 of the 1867 Constitution Act granted to the national government broad residual legislative powers to deal with the "Peace, Order, and good Government"¹⁵⁷ of Canada. In the *Ontario Liquor License Case*¹⁵⁸ the Privy Council held that this federal residual power did not exclude Ontario from enacting its own local prohibition law. Lord Watson argued that,

[T]he exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance. . . . To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would . . . not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces [G]reat caution must be observed in distinguishing between that which is local and provincial . . . and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.¹⁵⁹

The Privy Council in essence, if not in terms, rejected or at least subverted its earlier holding in *Russell v. The Queen*,¹⁶⁰ which held that Par-

155. CONSTITUTION ACT, 1867, § 92, cl. 16.

156. See *supra* note 148.

157. CONSTITUTION ACT, 1867, § 91.

158. Attorney-General for Ont. v. Attorney-General for Can., [1896] App. Cas. 348 (P.C. 1895) (Can.) (*The Local Prohibition Case*).

159. *Id.* at 360-61.

160. [1881-82] 7 App. Cas. 829 (P.C. 1882) (N.B.).

liament could validly enact a federal local prohibition law because it possessed the power to legislate on those subjects it deemed to be "of general concern to the Dominion, upon which uniformity of legislation is desirable."¹⁶¹

The *Russell* and *Ontario Liquor License* cases are difficult to reconcile. Although both interpret the extent of the federal government's residual power granted in section 91 to legislate for the "peace, order, and good government" of Canada, *Russell* upheld the Canada Temperance Act—a federal local-option prohibition scheme—while the *Ontario Liquor License Case* upheld a similar Ontario scheme as falling within the province's authority to legislate on "[m]atters of a merely local or private Nature in the Province."¹⁶² *Russell* construed the federal residual power contained in section 91—to legislate "for the peace, order, and good government" of Canada—to authorize Parliament to enact a nationwide temperance scheme. The *Ontario Liquor License Case* construed the federal residual power as insufficient to convey to Parliament *exclusive* authority to do so. This narrow construction was influenced by the Privy Council's determination that the provincial residual power contained in section 92—to legislate upon all matters "of a merely local or private nature in the province"—was broad enough to authorize a provincial temperance scheme. The two cases can only be reconciled by recognizing, as the Privy Council had in *Hodge v. the Queen*,¹⁶³ that some concurrent jurisdictional overlap between sections 91 and 92 might exist. But Lord Watson's "national dimensions" test for finding the outer boundary of federal legislative power provided little help, other than indicating that the exercise of "great caution" in locating the national dimension likely would shrink the "national" realm.

2. *Emergency and the Federal Residual Power.* It is thus not surprising that the vague national dimensions test was momentarily eclipsed by a more rigorous standard. According to Viscount Haldane, the national government's residual powers conferred by section 91 were exercisable only in an emergency. In Haldane's first encounter with the residuary power, however, he virtually read these powers out of section 91. In the *Insurance Reference*,¹⁶⁴ the Privy Council invalidated the federal Insurance Act of 1910. That Act sought to impose a licensing scheme on all insurers other than those who engaged solely in intra-pro-

161. *Id.* at 841. The general concern test is functionally identical to the "national dimensions" test. See *infra* text accompanying notes 183-91.

162. CONSTITUTION ACT, 1867, § 92, cl. 16.

163. [1883-84] 9 App. Cas. 117 (P.C. 1883) (Ont.).

164. Attorney-General of Can. v. Attorney-General of Alta., [1916] 1 App. Cas. 588 (P.C.) (Can.).

vincial business. Rejecting arguments based on both the federal trade and commerce power and the residuary power, the Privy Council declared that Parliament lacked any residual power to license insurers, emergency or otherwise. Six years later, however, in the *Board of Commerce Case*,¹⁶⁵ the Privy Council countenanced the use of residuary powers by the national government in times of emergency. Although the Privy Council struck down federal legislation that prohibited hoarding and required "necessaries of life" to be sold at fair prices, it observed that "highly exceptional"¹⁶⁶ or "abnormal"¹⁶⁷ circumstances, such as "war or famine,"¹⁶⁸ might justify the use of the residuary power for such a purpose.¹⁶⁹

A similar emergency standard emerged from *Toronto Electric Commissioners v. Snider*.¹⁷⁰ In *Snider*, the Privy Council invalidated federal labor legislation on the dual grounds that labor relations were a matter of "property or civil rights" assigned exclusively to the provinces¹⁷¹ and that the residuary power could not justify the legislation unless there was "some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war."¹⁷² The Privy Council also used *Snider* to resolve conveniently the tension between *Russell* and the *Ontario Liquor License Case*. It did so by characterizing Canadian intemperance as "so great and so general that at least for the period [of the Canada Temperance Act] it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster."¹⁷³ *Russell* was thus swept under the emergency doctrine, albeit at a certain cost of historical accuracy, for Canada in the 1880s was no more off on a national bender than was Britain.¹⁷⁴

Although the Privy Council regarded war, famine, or the threat of national inebriation as sufficient emergencies to invoke the national residuary power, the worldwide economic collapse of the 1930s did not so qualify. At the same time that the United States Supreme Court revolutionized American constitutional law by finding vastly enlarged powers

165. *In re Board of Commerce Act*, 1919, [1922] 1 App. Cas. 191 (P.C. 1921) (Can.).

166. *Id.* at 197.

167. *Id.* at 200.

168. *Id.* at 197.

169. *Id.* at 197-200.

170. 1925 App. Cas. 396 (P.C.) (Ont.).

171. CONSTITUTION ACT, 1867, § 92, cl. 13.

172. *Toronto Elec. Comm'rs*, 1925 App. Cas. at 412.

173. *Id.*

174. For the Canadian view of this patronizing explanation of *Russell*, see *The King v. Eastern Terminal Elevator Co.*, [1925] 1 S.C.R. 434, 438 (Anglin, C.J., dissenting).

in Congress,¹⁷⁵ the Privy Council invalidated most of Prime Minister Bennett's legislation designed to solve the Depression by securing major economic and social change. Minimum wage and maximum hour legislation were treated as simply an attempt to regulate labor relations and were thus invalid under *Snider*.¹⁷⁶ The Privy Council also declared unemployment insurance to be a matter relating to "property and civil rights," exclusively reserved to the provinces.¹⁷⁷ The Privy Council's failure to even consider whether national economic depression might have given a "national dimension" to Prime Minister Bennett's version of the New Deal appeared to signal the final demise of the national dimensions test.

The emergency test was not completely toothless, however. During World War I, the federal Parliament enacted the War Measures Act,¹⁷⁸ which vested enormous regulatory power in the federal government on almost any conceivable matter. The Act took effect whenever the federal government declared that war, insurrection, or invasion exists. The Privy Council upheld price control measures imposed under the Act's authority during World War I in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*¹⁷⁹ In subsequent years, Parliament enacted legislation authorizing national regulatory powers, and the courts sustained the legislation. The Supreme Court of Canada upheld rent control during World War II¹⁸⁰ on the same basis, and the Privy Council validated the forced deportation of Canadian citizens of Japanese ancestry after World

175. Compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (penalty tax held to be unconstitutional exercise of taxing power outside of the enumerated powers), *United States v. Butler*, 297 U.S. 1 (1936) (Congress' taxing power cannot reach areas reserved to the state's police powers) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (New Deal legislation held unconstitutional exercise of commerce power) with *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown for personal consumption did fall under Congress' interstate commerce power), *United States v. Darby*, 312 U.S. 100 (1941) (minimum wage law was exercise of Congress' interstate commerce power) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (regulating employee-employer relationship did fall under Congress' interstate commerce power).

176. *Attorney-General for Can. v. Attorney-General for Ont. (Labor Conventions)*, 1937 App. Cas. 326 (P.C.) (Can.).

177. *Attorney-General for Can. v. Attorney-General for Ont. (Unemployment Insurance)*, 1937 App. Cas. 355 (P.C.) (Can.). This decision was reversed by a 1940 amendment to the Constitution Act, 1867, § 91, cl. 2A, which added unemployment insurance to the list of powers assigned the federal government under section 91 of the Constitution Act.

178. War Measures Act, 8 R.S.C. ch. W-2 (1985). The War Measures Act was repealed and replaced by the Emergencies Act, 36-37 Eliz. II, Can. Stat. ch. 29 (1988). For a discussion of the differences between the two acts, see Tenofsky, *The War Measures and Emergencies Acts: Implications for Canadian Civil Rights and Liberties*, 19 AM. REV. CAN. STUD. 293 (1989).

179. 1923 App. Cas. 695 (P.C.) (Ont.).

180. *In re Reference as to the Validity of the Wartime Leasehold Regulations*, 1950 S.C.R. 124 (Can.).

War II.¹⁸¹ In 1976, the Supreme Court of Canada upheld the federal Anti-Inflation Act¹⁸² on the grounds that sustained double-digit inflation and high unemployment provided a "rational basis" for the parliamentary determination of an emergency.¹⁸³

3. *The Return of a Broad National Dimensions Test.* Eventually, the emergency test almost completely swallowed the national dimensions test because the test of the required degree of "national dimension" to invoke the federal residual power was the existence of special circumstances constituting an emergency. The Privy Council revived a broader conception of the national dimension test in *Attorney-General for Ontario v. Canada Temperance Federation*,¹⁸⁴ by concluding that the federal residuary power could be invoked when a subject "must from its inherent nature be the concern of the Dominion as a whole."¹⁸⁵ This resurrected version met with considerable success, and the Supreme Court of Canada has applied it to uphold federal legislative power over aeronautics,¹⁸⁶ the national capital region surrounding Ottawa,¹⁸⁷ and mineral resources under the British Columbia seabed.¹⁸⁸ It is difficult to ascertain, however, when a subject inherently concerns the whole nation. One suggestion is that this occurs whenever a problem "is beyond the power of the provinces to deal with it."¹⁸⁹ Another approach is that suggested by W.R. Lederman to reconcile the emergency test and the revived national dimension test of *Canada Temperance Federation*.¹⁹⁰ Lederman argued that the federal residuary power consists of two elements: first, a non-emergency power to deal with narrow and limited subject areas that are naturally unified and not expressly assigned to the provinces by section 92 of the 1867 Constitution Act, and second, an emergency-activated power, limited only by the duration of the emergency, to assume plenary authority over all subject matters necessary to deal with the emergency.

181. Co-operative Comm. on Japanese Can. v. Attorney-Gen for Can., 1947 App. Cas. 87 (P.C. 1946) (Can.).

182. Anti-Inflation Act, 23-25 Eliz. II, Can. Stat. ch. 75 (1975).

183. *In re* Reference concerning the Validity of the Anti-Inflation Act, [1976] 2 S.C.R. 373 (Can.).

184. 1946 App. Cas. 193 (P.C.) (Ont.).

185. *Id.* at 205.

186. *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 (Can. 1951).

187. *Munro v. National Capital Comm'n*, 1966 S.C.R. 663 (Can.).

188. *In re* Offshore Mineral Rights, 1967 S.C.R. 792 (Can.).

189. Gibson, *Measuring "National Dimensions"*, 7 MAN. L.J. 15, 33 (1976) (emphasis omitted).

190. See Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. BAR REV. 597 (1975).

Justice Beetz expressly adopted this approach in the *Anti-Inflation Reference Case*,¹⁹¹ with the assent of a majority of the Court.

4. *Judicial Interpretation and Shifts in the Baseline Presumption.*

The long wrangle over the extent of the national government's residuary powers produced a shift in the baseline presumption. Rather than starting from the presumption that section 91 vests a general legislative power in the federal government and then determining what remains of provincial authority, the process is reversed. Courts first inquire which matters are "of a merely local or private Nature in the Province,"¹⁹² leaving the residue from that inquiry to the authority of the national government.¹⁹³ The interpretive experience in the United States led to a very different outcome. Even though the United States Constitution expressly reserves to the states all powers not delegated to the national government,¹⁹⁴ the American courts proceed from the assumption that the states may legislate in only those domains the national government leaves untouched.¹⁹⁵ This approach exemplifies the modern irrelevance of text. The courts of the two nations act as if they were interpreting their neighbor's Constitution.

Judicially decreed decentralization has shaped Canadian federalism despite constitutional amendments intended to foster centralization. In

191. *In re Reference by the Governor in Council Concerning the Validity of the Anti-Inflation Act*, [1976] 2 S.C.R. 373, 451.

192. CONSTITUTION ACT, 1867, § 92(16).

193. It has not been just the federal residuary power that has undergone judicial shrinkage. Even though the Constitution Act, 1867, did not expressly reserve to the provinces authority over intra-provincial trade or commerce and did expressly grant to the federal government the power to regulate trade and commerce, such a reservation in favor of the provinces was soon read into the Act. See *Attorney-General for Can. v. Attorney-General for Alta.*, [1916] 1 App. Cas. 588 (P.C.) (Can.) (*Insurance Act Reference*); *Attorney-General for B.C. v. Attorney-General for Can.*, 1937 App. Cas. 377 (P.C.) (Can.) (*National Products Marketing*); *Citizens Ins. Co. of Can. v. Parsons*, [1881-82] 7 App. Cas. 96 (P.C. 1881) (Can.). For a thorough examination of this trend, see F. SCOTT, *supra* note 140, at 251.

194. See U.S. CONST. amend. X.

195. This phenomenon involves an accretion of federal power under the commerce clause, the conditional spending power, and the operation of the preemption doctrine. Under its commerce power, Congress may regulate any class of activity, so long as it has made a rational judgment that the regulated activity "affects" interstate commerce. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (portion of Consumer Credit Protection Act, 18 U.S.C. §§ 891-896 (1988), prohibiting "loan sharking" activities is within Congress' power under the commerce clause to control activities affecting interstate commerce). Congress may condition the states' receipt of federal funds upon alteration of state law or even the state constitution. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (statutory change); *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978) (constitutional amendment). Once Congress has acted to occupy fully the field, the preemption doctrine operates to foreclose the possibility of state legislation. See *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141-42 (1963); L. TRIBE, *supra* note 30, §§ 6-25 to 6-28, at 479-508.

1951, and by further amendment in 1964, the Parliament of Canada was given power to legislate upon pensions and related benefits,¹⁹⁶ but the federal power was qualified by a provision that "no such law shall affect the operation of any law present *or future* of a provincial legislature in relation to any such matter."¹⁹⁷ This was the first express recognition that provincial law could supersede contrary national legislation. John Calhoun and Robert Hayne would have applauded; Daniel Webster¹⁹⁸ and Sir John Macdonald would have shuddered.

D. *Patriation and the Notwithstanding Clause*

When Canada acted to patriate its Constitution, it responded to the inherited British tradition of parliamentary supremacy, the Canadian tradition of provincial autonomy, and the American tradition of constitutionally and judicially secured individual liberties. By adopting the Charter of Rights and Freedoms, Canadians seemingly embarked upon the American experiment—a system that permits ultimate judicial determination of the scope of such fundamental rights. But the older traditions of parliamentary supremacy and provincial autonomy tempered Canada's radical course. To limit the role of the judiciary, Canada employed the "notwithstanding clause"¹⁹⁹ and vested in both the national Parliament and the provincial legislatures the power to override the fundamental freedoms and keystone legal rights secured in the Charter of Rights and Freedoms. Canadians adhered to their heritage of parliamentary supremacy and rejected an unqualified acceptance of the American tradition of virtually unfettered judicial review of constitutional issues.

Alexis de Tocqueville once observed that "[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one."²⁰⁰ But had de Tocqueville traveled more extensively through Canada, he might have observed that British North Americans, like their cousins in the imperial homeland, were vastly less inclined to

196. By the British North America Act, 1951 (U.K.), 14 & 15 Geo. VI, ch. 32, *reprinted in* R.S.C. 1985, app. II, No. 35, a new section 94A was inserted into the Constitution Act, 1867, giving Parliament power to legislate upon old-age pensions. That authority was broadened by the Constitution Act, 1964, 12 & 13 Eliz. II, ch. 73 (U.K.), *reprinted in* R.S.C. 1985, app. II, No. 38.

197. CONSTITUTION ACT, 1867, § 94A, as amended (emphasis added).

198. Daniel Webster was the contemporary of Calhoun and Hayne most opposed to their compact theories of union. Webster's senatorial debates with Hayne are, by now, the stuff of legend. *See, e.g.,* 1 G. CURTIS, *LIFE OF DANIEL WEBSTER* 351-66 (1870); M. BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* 180-88 (1984).

199. CANADIAN CHARTER § 33.

200. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed. 1969). This is, of course, not a phenomenon greeted with universal acclaim. *See generally* R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 351-62, 407-18 (1977) (stating that the "most fundamental question of all" is the legitimacy of judicial review).

trust judges to resolve every significant issue. The notwithstanding clause preserved that English tradition of parliamentary supremacy—albeit diluted by the introduction of constitutional judicial review that inevitably follows upon adoption of constitutionally secured human rights. The resulting interplay between judicial invalidation of legislation on constitutional grounds and parliamentary trumpery using the notwithstanding clause is a distinctly Canadian creation.²⁰¹ Although the roles of the parties continue to evolve, to date the Supreme Court has not hesitated to exercise its judicial review power,²⁰² and the national Parliament has yet to employ the notwithstanding clause trump.

The grant of the notwithstanding clause power to the provinces reflects both the regionalized nature of Canada and the tradition of parliamentary supremacy. If parliamentary supremacy were the only value at work, then the override power would be vested in Parliament alone, and if provincial autonomy were the sole animus, then provinces would have been permitted to define for themselves the content of Charter rights by denying the Supreme Court of Canada authority to review the final judgments of the highest provincial courts.²⁰³ The provincial override power thus borrows from two major Canadian traditions—regionalization and parliamentary supremacy—and a third tradition common to all political societies: practical power politics. According to Professor Michael Mandel, the provincial legislative override power “was conceded by the

201. Of course, the notwithstanding clause can be used preemptively, and need not be reactive to judicial decisions. Both Quebec and Saskatchewan have used the clause preemptively. See *infra* note 210 (Quebec) and note 223 (Saskatchewan). Indeed, the only use of the notwithstanding clause to negate a judicial decision has been Quebec's employment of the device to negate *Ford v. Quebec*, [1988] 2 S.C.R. 712 (Can.). See *infra* notes 206-17 and accompanying text.

202. See, e.g., *The Queen v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (finding that section 251 of the Criminal Code of Canada, which criminalized abortions, was violative of a woman's security of the person, guaranteed by section 7 of the Canadian Charter); *The Queen v. Vaillancourt*, [1987] 2 S.C.R. 636 (Can.) (invalidating the felony murder provisions of the Criminal Code as offensive to the principle of “fundamental justice” secured by section 7 of the Charter); *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.) (holding that the 1907 federal Lord's Day Act, R.S.C. ch. L-13, § 4 (1970), which prohibited business activity on Sundays, violated the Charter's guarantees of freedom of conscience and religion); *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 455 (Can.) (finding that decisions made by Cabinet are reviewable under the Charter). This absurdly selective list should not be taken as an indication that Charter litigation is a rarity. Since 1982 the Supreme Court of Canada has churned out a steady stream of Charter opinions. See generally M. MANDEL, *supra* note 19; P. RUSSELL, R. KNOPFF & T. MORTON, *FEDERALISM AND THE CHARTER* 11-13 (5th ed. 1989) (discussing the early treatment of the Charter by the Supreme Court.) A crude measure of the Court's Charter activity is the fact that one major treatise on Canadian constitutional law, published only three years after the Charter's adoption, devotes 173 pages, or 21% of its total text, to discussion of the Charter. See P. HOGG, *supra* note 144, at 649-822.

203. But the latter choice—to allow provinces to define rights—would have served provincial autonomy only if provincial judges were appointed by the provinces, and they are not; the 1867 Constitution Act specifies that the federal government appoint provincial judges. CONSTITUTION ACT, 1867, § 96.

federal government to the opposing provinces as the price for agreement to the constitutional package."²⁰⁴

This is hardly surprising, since prior to the Charter the principal limits on provincial power were the jurisdictional limits imposed under the 1867 Constitution Act. These limits were judicially construed to vest the provinces with significant autonomy within the Canadian federal system. The Charter threatened to change this constitution by the imposition of nationwide norms of human liberty, which would have severely constrained provincial freedom of action. The notwithstanding clause may thus be seen as both a counterweight to the feared nationalizing propensities of the Charter and the price exacted by the provinces for their assent to the new constitutional order.²⁰⁵

The provincial legislative override essentially states that national rights are national to the extent the provinces permit. Dramatic evidence of this is seen in the employment of the notwithstanding clause by Quebec's National Assembly to preserve its legislation, particularly that securing French linguistic hegemony, from scrutiny under the Charter of Rights and Freedoms.

E. *Quebec and the Notwithstanding Clause*

In 1977, the Quebec legislature, saturated with separatist sentiment and fearful that its French cultural identity might disappear, enacted Bill 101, the Charter of the French Language.²⁰⁶ The bill elevated the French language into a vastly preferred status and placed draconian legal restrictions on the use of other languages. The irony was that although Canada was officially bilingual,²⁰⁷ Quebec was officially a unilingual

204. M. MANDEL, *supra* note 19, at 75. It is ironic that many of the provincial Premiers insisting upon inclusion of the provincial override in the Charter were westerners (such as Saskatchewan's Allen Blakeney and Manitoba's Sterling Lyon), whose constituencies now excoriate Quebec for its invocation to preserve French linguistic hegemony in Quebec. This behavior parallels the American experience of manipulating state sovereignty principles for expedient sectional advantage. See *supra* Part I(A)-(C).

205. See Knopff & Morton, *Nation-Building and the Canadian Charter of Rights and Freedoms*, in CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA 133 (A. Cairns & C. Williams eds. 1985). For example, Allen Blakeney, then Saskatchewan's Premier, insisted upon inclusion of the notwithstanding clause as a means to insure that his New Democratic Party could continue to enact its socialist legislative agenda even in the face of a hostile Supreme Court of Canada. Blakeney no doubt recalled the fate of Prime Minister Bennett's version of the New Deal at the hands of the Judicial Committee of the Privy Council. See *supra* text accompanying notes 175-77.

206. QUE. REV. STAT., ch. C-11 (1977).

207. See The Official Languages Act, R.S.C. ch. O-2, § 1 (1970). The authority of the federal government to enact the legislation was upheld as a valid exercise of its residual authority over federal governmental and parliamentary institutions in *Jones v. Attorney General* [1975] 2 S.C.R. 182 (N.B.).

French province.²⁰⁸ Quebec acted, in the words of Premier René Lévesque, "to make it as . . . difficult as we can for . . . that bloody Charter [of Rights and Freedoms] to be applied to Quebec."²⁰⁹ To achieve this result, the legislature repealed all Quebec legislation and immediately re-enacted it with the addition of a notwithstanding declaration in each statute.²¹⁰

Initially, Quebec's ploy proved unsuccessful. In *Alliance des Professeurs de Montreal v. Attorney-General of Quebec*,²¹¹ the Quebec Court of Appeal concluded that the omnibus use of the notwithstanding power offended the Charter by its failure to "sufficiently specify the guaranteed rights or freedoms which the legislation intended to override."²¹² To the Quebec Court of Appeal, mere recitation of the section numbers of the Charter rights and freedoms overridden was not sufficient. Indeed, to Judge Jacques, a valid override requires some substantive "link between the legislation and the right" overridden.²¹³

Appeal of *Alliance des Professeurs* to the Supreme Court of Canada eventually was abandoned in favor of another series of cases posing the same issue. *Ford v. Quebec*²¹⁴ and *Devine v. Quebec*²¹⁵ challenged the legitimacy of Quebec's prohibitions against the use of English in advertising or signs as a violation of numerous Charter rights, including the freedom of expression guaranteed by section 2(b) of the Charter. The *Ford* Court responded to Quebec's omnibus override of the Charter by overruling *Alliance des Professeurs* and concluding that:

Section 33 [the notwithstanding clause] lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of a[] . . . link . . . between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review.²¹⁶

208. Of course, all the remaining provinces except New Brunswick are also officially unilingual, but none of them sought, as did Quebec, to prevent by force of law the use of other languages.

209. D. GIBSON, *THE LAW OF THE CHARTER: GENERAL PRINCIPLES* 126 (1986).

210. *See* An Act Respecting the Constitution Act, ch. 21, 1982 Qué. Stat. 441.

211. 1985 C.A. 376, 21 D.L.R.4th 354.

212. *Ford v. Quebec*, [1988] 2 S.C.R. 712, 737 (Can.) (characterizing rationale of decision of the Quebec Court of Appeal). In the Court of Appeals, Justice Jacques concluded that "[t]he fundamental freedoms and legal guarantees which may be disregarded by a statute by virtue of s. 33 (of the Charter—the notwithstanding clause) are so important that they should be expressly stated so as to bring into sharp focus the effect of the overriding provisions and the rights deprived." *Alliance des Professeurs*, 1985 C.A. at 380, 21 D.L.R.4th at 361.

213. *Alliance des Professeurs*, 1985 C.A. at 382, 21 D.L.R.4th at 364.

214. [1988] 2 S.C.R. 712 (Can.).

215. [1988] 2 S.C.R. 790 (Can.).

216. *Ford*, [1988] 2 S.C.R. at 740.

The Court held that those provisions of Quebec's Charter of the French Language that were insulated from review under the Canadian Charter by reason of the override nevertheless offended parallel guarantees of free expression contained in the Quebec Charter of Human Rights.²¹⁷ Similar reasoning informed the result in *Devine*. The *Ford* court, however, concluded that the provision of Quebec's language legislation requiring French-only firm names escaped insulation from Charter review because the 1982 omnibus override legislation had expired in 1987 and had not been renewed by the Quebec National Assembly. Accordingly, the Court ruled that the requirement of French-only firm names violated the Charter's guarantee of free expression.

The Quebec government swiftly adopted new override legislation sufficient to negate *Ford*, which triggered a torrent of demands throughout English Canada for repeal of the notwithstanding clause.²¹⁸ The controversy exposed a modern Canadian version of the sectional and cultural rivalry that infected Calhoun's time. Just as in antebellum America, the use of a provincial veto is efficacious only to the extent that it is tolerated by the remainder of the federal union. However, in contemporary Canada, unlike Calhoun's America, the sectional brake is a textual part of the Constitution and is thus harder to deny. Moreover, its invocation by Quebec is part of a long-standing tradition of Canadian accommodation of a separate French identity and of provincial autonomy. However unhappy English Canada may be with continuing demands for greater recognition of Quebec's difference from Canada—and

217. American lawyers will find it odd that the Supreme Court of Canada possesses authority to review and decide issues of provincial law. Yet, that power was implicitly recognized in the Constitution Act, 1867, § 101, which authorizes Parliament to establish "a General Court of Appeal for Canada." Section 35 of the Supreme Court Act, R.S.C. ch. S-19 (1970), confers broad jurisdiction upon the Supreme Court to hear and decide appeals raising questions of constitutional, federal, or provincial law. "The fact that a case raises only a question of provincial law does not affect the right of appeal, and a large number of such cases are in fact appealed to and disposed of by the Court." P. HOGG, *supra* note 144, at 171-72. Nor does the Supreme Court of Canada employ *Erie*-like deference when faced with a question of provincial law. The Court "always makes it[s] own determination of . . . a question of provincial law, and it does not hesitate to reverse a decision rendered by a provincial court of appeal in a case raising only questions of provincial law." *Id.* at 173.

218. See M. MANDEL, *supra* note 19, at 80-81. Repeal would be extraordinarily difficult. Section 38 of the Constitution Act, 1982 requires the consent of a majority of the Senate, House of Commons, and legislatures of at least two-thirds of the provinces containing at least 50% of the population of all provinces. Moreover, under section 38(3) a province may expressly nullify any such amendment, as to it, if it is an amendment "that derogates from the legislative powers . . . or any other rights or privileges of the legislature or government of a province." CONSTITUTION ACT, 1982, § 38(2). Since elimination of the provincial override is precisely to that effect, Quebec would presumably act under section 38(3) to block the operation of such a Charter amendment as to Quebec. The difficulties of amendment illustrate again the Canadian resonance of Calhoun's concurrent majority principle.

despite the death of the Meech Lake Accord,²¹⁹ which would have enshrined in the Constitution Quebec's status as a "distinct society"—Quebec *is* in fact distinct.

The failure of the Meech Lake Accord did not end Quebec's drive for greater provincial autonomy. Rather, its demise merely expanded the scope of the conflict. Quebec's Premier, Robert Bourassa, the opposition Parti Québécois leader, Jacques Parizeau, and the renegade Tory and ex-cabinet minister, Lucien Bouchard, have buried their political differences to establish the multi-partisan Bélanger-Campeau Commission to craft Quebec's proposals for restructuring the Canadian Constitution. Bourassa's Liberal party has already produced the Allaire Report, calling for a radical shift of authority from the central government to the provinces. Western Premiers have begun to explore ways in which the four Western provinces can operate as a bloc in order to wrest power from Ottawa, going so far as to suggest establishment of a regional income tax with countervailing tax concessions on the part of the federal government.²²⁰ Indeed, British Columbia's Premier, William Vander Zalm, publicly suggested that British Columbia "will certainly seek a different type of confederation, perhaps similar to Quebec-type association within Canada."²²¹ The death of Meech Lake simply opened the door to a far more free-ranging debate on the constitutional future of Canada. The existing order has been so exploded that even Prime Minister Mulroney implicitly concedes enormous change by his declaration that "Canada will not be redefined exclusively by the province of Quebec."²²² Redefinition seems inevitable, and its form likely will further accentuate such concessions to provincial autonomy as the notwithstanding clause.

F. Conclusion: *The Effects of the Notwithstanding Clause*

Even in the existing order, provincial use of the notwithstanding power is not limited to Quebec,²²³ and the use of this power has set the

219. The proposed Constitution Amendment, 1987, is generally referred to as the Meech Lake Accord. Its text may be found in P. HOGG, *MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED*, app. at 69-83 (1988).

220. See Cernetig, *West Wants to Curb Ottawa's Spending*, *Globe & Mail* (Toronto), July 28, 1990, at A1, col. 1.

221. Sexton, *Canada May Never Be the Same*, *Newsday*, June 29, 1990, at 13; Claiborne, *Despite Pact Failure, Precipitous Breakup of Canada Unlikely*, *Wash. Post*, June 26, 1990, at A15, col. 1.

222. Fraser, *Quebec Won't Set Agenda in National Debate, PM Insists*, *Globe & Mail* (Toronto), July 30, 1990, at A1, col. 3.

223. Professor Mandel notes that the Conservative government of Saskatchewan, led by Grant Devine, used the notwithstanding clause to insulate from Charter review its "back-to-work" legislation designed to end a government employees' strike. M. MANDEL, *supra* note 19, at 77 (describing the popular reaction to the Saskatchewan use of the notwithstanding clause). See *The SGEU Dispute Settlement Act*, ch. 11, 1984-1986 Sask. Stat. 1173; see also Tassé, *supra* note 19, at 107-08.

stage for Canadian centrifugal action. It can be argued that the centrifugal effect of the notwithstanding clause is insignificant because the clause operates to balance the loss of provincial authority implicit in the adoption of the Charter. Because the notwithstanding clause does not apply to every section of the Charter, arguably the provinces are more constrained after the Charter than before its adoption. Although this may be true, it ignores the symbolic power of a provincial assertion of independence under the notwithstanding clause. Symbolic power may ultimately prove to be more potent than real power, because it carries with it the possibility of the transformation of real power. Entrenched Charter rights are themselves of great symbolic and real importance. A provincial power to override such rights thus heightens the possibility of provincial autonomy on matters of fundamental constitutional significance. The provincial override thus operates to provide further legitimacy to provincial demands, like Quebec's, for greater autonomy. However, it is too early to predict whether the provincial override will result in a bitterly fractured federal union or will serve to maintain existing regional differences.

By contrast, the federal override power has yet to assume any significance. It has not yet been employed and its use by Parliament is apt to be highly volatile. Although Charter rights are not absolute,²²⁴ they are popularly regarded as a critical bulwark against governmental abuse. Any Parliamentary action to override them is thus likely to inflame a significant number of Canadians. This is not to suggest that the federal override power will always languish in desuetude; rather, the current significance and pronounced effect of the notwithstanding clause is to bolster demands for greater provincial autonomy.

III. AMERICAN ANALOGUES TO THE NOTWITHSTANDING POWER

The constitutional system of the United States also permits the states and Congress to exercise a legislative override upon constitutional issues, but the American version of the notwithstanding power lacks explicit textual roots in the Constitution and instead masquerades in other forms. The American version of the provincial override, although patchy, is more pronounced and ingrained than the federal legislative override. The latter remains largely a theoretical power despite its considerable potential.

(pointing out that, other than Quebec, only Saskatchewan has used the notwithstanding power to enact override clauses).

224. See, e.g., CANADIAN CHARTER § 1 ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

A. *State Legislative Override of Constitutional Rights*

The United States Supreme Court has determined in a number of areas that the states may delineate the boundaries of a constitutionally guaranteed right. In these cases, the Court articulates the constitutional right at a highly general level—e.g., privacy—with an almost equally general conclusion that the right applies to a given claim—e.g., abortion. But in deciding the boundaries of the right, the Court often concedes to the states virtually plenary authority. This process is not as universal in substance and scope as the Canadian provincial override, and, also unlike its Canadian relative, it may not be invoked solely by a state legislature. The American analogue to the provincial override begins with a recognition by the Supreme Court that the scope of a certain federal constitutional right, in a given context, is best determined by the states. The state determines the substance of the right, yet the principle of federal supremacy is preserved in a purely formal fashion. A brief examination of some concrete applications may elucidate this process.

1. *Privacy and Abortion.* The non-textual right of privacy has been affixed to the Constitution since *Griswold v. Connecticut*.²²⁵ Fashioned out of a cluster of cases dealing with familial and procreative rights,²²⁶ the Court extended the privacy right to include a woman's right to choose to terminate her pregnancy.²²⁷ The abortion aspect of the privacy right has never been absolute, however, because the Court consistently has recognized that in the latter stages of pregnancy the states may assert a compelling interest in preserving the potential human life represented by viable fetuses.²²⁸ Until *Webster v. Reproductive Health Services*,²²⁹ the range of governmental justifications sufficient to support restrictions upon the abortion right were quite limited.²³⁰

225. 381 U.S. 479 (1965).

226. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (using equal protection clause to strike down Oklahoma's mandatory sterilization of recidivist thieves as lacking the compelling reason required of governmental intrusions on fundamental rights of procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) ("liberty . . . to direct the upbringing and education of children" prevented Oregon from requiring that all children attend public schools); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty "to marry, establish a home and bring up children" prevented Nebraska from prohibiting the teaching of foreign languages prior to the eighth grade).

227. *Roe v. Wade*, 410 U.S. 113 (1973).

228. There also is no right to receive public assistance in the performance of abortions. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (upholding prohibitions on use of publicly funded facilities or personnel to perform abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding prohibitions on Medicaid funding for abortions).

229. 109 S. Ct. 3040 (1989).

230. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (invalidating a smorgasbord of restrictions involving consent, reporting, viability testing, and two-physician requirement); *Bellotti v. Baird*, 443 U.S. 622 (1979) (invalidating a requirement of

The *Webster* decision heralds a new era that is redolent of the American version of the provincial legislative override. Five justices agreed that Missouri's prohibition of nontherapeutic abortions in publicly supported hospitals and its requirement of testing fetal development to determine viability were consistent with the privacy right. The majority disintegrated when it attempted to deliver a rationale for this result. Justice O'Connor adhered to her prior framework, subjecting only those abortion restrictions "unduly burdensome" to a woman's right to terminate her pregnancy to the exacting requirement of satisfying a compelling state interest.²³¹ O'Connor thus found the Missouri restrictions not unduly burdensome. A plurality of Chief Justice Rehnquist and Justices Kennedy and White declared the Missouri testing requirement inconsistent with the trimester framework of *Roe* and they remodeled the structure, declaring the states' interest in preserving fetal life to be compelling throughout gestation. Justice Scalia damned the entire enterprise and called for the straightforward reversal of *Roe v. Wade*.

The *Webster* plurality reaffirmed the existence of both the privacy right and the included abortion right, maintaining that state regulations may encroach upon the abortion right only to the extent that the restrictions imposed "permissibly further[] the State's interest in protecting potential human life."²³² To Justice Blackmun, this was "the question that courts must answer in abortion cases, not the standard for courts to apply."²³³ Justice Blackmun's point might not have been lost on the plurality; in formulating a circular test for identifying state invasions of the abortion right, the plurality preserved the *form* of constitutional entitlement, while leaving the states virtually plenary authority to impose abortion restrictions that had some minimally plausible connection to the preservation of fetal life. What abortion restriction could possibly lack such a connection?

This gambit failed to command a majority of the Court and cannot be offered as proof that an American notwithstanding clause lives in the politically charged forum of abortion rights. But the willingness of three members of the Court to embark on such a venture, and the fact that two

third-party consent to an abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (invalidating a range of restrictions including third-party consent requirements).

231. Justice O'Connor's "undue burden" test originated in her dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461-66 (1983) and was outlined most fully in her dissent in *Thornburgh*, 476 U.S. at 828. According to Justice O'Connor, "[J]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes . . . with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision." *Id.*

232. *Webster*, 109 S. Ct. at 3057.

233. *Id.* at 3076 (Blackmun, J., dissenting).

more justices concurred in the result, are vivid indicators of a rapidly developing plasticity of constitutional thought in this area.

2. *Free Speech and Obscenity.* Despite the seemingly absolute nature of the command that "Congress shall make no law . . . abridging the freedom of speech,"²³⁴ the guarantee has never been interpreted to prohibit governmental restrictions on obscene speech or expression.²³⁵ The problem, of course, has been to separate the obscene from the merely racy. Although Justice Potter Stewart professed to "know it when I see it,"²³⁶ such judgments inevitably are personal and subjective. Jerry Falwell and Larry Flynt, for example, are apt to have wildly disparate notions of the obscene. For sixteen years the United States Supreme Court struggled to avoid such individualized judgments,²³⁷ but the Court abandoned that effort in its 1973 decision, *Miller v. California*.²³⁸

In *Miller*, the Court conceded that the line between obscenity and protected speech was defined by "contemporary community standards" and could be drawn to include speech that was *not* "utterly without redeeming social value."²³⁹ The referent community was no longer national, but was at least as localized as the states.²⁴⁰ Once again, the Court recognized the *form* of a uniform national constitutional entitlement, while leaving the substance of such rights in the hands of the states:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive" . . . [O]ur Nation is sim-

234. U.S. CONST. amend. I. This prohibition is binding upon the states as well via the due process clause of the fourteenth amendment. See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927) (holding that states violated due process clause of fourteenth amendment by applying Syndicalism Act, ch. 37, 1920 Kan. Sess. Laws 55, without evidence that organization advocated violence).

235. See generally L. TRIBE, *supra* note 30, § 12-16, at 904-09 (historical account of development of obscenity law).

236. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

237. In *Roth v. United States*, 354 U.S. 476 (1957), the Court concluded that obscenity was constitutionally protected speech and that the test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966), the Court shifted from the *Roth* conclusion that obscenity was unprotected because of its worthlessness to a view that it could be denied protection only if it was utterly worthless. But the Court could never readily agree on exactly what constituted obscenity; in 1968 Justice Harlan observed that "[t]he subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., dissenting).

238. 413 U.S. 15 (1973).

239. *Id.* at 37 (quoting *Memoirs*, 383 U.S. at 418).

240. *Id.* at 30.

ply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation²⁴¹

The constitutionally informed judgment of obscenity thus varies from state to state or even village to village.²⁴² Like a snake shedding its skin, the form of the national constitutional right remains while the substance of the right—the critical power of characterization of expression as obscene—slithers into the bushy tangle of the several states.

An imported version of the Canadian provincial legislative override would deal with this phenomenon more simply, by permitting the states to adopt *any* legislation proscribing and defining obscenity—the first amendment notwithstanding—so long as the law expressly relied on the override power. The American analogue does not permit such unconstrained latitude, but it does create an extraordinary plasticity in the constitutional entitlement of free speech and expression. The fact that this plastic right can be sculpted almost at will by the states shows that the principle of a state legislative override has rooted itself in this corner of the American constitutional garden.

3. *Cruel, Unusual, and Capital Punishment.* In *Furman v. Georgia*,²⁴³ the United States Supreme Court ruled that Georgia's death penalty statute constituted cruel and unusual punishment²⁴⁴ because it gave "untrammelled discretion"²⁴⁵ to juries which resulted in the "freakish and wanton" imposition of the death penalty.²⁴⁶ The *Furman* "majority" (consisting of five separate opinions) established a new role for eighth amendment jurisprudence. The majority contended that the eighth amendment commanded the Court to review all facets of state death penalty legislation in order to determine whether, in its totality, the

241. *Id.*

242. The Court has not totally relinquished control over the characterization of speech or expression as obscene. In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court held that a local jury, even if applying local standards, could not find the movie "Carnal Knowledge" obscene. *Pope v. Illinois*, 481 U.S. 497 (1987), held that the question of whether purportedly obscene material lacked serious literary, artistic, political, or scientific value was to be judged by the standards of the mythical "reasonable person" rather than those of "an ordinary member of any given community." *Id.* at 500-01. How much of a difference this makes is not entirely clear, but at the least it appears to mandate a national standard for the issue of "artistic merit," leaving local communities with plenary authority over the questions of whether the material appeals to prurient interests and is patently offensive.

243. 408 U.S. 238 (1972).

244. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The prohibition of cruel and unusual punishments applies to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

245. *Furman*, 408 U.S. at 247.

246. *Id.* at 414.

body of state law constituted cruel and unusual punishment. In contrast, the *Furman* dissenters maintained that the cruel and unusual punishments clause warranted nothing more than an examination of the *mode* of punishment.²⁴⁷ Thus, the classic English punishment for treason—being dragged to the place of execution, hung until near death, disemboweled, and burned—presumably would be cruel and unusual, while execution by lethal injection would be neither. The *Furman* dissenters were confident that the eighth amendment did not provide a vehicle by which the courts could displace the judgments of the state legislatures concerning constitutionally acceptable applications of the death penalty.

The Court elaborated on the newly proclaimed role of the eighth amendment in *Gregg v. Georgia*.²⁴⁸ First, the Court attempted to identify national “contemporary societal values” and sought to compare a state’s legislation to those values. Thus, state imposition of the death penalty for shoplifting would be so outside national societal values that the statute would be deemed cruel and unusual. Second, the *Gregg* Court concluded that even if a death penalty statute conformed to the national societal consensus, the judiciary had an independent duty to decide if such a statute was cruel and unusual due to a disproportionate penalty or because it did not make a “ineasurable contribution to acceptable goals of punishment.”²⁴⁹ Applying this test, the Court prohibited the death penalty in the following circumstances: rape of an adult woman;²⁵⁰ felony murder where the defendant neither killed nor intended to kill;²⁵¹ and offenses committed by juveniles under the age of sixteen.²⁵² Additionally, execution of a convict who is insane at the time of execution has been deemed unconstitutional.²⁵³

This elaborate scaffolding began to collapse with the Court’s decision in *Stanford v. Kentucky*,²⁵⁴ which upheld the practice of executing juveniles as young as sixteen. The *Stanford* Court’s assessment of contemporary societal values concluded that a majority of states that im-

247. *Id.* at 380 (Burger, C. J., dissenting); *id.* at 421-23 (Powell, J., dissenting).

248. 428 U.S. 153 (1976).

249. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality).

250. *Id.*

251. *Enmund v. Florida*, 458 U.S. 782 (1982). *But see* *Tison v. Arizona*, 481 U.S. 137, 152 (1987) (death penalty upheld as applied to defendants who had neither killed nor intended to kill but whose participation in the felony resulting in murder was “major and whose mental state [was] one of reckless indifference to the value of human life”).

252. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

253. *Ford v. Wainwright*, 477 U.S. 399 (1986). *But cf.* *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (permitting the execution of the mentally retarded).

254. 109 S. Ct. 2969 (1989).

posed the death penalty permit capital punishment for juveniles.²⁵⁵ The *Stanford* majority split on the second prong of the *Gregg* test. A four-person plurality rejected this prong in its entirety, concluding that to allow judges to assess proportionality or acceptable penological goals "is to replace judges of the law with a committee of philosopher-kings."²⁵⁶ Rather, the plurality stated, the Court's "job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*."²⁵⁷ Thus, arguments about penological goals and proportionality properly are directed "not [to] this Court but the citizenry of the United States. It is they, not we, who must be persuaded."²⁵⁸ This view mirrors that of the *Furman* dissenters.

Justice O'Connor, however, prevented a complete collapse of the death penalty framework. Although she concurred in the *Stanford* result, she maintained that the Court has a "constitutional obligation" to assess the proportionality of the death penalty to the offense whenever a state decides to impose capital punishment.²⁵⁹ But even Justice O'Connor agreed that the "unusual" limitation derives its substance *entirely* from the range of laws enacted by the various state legislatures. Thus, for Justice O'Connor, the Court engages in proportionality review utilizing a composite of state legislation as a standard. The plurality of Chief Justice Rehnquist and Justices Scalia, Kennedy, and White also would allow the states to control the substance of the "cruel" component. As in *Webster*, Justice O'Connor occupies a pivotal solo position that prevents, for the moment, the full fruition of an American version of the provincial legislative override of the cruel and unusual punishment clause. But, as in *Webster*, *Stanford* effectively consigns most death penalty issues to the states for legislative decision. In this instance the form of constitutional entitlement that must be observed is that of proportionality. Once Justice O'Connor is satisfied that the death penalty is not disproportionate to the offense, the states virtually have plenary authority to act. Only the action of other states remains as check on a state's authority. Unlike Canada, where a province may legislatively override

255. To be sure, the process of counting the states tended to confirm Mark Twain's observation that there are "lies, damned lies, and statistics." 1 S. CLEMENS, MARK TWAIN'S AUTOBIOGRAPHY 246 (1924). The majority counted only the 37 states that impose the death penalty and concluded that a minority of 15 specifically prohibited the death penalty for juveniles (under age 17). The dissenters, on the other hand, unaccountably dismissed from their survey the 18 states that impose the death penalty and do not specify any minimum age for its imposition and added the 15 states that have no death penalty at all to arrive at the conclusion that 30 states are opposed to the juvenile death penalty and only two in favor.

256. *Stanford*, 109 S. Ct. at 2980.

257. *Id.* at 2979 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

258. *Id.*

259. *See id.* at 2981 (O'Connor, J., concurring).

the Charter without regard to other provinces, an American state is required to keep one eye cocked to the sentiments of other states. A perfect analogue to the provincial notwithstanding clause would leave Florida free to impose the death penalty for cashing a bad check; the hybrid American analogue would curb Florida's enthusiasm in the absence of significant legislative agreement in other states.

4. *Procedural Due Process.* For nearly two centuries the United States Supreme Court thought that the procedural safeguards afforded by the due process clauses²⁶⁰ applied to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁶¹ The Court deemed procedural due process essential to ensure "fundamental fairness"²⁶² or prevent governmental invasion of the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."²⁶³ The rights protected by procedural due process and the type of process due were treated as separable issues—issues that derived their content from a "higher law."²⁶⁴ But not all exercises of governmental power were to be tested by the procedural demands of due process. In the classic formulation, only "rights"—derived from constitutional, natural, or common law sources—were protected. "Privileges"—governmental largesse—could be granted or withheld at the government's discretion.²⁶⁵

260. U.S. CONST. amends. V & XIV.

261. *Hurtado v. California*, 110 U.S. 516, 535 (1884). *See also* *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (due process protects "fundamental principle[s] of liberty and justice which inhere[] in the very idea of free government and [are] the inalienable right of a citizen of such a government").

262. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

263. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

264. *See, e.g., Twining*, 211 U.S. at 106 (finding a natural law right of freedom from arbitrary governmental action).

265. Thus, to become or remain a public employee was an unprotected privilege. For the classic summation, see Justice Holmes' statement while he was on the Massachusetts Supreme Judicial Court: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). The harshness of this doctrine was greatly tempered by the doctrine of "unconstitutional conditions," which prevented governments from withholding its largesse from those who insisted upon exercising constitutional rights. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not deny unemployment benefits to a person who refuses, for religious reasons, to work on Saturdays); *Speiser v. Randall*, 357 U.S. 513 (1958) (government may not produce indirectly that which it may not command directly); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) (regardless of capacity in which government acts it is not treated like a private party for constitutional purposes).

In a series of cases in the early 1970s, the Court rejected the right/privilege distinction.²⁶⁶ The justices regarded governmental largesse as an "entitlement,"²⁶⁷ which deserved due process protection if it was sufficiently "important" to the individual,²⁶⁸ or if it derived from either "an independent source *such as* state law"²⁶⁹ or "mutually explicit understandings" between state and citizen.²⁷⁰ But this expansive conception of the "liberty" and "property" interests protected by due process has shrunk into a wizened raisin of its original fruit. For example, *Bishop v. Wood*²⁷¹ held that a policeman's claim of entitlement to continued employment "must be decided by reference to state law."²⁷² Similarly, in *Meachum v. Fano*²⁷³ the Court held that a state prisoner possessed no liberty interest in resisting transfer to another prison "absent a state law or practice conditioning such transfers on proof of serious misconduct or . . . other events."²⁷⁴ In short, expectations ungrounded in positive state law are insufficient to trigger due process protection.²⁷⁵

266. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972) (distinction not dispositive to due process adjudication); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (rejecting the notion that the distinction determines constitutional rights); *Bell v. Burson*, 402 U.S. 535 (1971) (substance, not form, determines if rights have been violated); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (upholding Court's prior rejection of concept that constitutional rights turn on whether benefit is "right" or "privilege"). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

267. The term originated in Professor Reich's influential article, see Reich, *The New Property*, 73 YALE L.J. 733 (1964), and was adopted by the Court in *Goldberg*, 397 U.S. at 262 n.8.

268. See Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 150 (1983). *Goldberg* did not speak of "importance," per se, but of the likelihood of "grievous loss" to the individual, the relative importance of the individual's loss, and the government's interest in summary adjudication. See *Goldberg*, 397 U.S. at 262-66.

269. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added to underscore Court's view that state law was not the exclusive source).

270. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). But see *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981) (finding the "mutually explicit understanding" doctrine irrelevant to the creation of "liberty" interests). The *Jago* Court found no liberty interest impaired by a rescission of parole after the prisoner had been informed of its grant.

271. 426 U.S. 341 (1976).

272. *Id.* at 344.

273. 427 U.S. 215 (1976).

274. *Id.* at 216. To be sure, a prisoner has already had her liberty taken from her under the due process afforded by the criminal justice system. Thus, most post-incarceration liberty interests are definable by the state. But see *Vitek v. Jones*, 445 U.S. 480 (1980), which observed in an alternative holding that transfer of a prisoner to a mental institution involved a claimed liberty interest, the sufficiency of which must be tested independently of state law.

275. See *Connecticut Bd. of Pardons v. Duinschat*, 452 U.S. 458, 465 (1981) (no due process right in connection with application for commutation of life sentence even though over 75% of such applications were granted); *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 11 (1979) (no right to due process in the context of an initial parole decision because the state had provided "no more than a mere hope" for the parole).

*Paul v. Davis*²⁷⁶ is an even better illustration of current doctrine. In that case, the Court found no due process interests implicated in a police department's circulation to local merchants of a flyer describing Davis as a known and active shoplifter, even though Davis had never been convicted of the crime. The Court concluded that "liberty," for due process purposes, did not include Davis' interest in reputation alone, because "Kentucky law does not extend . . . any legal guarantee of present enjoyment of reputation which has been altered as a result of [the actions of the police]," notwithstanding the protections against injury by virtue of tort law.²⁷⁷ Thus, Davis lacked a protectible liberty interest simply because Kentucky had not statutorily provided one.

There is a clear trend toward development of a jurisprudence of due process that first identifies the interests protected by due process and then inquires into the nature of the procedural protections. When the interests are of statutory entitlement, the protected interests are generally only those determined by state law.²⁷⁸ The result is that, with respect to much of the statutory entitlement area and some liberty interests, the Constitution's due process guarantee bites only that which the states decide to proffer.

In *Arnett v. Kennedy*,²⁷⁹ a three-justice plurality went further and embraced the idea that "the property interest . . . [asserted] was itself conditioned by the procedural limitations which had accompanied the grant of that interest."²⁸⁰ The Court permitted the state not only to define the rights to which due process attaches, but also to define the process that is due, since "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the

276. 424 U.S. 693 (1976).

277. *Id.* at 711-12. But if the damage to reputation had accompanied governmental denial of some other protectible interest, such as a job, due process would attach. *Id.* at 701. See also *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

278. But see *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Court refused to defer to state law resolution of competing interests in property subject to replevin by a creditor). *Fuentes* is not easily reconciled with *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), which held that pre-existing state law determined the nature of a creditor's interest. *Fuentes* was seemingly overruled by *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) but then partially revived by *North Ga. Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975). It also is true, of course, that activities that are themselves constitutionally protected, such as speech, may not be proscribed without due process. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (requiring prior submission of a film to a censor is constitutional only if it includes "procedural safeguards designed to obviate the dangers of a censorship system"). No claim is made that either the states or Congress can limit these textually independent constitutional liberties.

279. 416 U.S. 134 (1974).

280. *Id.* at 155.

bitter with the sweet."²⁸¹ This, of course, allows the legislature alone to determine the meaning of the entire due process guarantee. The Court's role in statutory entitlement cases would become similar to that of the mythological Mercury—a mere messenger for the legislative gods. But *Arnett* did not take root; in *Cleveland Board of Education v. Loudermill*,²⁸² the Court explicitly denounced the *Arnett* "bittersweet" doctrine and reserved for itself the role of interpreting the meaning of the procedures guaranteed by the Constitution.²⁸³ The Court, however, is not willing to play a similar role with regard to defining the substantive interests protected by due process.

The *Loudermill* divorce between substance and procedure cannot be viewed as a rejection of all legislative input into the nature of the process due. A presumption of constitutionality for legislatively provided procedures has been established in a series of cases. Thus, in *Mathews v. Eldridge*,²⁸⁴ the Court concluded that "substantial weight must be given to the good-faith judgments of [congressionally delegated administrators] that the procedures they have provided assure fair consideration of the entitlement claims of individuals."²⁸⁵ Even more pointed is *Walters v. National Association of Radiation Survivors*,²⁸⁶ which upheld a ten dollar limit on attorneys' fees chargeable in connection with claims for veterans' benefits, stating that "deference to congressional judgment must be afforded *even though* the claim is that a statute Congress has enacted effects a denial of . . . procedural due process . . ."²⁸⁷ Deference is not confined to congressional judgments: *Ingraham v. Wright*²⁸⁸ concluded that state tort remedies for deprivation of liberty were presumed to meet due process requirements as well.²⁸⁹

Large chunks of the Constitution's due process guarantee have thus been delivered into the hands of both state and federal legislatures. The driving force in determining the contours of this ancient right²⁹⁰ is now

281. *Id.* at 153-54.

282. 470 U.S. 532 (1985).

283. *Id.* at 540-41.

284. 424 U.S. 319 (1976).

285. *Id.* at 349.

286. 473 U.S. 305 (1985).

287. *Id.* at 319-20 (emphasis added).

288. 430 U.S. 651 (1977).

289. *Paul v. Davis*, 424 U.S. 693 (1976), can be read the same way, for it seems bottomed on the idea that the existence of post-deprivation state tort remedies is sufficient to vindicate any claimed interest. See also *Hudson v. Palmer*, 468 U.S. 517 (1984) (same with respect to intentional destruction of property); *Parratt v. Taylor*, 451 U.S. 527 (1981) (state tort remedy sufficient to vindicate due process claim in connection with prison officials' negligent destruction of prisoner's property).

290. The due process right is traceable to Magna Carta. See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (due process was "undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*."). See also

primarily legislative. Thus, in the statutory entitlement area, there is little functional difference from the Canadian legislative override. The United States Supreme Court, however, remains free to disavow or avoid its own precedent. In Canada, by contrast, once a legislature has exercised the override power, a legislative change of heart is required in order to change direction.²⁹¹ The American version is thus more restricted in scope, less permanent, and more pliable than its Canadian counterpart, but it is hardly less dramatic in its current operation.

5. *Free Exercise of Religion.* Even though everyone agrees that the free exercise clause²⁹² protects "the right to believe and profess whatever religious doctrine one desires,"²⁹³ there has been considerably more difficulty in deciding when the clause shields religious practices from state regulation. In *Reynolds v. United States*,²⁹⁴ the Court upheld the application of criminal prohibitions of polygamy to Mormons, noting that although laws "cannot interfere with mere religious belief and opinions, they may with practices."²⁹⁵ For the better part of the century following *Reynolds*, states were free to enact generally applicable laws that prohibited practices unique to certain religions.²⁹⁶ This doctrine remained until the heyday of the Warren Court. In *Sherbert v. Verner*,²⁹⁷ the Court invalidated South Carolina's denial of unemployment benefits to a Seventh Day Adventist who refused to accept employment on Saturdays, reasoning that only a compelling state interest could justify the im-

A.E. HOWARD, *THE ROAD FROM RUNNYMEDE* 298-315 (1968) (discussing the due process protections in the Magna Carta).

291. The entire override power could be eliminated by constitutional amendment, although there are great difficulties with that route. See *supra* note 218.

292. U.S. CONST. amend. I. According to the free exercise clause, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." As with many other provisions of the Bill of Rights, the free exercise clause has been made applicable to the states by incorporation into the due process clause of the fourteenth amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

293. *Employment Div. v. Smith*, 110 S. Ct. 1595, 1599 (1990).

294. 98 U.S. 145 (1879).

295. *Id.* at 166.

296. There are several minor qualifications. First, although the Supreme Court has never so held, states are surely unable to prohibit "acts . . . only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 110 S. Ct. at 1599. Second, when claims of free exercise are combined with other constitutional protections, the Court has been willing to prohibit the states from applying religiously neutral, generally applicable laws to religiously motivated action. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory education statute on privacy and free exercise grounds); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a compulsory flag salute statute on free speech and free exercise grounds); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing scheme applicable to solicitations on free speech and free exercise grounds).

297. 374 U.S. 398 (1963).

position of such a burden on religious practices.²⁹⁸ The Court thus rendered every state law that might have an impact upon religious practices subject to close judicial scrutiny.

This legacy of the Warren Court was swept away by the Court's decision in *Employment Division v. Smith*.²⁹⁹ Oregon had denied unemployment benefits to two Native Americans who were fired from their jobs with a drug rehabilitation organization because their sacramental use of the hallucinogen peyote constituted a work-related instance of misconduct and a violation of Oregon law which prohibits the possession or use of peyote and makes no exception for religious use. The Court upheld the Oregon law and concluded that the *Sherbert* test—requiring a compelling state interest to justify governmental action that substantially burdens a religious practice—was not applicable. As long as the state acts in a religiously neutral fashion to prohibit all citizens from engaging in specified conduct, it complies with the demands of the free exercise clause. The result returns free exercise jurisprudence to the *Reynolds* rule, giving the states virtually unfettered authority to define the extent of the free exercise guarantee.

The *Smith* decision essentially gives states the power to override the free exercise clause. Of course, the states may not act to curtail *only* religious practices; state legislation must be facially neutral, but such seemingly neutral laws may permissibly affect the religious practices of a narrow group. A Canadian province that invokes the notwithstanding clause to override section 2(a) of the Charter³⁰⁰ would hardly possess greater power than does an American state in the wake of the *Smith* case.

6. *A Concluding Thought on the State Override.* A partially developed and still evolving pattern emerges from this brief survey. Modern American constitutional case law is acquiring a form of the Canadian provincial override. The American incarnation of the override is not as secure as its Canadian equivalent, nor as sweeping in its scope, but both versions respond to the same structural demands for regional autonomy and serve as a popular trump to the fashioning of constitutional entitlements by unelected judicial mandarins. It is thus somewhat surprising and ironic that those same judicial mandarins created the *de facto* American state override—which indicates the current Court's tendency to deny the mantle of judicial mandarinism. Indeed, it is only a bit extravagant to claim that the observable phenomena amounts to the first glim-

298. *Id.* at 406-09.

299. 110 S. Ct. 1595 (1990).

300. The CANADIAN CHARTER § 3 provides: "Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion"

merings of a back-door disincorporation of the Bill of Rights. Although the incorporation doctrine is too solidly rooted to be weeded out of the constitutional garden, the Court may think that a little discreet pruning when nobody is looking will go unnoticed.

B. *Congressional Override of Constitutional Rights*

There are at least five major areas—one theoretical, four actual—in which the United States Congress possesses the power effectively to override constitutional guarantees as interpreted by the United States Supreme Court.³⁰¹ Most controversially, and most theoretically, Congress could eliminate the jurisdiction of the federal courts to hear and decide constitutional issues. The effect of such action would be to vest the state courts with the final decision over constitutional controversies. Unlike the Canadian parliamentary override, which permits Parliament to prescribe a substantive rule at odds with the Charter, Congress could not mandate the substantive outcome in the state courts; it could only shift and fracture the locus of decision. In that sense, the power to strip the courts of jurisdiction is analogous to neither the Canadian parliamentary nor the provincial override. But since American constitutional law is so strongly the realm of the federal courts, particularly the United States Supreme Court, the impact of this power is so dramatic that it can be considered roughly analogous to the Canadian notwithstanding clause.

In a second area, Congress has claimed and the Court has conceded an effective override power in the area of the commerce clause.³⁰² Congress possesses and exercises the power to vest the states with authority to discriminate against interstate commerce, even though the states could not validly do so absent such congressionally conferred authority. Although the conclusion that this power is a true override may be controversial, the roles of Court and Congress in this area bear a strikingly similarity to those of Court and Parliament under section 33 of the Charter.

In a third area, the Supreme Court has conceded to Congress the power to define those “entitlement” interests to which the procedural protections of due process apply, thus treating congressionally created procedures as presumptively in conformity with the fifth amendment due process clause.

301. This discussion omits entirely the uncontroversial use of congressional power to initiate the amending process under article V of the United States Constitution.

302. The Commerce clause provides that “The Congress shall have Power . . . [t]o regulate commerce . . . among the several States” U.S. CONST. art. I, § 8.

To the extent that the Court has empowered the states to define the substance of certain Bill of Rights guarantees, a parallel power also has been vested in Congress. Following *Smith*, for example, Congress is as free as the Oregon legislature to outlaw the use of peyote without the provision of an exemption for religious use.

Finally, the history of the fourteenth amendment indicates that in extraordinary circumstances Congress has the effective power to compel states to ratify constitutional amendments proposed by Congress. This is a power far greater than any contained within the Canadian notwithstanding clause.

1. *Congressional Power to Limit the Jurisdiction of Federal Courts.*

Almost from the beginning of constitutional union there has been argument about whether the jurisdiction conferred by article III on the federal courts is permissive or mandatory. Justice Joseph Story delivered an early exposition of the nature and scope of federal jurisdiction in the landmark case of *Martin v. Hunter's Lessee*.³⁰³ Story stated that "the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."³⁰⁴ He also believed the Supreme Court's original jurisdiction could not be expanded beyond the limits prescribed in article III.³⁰⁵ Story concluded that Congress was obliged to create at least one inferior federal court in which "to vest all that jurisdiction which, under the constitution is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance."³⁰⁶ But Story was wrong because article III clearly does not obligate Congress to create inferior federal courts.³⁰⁷ Followers of the Story tradition repeat or confound his error. William Crosskey, for example, contended that every case falling within the categories described in article III must be heard at trial or on

303. 14 U.S. (1 Wheat.) 304 (1816).

304. *Id.* at 331. See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 1696 (1833) ("[I]t is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared, that it shall extend to 'all cases.'").

305. *Martin*, 14 U.S. (1 Wheat.) at 330-31.

306. *Id.* at 331.

307. Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added). See also Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982). According to Bator,

The argument advanced by Justice Story, that article III requires the Congress to vest the entire quantum of federal judicial power in federal courts, has been rejected by an unbroken line of Congressional and Supreme Court precedents, running from the time of the first Congress to the present. It no longer deserves to be taken seriously.

Id. at 1035.

appeal by a federal article III court³⁰⁸—despite the fact that since the founding of the nation the federal courts never have been vested with anything remotely akin to plenary diversity jurisdiction.³⁰⁹ Theodore Eisenberg reached the same conclusion, but by the implausible route of contending that Congress both *must* establish inferior federal courts and *may not* reduce the Supreme Court's appellate jurisdiction.³¹⁰

Henry Hart lies at the opposite end of the spectrum, arguing both that Congress need not create inferior federal courts³¹¹ and that the exceptions and regulations clause³¹² empowers Congress to limit the Supreme Court's appellate jurisdiction.³¹³ But Professor Hart did not conclude that Congress possessed unfettered discretion to hobble the Court's appellate jurisdiction: Congressional exceptions could not vitiate the "essential role" of the Court.³¹⁴ Adherents to the Hart view of article III tend to agree that—despite the absence of textual limitations upon the congressional power to eliminate the inferior federal courts and the appellate jurisdiction of the Supreme Court—some limits must be inferred.³¹⁵ But some followers of the Hart tradition, like Professor Martin Redish, emphasize the plenary authority of Congress to control all federal jurisdiction except the Supreme Court's self-executing original jurisdiction.³¹⁶ To Redish, Congress may, but need not, vest the federal

308. 1 W. CROSSKEY, *supra* note 56, at 610-18.

309. See, e.g., Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Judiciary Act gave the federal courts jurisdiction over diversity actions involving more than \$500 in controversy, but only where the suit was between "a citizen of the State where the suit is brought and a citizen of another State." Amount in controversy limitations on federal diversity jurisdiction have, of course, remained a staple of federal jurisdiction.

310. Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 n.66, 510, 514-16 (1974).

311. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953).

312. "In all" cases in which federal jurisdiction exists under article III except those in which article III gives the Supreme Court original jurisdiction, "the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

313. Hart, *supra* note 311, at 1364.

314. *Id.*

315. See, e.g., Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 160-83 (1960) (congressional exceptions may not destroy the Court's "essential functions" of ultimate resolution of issues of federal law and maintenance of supremacy of federal law); Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-60 (1981) (endorsing the essential functions theory but vesting those essential functions in the federal judiciary as a whole, leaving for Congress an allocational function between the component parts of the federal judiciary); Van Alstyne, *supra* note 37, at 229 (congressional exceptions may not operate to violate other, independent, constitutional norms).

316. See, e.g., M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 12 (1980); M. REDISH, *supra* note 37, at 24-52; Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L.

courts with plenary jurisdiction over constitutional issues; the structure of article III appears to grant a state court the authority to possess the last word on the meaning of the Constitution.

Professor Akhil Amar seeks to synthesize the positions held by the two camps by claiming that article III mandates ultimate disposition in a federal article III court of all cases that concern federal questions, ambassadors, or admiralty,³¹⁷ but permits Congress "virtually plenary power to strip away appellate jurisdiction in . . . diversity cases, thus leaving the state courts as final arbiters of these controversies."³¹⁸ The Amar camp's argument can be condensed into the following five premises: First, article III mandates that the national judicial power be vested in an article III court—the Supreme Court and such other inferior federal courts as Congress may decide, in its discretion, to establish. Second, the national judicial power, so vested, must include *all* cases in the "arising under," ambassadorial, and admiralty categories of article III jurisdiction. Third, the Supreme Court's original jurisdiction may not be expanded beyond the limits set out in article III (state party and ambassadorial cases). Fourth, the Supreme Court's appellate jurisdiction *must* include the remainder of the mandatory heads of jurisdiction not included in its original jurisdiction and *may* include the remainder of the set of permissive heads of jurisdiction not included in its original jurisdiction. Finally, as a consequence, the appellate jurisdiction of the Supreme Court may not be reduced to prevent it or some other article III court from conclusively resolving cases that fall within the mandatory heads of jurisdiction.³¹⁹

A major flaw in the Amar argument lies in the last premise.³²⁰ Professor Amar and his cohorts seek to seal off the Supreme Court's

REV. 143 (1982); Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982).

317. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985) [hereinafter Amar, *Neo-Federalist View*]; Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 478-88 (1989) [hereinafter Amar, *Marbury and Section 13*]. Aligned with Professor Amar is Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984), and possibly Sager, *supra* note 315.

318. Amar, *Marbury and Section 13*, *supra* note 317, at 479.

319. Amar, *Neo-Federalist View*, *supra* note 317, at 254-57.

320. There are other flaws as well. Professor Redish skillfully attacks Professor Amar's thesis as one that "ignores the unambiguous textual directives of Article III[,] . . . presents an internally inconsistent interpretation of constitutional text [and] represents a view of Article III totally devoid of meaningful historical support, and, in fact, inconsistent with the prevailing understanding of the Article's history." M. REDISH, *supra* note 37, at 36. See generally *id.* at 36-41 (attacking the historical basis of Amar's argument); Redish, *Text, Structure and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990); Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990). For Amar's reply to his critics, see Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

mandatory grant of appellate jurisdiction from the “exceptions and regulations” qualifier that immediately follows the grant. With one breath article III mandates that the Supreme Court “*shall* have appellate Jurisdiction”³²¹ of *all* cases not within its original jurisdiction, but in the very next breath, it hastens to add that this sweeping grant is subject to “such Exceptions, and under such Regulations as the Congress shall make.”³²² Professor Amar argues that the exceptions and regulations qualifier serves only to permit Congress to strip article III courts of the power to decide cases that arise under the permissive heads of jurisdiction, suggesting that any larger construction would contradict the article III mandate that the judicial power both *must* be vested in a federal judiciary and must extend to *all* cases in certain categories.³²³

Contradiction cannot be escaped, however, because even if Congress were to leave the Supreme Court’s appellate jurisdiction undisturbed, congressional elimination of the lower federal courts—combined with state refusal to hear federal claims—would leave these justiciable issues for final resolution outside any judiciary, federal, or state. Professor Amar contends this result is unconstitutional because “[t]he judicial power [of the United States] must extend to these cases, but the original jurisdiction of the Supreme Court cannot be expanded to take cognizance of them.”³²⁴ To avoid this problem, Professor Amar posits three solutions: the use of *Testa v. Katt*³²⁵ to compel state courts to hear the federal claim if they entertain analogous state claims; a congressional mandate that the states exercise jurisdiction; and the creation of lower federal courts.³²⁶ The first two solutions are satisfactory to Amar because, given his view that the exceptions and regulations clause does not permit Congress to strip the federal courts of appellate jurisdiction of federal claims, there will remain the possibility of final review by an article III court. But the *Testa* solution is partial at best, and it is entirely dependent on state jurisdictional choices for its efficacy. The congressional mandate has, as Amar concedes, a dubious claim to validity.³²⁷ The preferred solution, creation of lower federal courts, concededly lies entirely within the discretion of Congress.³²⁸ The net result is that, *unless Congress acts to prevent it*, cases premised on federal law may go

321. U.S. CONST. art III, § 2, cl. 2 (emphasis added).

322. *Id.*

323. Amar, *Neo-Federalist View*, *supra* note 317, at 255-57.

324. *Id.* at 256 n.165.

325. 330 U.S. 386 (1947) (holding that state courts must entertain a federal claim if they entertain analogous state claims).

326. Amar, *Neo-Federalist View*, *supra* note 317, at 255-57 n.165.

327. *See id.* at 256 n.165.

328. *See id.* at 212.

entirely unresolved by article III courts. This result can occur even if the Supreme Court possesses every iota of its original and appellate jurisdiction permitted under article III. Thus, no matter how one reads the exceptions and regulations clause, there will be some conflict with the Amar reading that the balance of article III creates "permissive" and "mandatory" heads of jurisdiction.

Since the Amar camp's reading of the exceptions and regulations clause fails to deliver the cohesive account of article III that it promises, there is no reason to uncouple article III's *grant* of appellate jurisdiction from its immediate qualifier. It is entirely plausible that the Framers intended the Court's vast grant of appellate authority to be subject to whatever exception or regulation Congress thinks desirable.³²⁹ Among the current Supreme Court Justices, Justice O'Connor would allow Congress to deprive the Supreme Court of appellate jurisdiction of cases arising under Professor Amar's category of mandatory federal jurisdiction.³³⁰

If Congress has the power to eliminate inferior federal court jurisdiction over, for example, abortion cases and to eliminate completely the Supreme Court's power of appellate review of such cases,³³¹ then it possesses extraordinary authority to nullify disfavored constitutional judgments of the Supreme Court. But, unlike Canada's Parliament, Congress lacks the ability to prescribe a substantive outcome at variance from the Constitution.³³² Congress can only shift the locus of judicial sovereignty

329. Professor Amar's able and innovative thesis deserves a more thorough examination and rebuttal than this sketchy survey. For purposes of this Article it is enough to demonstrate that Amar's thesis is not infallible, and that a considerable body of theoretic and judicial opinion supports the view that Congress possesses virtually plenary authority over the jurisdiction of the federal courts via its discretionary power to establish inferior federal courts and to restrict the Supreme Court's appellate jurisdiction.

330. See *South Carolina v. Regan*, 465 U.S. 367, 396-97 (1984) (O'Connor, J., concurring) (stating that only original Supreme Court jurisdiction is not subject to congressional exceptions and regulations). Cf. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (Congress may revoke appellate jurisdiction over broad classes of cases, even while under Supreme Court review.).

331. Cf. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (Congress may repeal statute granting class of appellate jurisdiction, but only where intent is clear and unambiguous.). In *Yerger*, the Court acknowledged that its appellate jurisdiction was "subject to exception and regulation by Congress," but concluded that Congress had not made sufficiently clear its intent to deny Supreme Court review. *Id.* at 102-03. An unequivocal statement of such congressional intent was necessary because the total absence of Supreme Court review "must greatly weaken the efficacy of the writ [of habeas corpus] . . . and seriously hinder the establishment of . . . uniformity in deciding upon questions of personal rights." *Id.* at 102-03. Despite the Court's evident misgivings about complete elimination of its appellate jurisdiction, *Yerger* did not hold that Congress lacked such power—only that Congress must assert it unequivocally.

332. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) (prescribing a rule of decision in cases pending in the federal courts "is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power"). In *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), the Court concluded that a presidential pardon granted to a

from the national courts to the state courts. That shift, however, could dramatically upset the constitutional order.

The power, conceded to Congress by the Amar camp, to create specialized article III tribunals to hear specific types of cases is hardly less dramatic.³³³ Congress could create an article III Court of Abortion Appeals, a Court of Appeals for the First Amendment, or a Court of Criminal Constitutional Appeals, while simultaneously depriving the Supreme Court of appellate jurisdiction over these matters.³³⁴ Even though Congress lacks the power to prescribe the substantive interpretations in the new courts, it could anticipate the nature of the immediate presidential appointments necessary to staff the courts. Congress could, if it possessed the necessary political clout, gerrymander the jurisdiction of its specialized article III tribunals (or eliminate them altogether) in order to maintain a judiciary calculated to produce congenial constitutional results. This blunt weaponry lacks the razor-sharp finesse of Canada's notwithstanding clause, but it nevertheless delivers to Congress considerable power to alter the judicial conception of constitutional meaning.

2. *Congressional Power Under the Commerce Clause to Override Constitutional Limits.* As previously mentioned,³³⁵ the modern understanding of congressional power over commerce is that it is plenary, and encompasses the power to confer regulatory authority upon the states—authority which would otherwise be struck down by the courts as an unconstitutional burden upon interstate commerce. This principle is not confined to the commerce clause, however. Professor William Cohen contends generally that

Congress can consent to [otherwise unconstitutional] state laws where constitutional restrictions bind the states but not Congress. . . . The proposition that the constitutional allocation of power to Congress,

Confederate sympathizer was sufficient proof that the recipient had not given aid or comfort to the Confederacy and was thus entitled to recover the proceeds of property taken by the United States during the Civil War. Congress sought to reverse the *Padelford* rule by a statute that provided that such a pardon was proof that the recipient had aided the Confederate States. See Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. The *Klein* Court declared the statute unconstitutional, in part because Congress had not simply sought to deprive the courts of the power to decide, but rather had attempted to tell the courts precisely how to decide. Similarly, in *Yakus v. United States*, 321 U.S. 414 (1944), Justice Rutledge observed that "[i]t is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or . . . without regard to them." *Id.* at 468 (Rutledge, J., dissenting). Although Justice Rutledge made this observation in dissent, his quarrel with the majority was not over this principle but over the more mundane issue of whether the defendant had forfeited an adequate prior opportunity for judicial review.

333. See Amar, *Neo-Federalist View*, *supra* note 317, at 258.

334. See *id.* at 254-59.

335. See *supra* notes 38-43 and accompanying text.

and the concomitant denial of power to the states, cannot be altered by ordinary legislation is a canard.³³⁶

The result of the Cohen position is that such "fundamental" constitutional restrictions upon the states as the equal protection guarantee³³⁷ or the contracts clause³³⁸ may be overridden by Congress.³³⁹

With regard to the exercise of the commerce power, Congress and the Court have combined to override the equal protection guarantee. In *Northeast Bancorp Inc. v. Board of Governors*,³⁴⁰ the Court unanimously rejected an equal protection challenge to New England state bank acquisition statutes that discriminated against banks from outside New England. The Court reasoned that the federal Bank Holding Company Act of 1956³⁴¹ authorized individual states to lift the federal barrier to interstate bank acquisitions. Without such congressional authorization "the state statutes would have violated the commerce clause."³⁴²

The modern understanding of the "dormant" aspect of the commerce clause is that the Court may foreclose certain state regulation, but Congress may override that judgment by vesting similar power in the state legislatures. Congressional judgments about the constitutional allocation of legislative power between the states and the central government trump the judgments of the United States Supreme Court. Congress indirectly may eviscerate federal constitutional rights of equality by conferring upon the states the power to legislate concerning such rights. In Cohen's judgment, this latter power ends when a particular equality right is one that may not be limited by either federal or state governments.³⁴³ Determining the limits on the power to delegate to the states is a difficult task—a difficulty compounded by the Court's propensity to locate within the fifth amendment's due process clause a number of equal protection rights.³⁴⁴ But wherever the boundary may be located, the argument is no longer over the *legitimacy* of congressional judgments of constitutionality

336. Cohen, *supra* note 39, at 406.

337. U.S. CONST. amend. XIV, § 1.

338. U.S. CONST. art I, § 10, cl. 1.

339. See Cohen, *supra* note 39, at 411-12.

340. 472 U.S. 159 (1985).

341. Pub. L. No. 89-485, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-1850 (1988)).

342. L. TRIBE, *supra* note 30, § 6-33, at 527 (footnote omitted).

343. Cohen, *supra* note 39, at 388. According to Cohen,

Congress should be able to remove constitutional limits on state power if those limits stem solely from divisions of power within the federal system. In other words, Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself.

Id.

344. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (gender classification in social security tax calculation designed to redress past disparate treatment of women withstood fifth amendment attack); *Wemberger v. Wiesenfeld*, 420 U.S. 636 (1975) (rejecting gender classification to compensate for past government discrimination against women where the classification penalized women wage

that trump those of the Court; the argument now is only the *degree* to which congressional judgment is entitled to displace other independent constitutional entitlements.

This congressional "authorization" or "consent" power—created by a mixture of congressional aggression and judicial torpor or acquiescence—resembles the Canadian parliamentary override power, but it is both more sweeping and less inclusive than its Canadian counterpart. The American analogue is more sweeping in that it permits Congress to have the last word on the constitutional allocation of power between the states and Congress, and is less inclusive in that it does not purport to grant Congress plenary authority to override the Bill of Rights at its pleasure. The Canadian power, in contrast, enables Parliament to override individual liberties guaranteed by the Charter, but does not give Parliament authority to revise by ordinary legislation the constitutional division of authority between the central government and the provinces. The American version appears to give Congress the power to invade constitutional individual liberties to the extent that those liberties bind only the states. This power is subject to some fuzzy, ill-defined judicial limits—limits that are absent in the Canadian counterpart.³⁴⁵ It is thus not a pure analogue to the Canadian federal override, but functions in the same general manner and with relatively little judicial supervision. It would be an error to suppose that Congress wholly lacks the power to override the constitutional judgments of the United States Supreme Court; it would be a comparable error to suppose that Congress may do so in the same fashion as Canada's Parliament.

3. *Congressional Power to Define Procedural Due Process.* As previously discussed,³⁴⁶ the Burger and Rehnquist Courts have reconstructed procedural due process in a way that vests in both Congress and the state legislatures the power conclusively to determine the "entitlement" interests to which the procedural rights attach and presumptively to define the procedures that compose due process. The parallel nature

earners); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applied *Brown v. Board of Educ.*, 430 U.S. 483 (1954), to segregation of public schools in the District of Columbia).

345. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (striking down a Florida law that prohibited out-of-state banks from owning or controlling Florida businesses providing investment advisory sources). The Court construed the same federal "authorization" statute later at issue in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985), but concluded that the statute did not permit the states to discriminate, as Florida sought to do, in non-banking activities. *Lewis*, 447 U.S. at 47. See also *Metropolitan Ins. Co. v. Ward*, 470 U.S. 869 (1985) (interpreting the equal protection clause, despite the McCarran-Ferguson Act, 15 U.S.C. § 1011-15 (1988), as not permitting out-of-state discrimination in tax rates assessed insurers for the purpose of pressuring foreign states to conform their tax policies to those of the discriminating state).

346. See *supra* notes 260-90.

of the fifth and fourteenth amendment due process clauses serves to make doctrine easily transportable—indeed, virtually identical—from one to the other. Thus, much of the prior discussion is directly relevant to demonstrate that the Court has given Congress, no less than the states, the power to direct the meaning of constitutional text. This idea—that Congress may define the substance of the interests protected by due process and that its judgments about procedural due process are presumptively valid³⁴⁷—is a radical departure from the prior constitutional understanding. Due process was once considered “a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law,’ by its mere will.”³⁴⁸ But the revisionist understanding of the Burger and Rehnquist Courts has rendered this notion antiquated.

The new version of procedural due process is functionally similar to a hypothetical act of Congress which, relying upon an imagined textual counterpart to the Canadian notwithstanding clause, would declare certain interests unprotected by due process. Only the Court’s unwillingness to define “substance” to include legislatively-specified procedures³⁴⁹ prevents Congress from being “free to make any process ‘due process of law,’ by its mere will.”³⁵⁰ This last remaining barrier to legislative appropriation of the due process clause is highly permeable and uncertain. The Court has embraced the idea that, when it comes to statutory entitlement, “deference to congressional judgment must be afforded *even though the claim is that a statute Congress has enacted effects a denial of . . . procedural due process.*”³⁵¹ The role of the Court in this area is so severely attenuated, and the role of the Congress so exaggerated, that in this context of procedural due process Congress possesses and exercises a judicially-created constitutional legislative override power.

347. *Id.*

348. *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

349. Compare *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (plurality) (because Congress did not specifically provide for a pre-termination hearing, the employee had no due process right to one and “must take the bitter with the sweet”) with *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) (rejecting the “bitter with the sweet” view; court held that a fired employee had a due process right to a hearing even if the state did not provide for one). See also *supra* notes 273-83 and accompanying text.

350. *Murray’s Lessee*, 59 U.S. (18 How.) at 276.

351. *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985) (emphasis added) (upholding a \$10 limit on attorneys’ fees chargeable for assistance in obtaining veterans’ benefits).

4. *Congressional Power to Amend the Constitution.* Article V of the Constitution allows Congress the power to propose amendments; ratification, however, remains within the realm of the states.³⁵² Arguing for a congressional role, Alexander Hamilton declared to the 1787 Philadelphia Convention that "[t]here could be no danger in giving this power [to call constitutional conventions], as the people would finally decide in the case."³⁵³ Yet American history contains dramatic evidence that Congress effectively can compel amendment of the Constitution and that the Supreme Court will acquiesce in this exercise of power. Surely this fact grants the most extreme legislative override power imaginable.

The thirty-ninth Congress proposed the fourteenth amendment and sent it to the states for ratification on June 13, 1866. As there were then thirty-seven states, ratification by twenty-eight states was necessary. Ten of the eleven ex-Confederate States promptly rejected it, together with Kentucky, Maryland, and Delaware.³⁵⁴ The former Confederate States were regarded as states for the purposes of computing the requisite majority for ratification, because ratification of the thirteenth amendment by the legislatures of those states had been accepted and counted toward the majority needed to adopt it.³⁵⁵ On the other hand, the Republicans in Congress were unwilling to seat any Senators or Representatives from former Confederate States.³⁵⁶ Indeed, had a full contingent of Southern Senators and Representatives been seated, the fourteenth amendment probably would not have received the necessary two-thirds vote in both houses of Congress.³⁵⁷

By ordinary rules, the fourteenth amendment was dead because it had been rejected by thirteen states, four more than was necessary to defeat the proposal. Undeterred, the thirty-ninth Congress, acting without representation from ten states and under the control of radical Reconstruction Republicans, simply passed the Reconstruction Acts, a series of acts that were designed to destroy the uncongenial governments

352. According to the U.S. Constitution: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid . . . as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States . . ." U.S. CONST. art. V.

353. 2 RECORDS, *supra* note 49, at 558.

354. See Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500 n.97 (1989).

355. See Presidential Proclamation No. 52, 13 Stat. 774, 775 (1865) (President Andrew Johnson's proclamation of adoption of the thirteenth amendment). Seven former Confederate States had ratified the amendment and were included in Secretary of State Seward's list of ratifying states.

356. See Ackerman, *supra* note 354, at 502-03; Suthon, *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22, 28 (1953).

357. Southern sentiment may be inferred from the lopsided, nearly unanimous rejections of the fourteenth amendment in Southern legislatures. See Ackerman, *supra* note 354, at 500 n.97.

of the former Confederacy and remake them in a fashion more agreeable to Congress.³⁵⁸ Putting aside the problematic issue of whether the Reconstruction Acts could be justified under the guarantee clause,³⁵⁹ there was no justification for the provision denying representation in Congress to reorganized ex-Confederate states that refused to ratify the fourteenth amendment.³⁶⁰ It is impossible to square article V with this congressionally-imposed demand. If the article V procedures mean anything, they must "deny Congress the authority to bootstrap its amendments to validity by destroying dissenting governments and then denying congressional representation to the new ones until they accept the congressional initiatives that the preceding governments found unacceptable."³⁶¹

But that is exactly what happened, for the Reconstruction Acts destroyed the existing state governments of the former Confederacy and created new ones acceptable to Congress. In order to regain representation in Congress, the new state governments ratified the fourteenth amendment. Secretary of State Seward's initial proclamation concerning adoption of the fourteenth amendment predictably expressed great doubt as to the validity of the state ratification.³⁶² Congress, however, quickly instructed Secretary Seward that he should stifle his doubts, and the day after his proclamation, Congress adopted a concurrent resolution declaring the fourteenth amendment ratified and ordering its promulgation as such.³⁶³ A week later, Secretary Seward complied.³⁶⁴

The Supreme Court never reviewed the validity of the procedure for the adoption of the fourteenth amendment; indeed the Court refused³⁶⁵

358. For a general history of the Reconstruction process, see E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988); M. BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869* (1974).

359. "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art. IV, § 4. For its application to the Reconstruction Acts, see W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 166-243 (1972).

360. See Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867). The Act stated that:

[W]hen said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress

Id.

361. Ackerman, *supra* note 354, at 501-02.

362. See Proclamation of William H. Seward No. 11, 15 Stat. 706, 707 (1868). Seward had two separate concerns: (1) Ohio and New Jersey had ratified and then rescinded their ratification, and (2) the ratification of six former Confederate States were thought to be of dubious legitimacy. *Id.* at 707.

363. *Id.* at 708, 709-10.

364. *Id.* at 708-11.

365. See, e.g., *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 61-62 (1867) (the decision to replace the existing state governments of the "rebel" states by Congress was a political question not within the jurisdiction of the Court); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866) (the Court

or was prevented³⁶⁶ from reviewing the constitutionality of the Reconstruction Acts that coerced adoption of the amendment. Yet the ratification of the fourteenth amendment came to stand as precedent. When Kansas voted in 1937 to ratify a proposed constitutional amendment to give Congress the "power to limit, regulate, and prohibit" child labor,³⁶⁷ the stage was set for post hoc review. Because Kansas previously had rejected the same proposed amendment, the issue of the validity of its ratification came before the United States Supreme Court in *Coleman v. Miller*.³⁶⁸ The Court promptly declared the matter a non-justiciable political question and used the dubious ratification of the fourteenth amendment as its principal authority for this conclusion. After reciting the history of congressional bludgeoning of the states into ratification, the Court concluded:

This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures . . . should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.³⁶⁹

Coleman and the actions of the Reconstruction Congress confirm that Congress possesses an unreviewable power to break the will of the states and assure conformity to the congressional view of the Constitution. Despite the clear procedures dictated by article V, Congress need only compel the states to do its bidding in order to amend the Constitution unilaterally.³⁷⁰ This is surely a congressional override power of meta-constitutional proportions, beyond anything possessed by Canada's Parliament.

5. *A Concluding Thought on the Congressional Override.* Congress clearly has some blunt but exceedingly powerful weaponry that functions like the Canadian notwithstanding power. Congress can restrict the appellate jurisdiction of the United States Supreme Court and

held that it could not restrain the President by injunction from enforcing an act of Congress alleged to be unconstitutional).

366. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1868).

367. H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).

368. 307 U.S. 433 (1939).

369. *Id.* at 449-50.

370. Aggressive use of the conditional spending power might be a sufficient club to accomplish the job. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (congressional action withholding part of federal highway funds from states that had drinking ages of less than 21 was a valid exercise of federal spending power, even if intent of Congress was to encourage a uniform national drinking age of 21).

tinker with the nature and jurisdiction of the inferior federal courts in order to skew the process in the hope of producing judicial results more congenial to Congress. But, unlike the Canadian federal override power, Congress could not baldly dictate the specific substantive outcomes. Congress can only use this power to shift the locus of judicial sovereignty, a very considerable power in itself.

In the most extraordinary circumstances Congress can also effectively compel the states to ratify proposed constitutional amendments. This legislative mugging has occurred only once, in connection with the unique circumstance of reuniting the nation in the aftermath of civil war. It is thus foolhardy to suggest that Congress is either likely or able to replicate the feat under more ordinary circumstances. Nevertheless, the successful use of this apparently unreviewable power stands as evidence of its existence.

Congress also possesses more delicate instruments of power that approximate the Canadian notwithstanding power even more closely. The power to consent to otherwise unconstitutional state laws vests in Congress a virtual clone of the Canadian override, at least with respect to the constitutional allocation of power between the states and Congress. To the extent that the Court continues to recognize a congressional power to define the interests to which due process attaches, and to defer to Congress with respect to whether its mandated procedures comply with the procedural guarantees of due process, Congress possesses another virtual clone of the Canadian override power, although more limited in application.

IV. SOME NORMATIVE OBSERVATIONS ABOUT THE LEGISLATIVE CONSTITUTIONAL OVERRIDE POWER

The legislative power to override the Constitution—at least as the courts interpret the Constitution—stands at the intersection of two great constitutional conundrums of democratic federal systems that embrace constitutional judicial review. Along one axis lies an issue central to the nature of federal union—the federalist conundrum regarding the allocation of authority between the central government and the constituent units of the federal system. Along the other axis lies an issue central to representative democracies that seek to impose constitutional limits upon governments—the balance of power between the judicial and legislative branches. When both the central and regional governments of a federal system possess a legislative power to override the Constitution, issues along both these axes are directly engaged.

A. *The Federalist Conundrum*

The federalist issue concerns the extent to which the constituent members of the federal union should be permitted to interpret the national constitution differently, or—what may be the same question—whether constituent members should be able to fashion positive rules of law that are inconsistent with the national constitution. Superficially, the American answer—at least since the end of the Civil War—has been that the states enjoy no such power. Calhoun's explicit theory embracing the sectional (or state) veto has inoldered in its grave for over a century. Yet modern American constitutional law seems pockmarked with judicially-created doctrines that seem to preserve a patina of constitutional national uniformity, while in practice deferring to the variable substantive determinations of the several states. By contrast, Canadian constitutional law does not need to rely on judicial manufactures, because the provincial legislative override is textually ensconced in the Charter.

Both doctrines respond to some felt need for regional autonomy as the guarantor of individual liberties.³⁷¹ Therein lies the dilemma. If constitutional guarantees of individual liberty derive from an incident of *national* citizenship, then the very idea of national citizenship is endangered when regional units of the federal whole are empowered to redefine the incidents of national citizenship. The Canadian experience illustrates the danger. Prior to the Charter, provinces possessed virtually unfettered authority to prescribe the civil rights of their residents, at least within the boundaries of provincial legislative jurisdiction. The Charter narrowed this authority greatly, but tempered the blow by the provincial notwithstanding clause. It is the exercise of this override authority by the provinces that has added a powerful new centrifugal force to the orbit of Canadian federal union. Mixed with the already volatile politics of language, the provincial override, as used by Quebec to maintain French linguistic hegemony, provides a paradigmatic example of the ease with which the provincial override can become an instrument of extreme division within the national whole.³⁷²

To place the issue in American terms, imagine the existence of an explicit state legislative override power. Few would doubt that most of the states of the old Confederacy would have exercised such a power to override the equal protection guarantee after *Brown v. Board of Educa-*

371. Unlike the American Constitution, the Charter specifically preserves some collective rights. See CANADIAN CHARTER § 15(2) (affirmative action programs do not violate the equality rights guarantee), § 23 (minority language educational rights), § 25 (aboriginal rights), § 27 (preservation of Canada's multicultural heritage). Thus, the Charter is less preoccupied with claims of individual entitlement than the American Constitution.

372. See *supra* notes 207-20 and accompanying text.

tion.³⁷³ Can there be any doubt that, in the wake of *Texas v. Johnson*,³⁷⁴ Texas would have overridden the free speech guarantee to insulate its flag desecration statute from constitutional scrutiny? But do either of those cases appear appreciably different from post-*Webster* state legislative decisions to restrict access to abortions? One difference is that abortion regulation by the states remains subject to judicial review, albeit at a minimal level of scrutiny, whereas the hypothetical cases just posed would evade judicial review altogether. But that is a distinction without meaningful difference, for the de facto state override operates almost as effectively with respect to post-*Webster* legislation as would a de jure override.

Any possible value in legislative decentralization lies in local control of local issues, not in local control of rights inherent in national citizenship. In this respect, the Canadian experience offers some valuable lessons for the United States. The Supreme Court of Canada, unlike the United States Supreme Court, still polices the allocation of legislative authority between the provinces and the federal government. At the margins, where such judgments always are fraught with difficulty, the Supreme Court of Canada employs its inoderu version of a "national dimensions" test.³⁷⁵ By contrast, the United States Supreme Court abandoned the effort, ceding to Congress the power to determine the scope of its legislative authority. Although Canada's explicit legislative override power fails to extend to the constitutional apportionment of legislative authority among the units of federal union, the *sub rosa* American legislative override power sweeps most vigorously at precisely this point. It is with respect to congressional power to override the constitutional judgments of the Court concerning the scope of the dormant aspect of the commerce power that this is most apparent. Thus, Canada's scheme arguably fails to preserve core elements of national citizenship in its desire to foster regional autonomy. The American scheme, however, fails to preserve the constitutional design for the allocation of legislative power, and it thus strangles regional autonomy while acting only fitfully to protect individual liberties from alteration at the hands of the states.

B. *The Conundrum of Judicial or Legislative Supremacy*

Legislative power to override the Constitution raises issues that are central to the meaning of democracy. The legislative override presents the issue of the proper locus of decision within the federal system—state or national government—as well as the issue of the proper locus of deci-

373. 347 U.S. 483 (1954).

374. 109 S. Ct. 2533 (1989).

375. See *supra* notes 184-91 and accompanying text.

sion within the political construct of representative democracy—the legislature or the courts. Resolution of the latter issue necessarily involves the former issue, for one must decide whether the court or legislature charged with decisional power should be a national or state body. Nevertheless, in this section I attempt to bifurcate the issues and deal only with the question of the propriety of the legislative override as a check upon judicial review.

Contemporary American constitutional theorists generally concede that judicial review is at odds with democratic principles.³⁷⁶ From that premise, the thrust of American constitutional theory has been to define and to justify a role for the Court that coincides with majoritarian principles. Whatever the ultimate success of this theoretical venture, as a practical matter, judicial review is firmly entrenched in the American constitutional landscape. The American argument mostly concerns the scope and process of exercising the judicial review power, but lingering doubts concerning the legitimacy of the entire enterprise have shaped that debate and contributed to the development of the American analogue to the Canadian notwithstanding clause.

The formation of the American constitutional union occurred in an intellectual climate that accepted the legitimacy of individual natural rights as paramount to the authority of government.³⁷⁷ Thus, it was easy to accept judicial review as a device to ensure that governments did not transgress the immutable boundaries dictated by natural law. During the first 150 years of American independence, the Supreme Court often declared that natural rights, predating and transcending political union, were incorporated in the Constitution and were to be enforced by the judiciary against majoritarian invasion.³⁷⁸ The economic, moral, and

376. See, e.g., J. CHOPER, *supra* note 103, at 4-6 (contending that judicial review conflicts with the fundamental democratic principle of majority rule under conditions of political freedom); J. ELY, *DEMOCRACY AND DISTRUST* 7-9 (1980) (seeking to describe a judicial role consistent with the "core of the American governmental system"—majority rule). These scholars and others have been influenced by the work of Alexander Bickel, who labeled judicial review a "deviant institution in the American democracy" because it presented the "counter-majoritarian difficulty" of unelected judges invalidating the work of elected officials. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16, 18 (1962). But see Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (contending that democracy encompasses certain substantive fundamental rights as well as the procedural principle of majority rule and doubting whether elected representative bodies are any more majoritarian than courts).

377. See, e.g., F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 57-59 (1985); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 151-52 (1928); Massey, *Federalism*, *supra* note 2, at 314 nn.46-47, 321-22; Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130, 1134 (1987).

378. See, e.g., *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662-63 (1875) ("It must be conceded that there are such rights in every free government beyond the control of the state."); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118-19, 121 (1872) (Bradley, J., dissenting) (Constitu-

political convulsions of the 20th century shattered this belief in natural law. Skepticism, although claiming adherents in prior times,³⁷⁹ came to dominate American constitutional law with the Rooseveltian revolution of the 1930s. As a result, one of the major premises behind the legitimacy of judicial review has been sharply eroded over the past half century.

The other major premise for the legitimacy of judicial review also has undergone a steady erosion. The original constitutional scheme was hardly one of excessive majoritarianism. The Framers distrusted the power of unvarnished majorities³⁸⁰ and consequently devised arrangements to filter popular opinion through the "medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."³⁸¹ Judicial review served as one of those filters, but the direction of the American political experience has always been toward increasing popular participation in governmental organs.³⁸² The right to vote increasingly has been expanded,³⁸³ and the right to participate more di-

tion described as source of "personal privileges and immunities" for citizens); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139, 143 (1810) (recognizing obligation of states to abide by broad norms); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("An act of the legislature . . . contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."). Although not couched in natural rights rhetoric, such famous cases as *Lochner v. New York*, 198 U.S. 45 (1905), continued the natural law tradition by assuming that contract and property rights "pre-existed the Constitution" and were thus adopted by and enforceable through it. See Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 804 (1989). See also Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987) (contending that the Court viewed common law rights as natural rather than created).

379. See, e.g., *Calder*, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring) ("The authority [to enforce broad rights] is of a delicate and awful nature."); Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (characterizing judicial belief in natural law as "naive" acceptance as universal [and natural] that which is simply "familiar and accepted by them and their neighbors").

380. See, e.g., THE FEDERALIST No. 9, at 73-76 (A. Hamilton) (C. Rossiter ed. 1961) (noting the benefits of confederacy that permit a balanced, egalitarian assembly of states); *id.* No. 10, at 78-83 (J. Madison) (discussing the advantages of balancing the dangers of large factions in a large republic).

381. *Id.* No. 10, at 82 (J. Madison).

382. Cf. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 179 (1978). According to Bickel:

[T]he natural trend [in both common and constitutional law] has been toward the transfer of policy-making authority . . . from judges to legislatures. . . . A vast domain of social and economic policy, state and federal, occupied by the Court under the banner of the Commerce, Contract, Due Process, and Equal Protection Clauses of the Constitution, is now under the province of legislatures.

Id.

383. The struggles of the early 19th century involved attempts to secure universal suffrage for adult white males, but the franchise has been greatly expanded since then. See U.S. CONST. amend. XV, § 1 (vote extended to black Americans); *id.* amend. XIX, § 1 (vote extended to women); *id.* amend. XXIV, § 1 (vote may not be abridged for failure to pay taxes); *id.* amend. XXVI, § 1 (vote extended to persons 18 years of age or older).

rectly in legislative decisions has become widely accepted.³⁸⁴ Today, the premise of majority rule is so firmly fixed in the public mind that it is often regarded as the *sine qua non* of democratic legitimacy.

The erosion of these major foundational premises has made the legitimacy of judicial review ever more suspect. If there are no objective, immutable values, then it is axiomatic that any choice is wholly subjective. By what right, asks the modern American, may government substitute its subjective value choice for my own? When the question is framed in this way, the only legitimate answer lies in increasing acceptance of majoritarian politics. That is not an answer, of course, that lends much legitimacy to the constitutional value choices made by the Supreme Court. Accordingly, the Court's judgments, as in *Roe v. Wade*,³⁸⁵ have been criticized as impermissible usurpations of majority rule.³⁸⁶ A related recent phenomenon is the extensive lobbying of the Supreme Court—by letters, telegrams, petitions, and demonstrations³⁸⁷—preceding the Court's hearing and decision in *Webster v. Reproductive Health Services*.³⁸⁸ The public evidently perceives the Court's decisions to be similar to legislative decisions, and it responds by exerting the same kinds of pressure brought to bear upon elected representatives.

It is thus not surprising that the Court reacted to these changes by developing a form of legislative override that enables the elected representatives to load substantive content into plastic provisions of the Constitution. To some observers, this employment of a "majoritarian paradigm creates a [vanishing] Constitution that will matter ever less as a check on government in American society."³⁸⁹ But if constitutional values lack fixed, or even ascertainable referents, there is no self-evident reason why a coterie of life tenants should select the constitutional values that eternally bind an entire society. If such values are utterly subjective, what valid argument can be made to deny the people's elected representatives the final word?

Objections are numerous. Professor Chemerinsky believes majoritarianism itself is merely a means to accomplish specific substantive ends

384. See, e.g., *id.* amend. XVII (direct election of senators); *id.* amend. XXIII, § 1 (extension of electoral vote to the District of Columbia). On the state level, the rise of the initiative and referendum has injected tremendously powerful forces of direct democracy into the legislative process. See, e.g., T. CRONIN, *DIRECT DEMOCRACY* 56-59 (1989) (noting the extent to which direct democracy helped strengthen representative government).

385. 410 U.S. 113 (1973).

386. See R. BORK, *supra* note 52, at 110-16 (1990).

387. See Greenhouse, *Supreme Court, 5-4, Narrowing Roe v. Wade, Upholds Sharp State Limits on Abortions*, N.Y. Times, July 4, 1989, at A1, col. 1.

388. 109 S. Ct. 3040 (1989).

389. Chemerinsky, *supra* note 376, at 98.

such as autonomy or equality,³⁹⁰ but he assumes, without proof, that autonomy or equality are indispensable objectives of democracy. Even if that assumption is true, the manner in which the terms are defined suggests that the majoritarian principle is linked intimately to the accomplishment of these ends. To Professor Chemerinsky, autonomy is "the importance of each individual having a say in how he or she is governed,"³⁹¹ and equality is "the need for all to have a potentially equal ability to determine the government."³⁹² It is hard to imagine a more equal leveling agent than the vote. The necessity of "having a say" in how one is governed undoubtedly encompasses more than the raw ballot, and to the extent either equality of the franchise or communicative access to the elected representatives is materially frustrated, there is a need for courts to correct these flaws in the political machinery. But that argument merely echoes portions of the process theories of scholars such as Jesse Choper and John Ely; it does not explain satisfactorily why the courts are the appropriate repositories of ultimate constitutional value selection.

One argument is that none of the three branches of American democratic government is demonstrably more majoritarian than its cohorts.³⁹³ Legislators may ignore the collective preferences of their constituents out of ignorance, pressure from skillful single-interest groups, personal ideology, party loyalty, or self-interest. Even if the legislature seeks to implement constituent preferences faithfully, powerful obstacles to accomplishing an accurate legislative aggregation of public preferences exist.³⁹⁴ Finally, legislative accountability to voters is dubious in an age in which over ninety percent of incumbents win reelection, many with the aid of lavish contributions from single-interest groups.³⁹⁵ Appointed members of the executive branch and independent administrative agencies are subject to the same problems and are even less accountable to the voters;³⁹⁶ thus judicial review is arguably no more counter-majoritarian

390. *Id.* at 75-77.

391. *Id.* at 75.

392. *Id.*

393. *See id.* at 77-83.

394. *See id.* at 80. This assumes, of course, that the constituents themselves can accurately know their own preferences. For a brief treatment of the problem of ascertaining preferences, see Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245 (1986). For a vivid literary example of the illusory nature of personal choice, see W. STYRON, *SOPHIE'S CHOICE* 586-90 (Bantam ed. 1980).

395. *See* Chemerinsky, *supra* note 376, at 80 & nn. 166-67. *But see* Edwards, *What 'Permanent Congress'?*, N. Y. Times, Jan. 5, 1990, at A31, col. 2 (arguing that despite high re-election rates there exists considerable turnover in the House: since 1950 "at least two-thirds of the returning members of the House of Representatives had served fewer than 12 years.").

396. *See* S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 127-28 (2d. ed. 1985) ("[A]dministrators are not elected by the citizenry and are not held accountable to the electorate.").

than the actions of legislatures or executives. The next leap in the argument is to contend that courts are structurally preferable to decide issues of long-term consequence because they can better secure abstract values and protect disadvantaged minorities.³⁹⁷

These contentions, even if true, prove too much. However poorly the legislative process works, it remains more directly accountable to the people than the judiciary.³⁹⁸ Arguments that defend judicial review on the grounds of a supposed structural competence, a superior abstract wisdom, or a special sensitivity to minorities may be used to support assignment of almost any public policy function to unelected, unrepresentative elites selected for their supposed superior skill. The premise "is that, by virtue of its superior wisdom, a vanguard is best able to judge the interests of everyone—since almost all are too blinded by 'false consciousness' to know what they need or even what they 'really' want."³⁹⁹ To state the argument for judicial review in this broad fashion is problematic, for the argument turns on the "basic premise of dictatorship," a notion that is sharply at odds with the "fundamental premise of self-government [] that ordinary people are better able to judge their own interests than any ruler is."⁴⁰⁰ If, as many modern constitutional scholars concede, there are no longer any constant referents in the Constitution and "[t]he Justices cannot avoid value choices in constitutional decision-making,"⁴⁰¹ then defenders of judicial review must find some other means to justify a practice that vests these choices in a vanguard rather than in the people's admittedly imperfect proxies. Any argument defending judicial review ultimately must accept the criticism that it is, in Alexander Bickel's words, a "deviant institution" in democratic society.⁴⁰²

Democratic toleration of this deviant institution traditionally has stemmed from the belief that the Court's role is to enforce generally accepted, "natural" norms that transient majorities are morally and legally powerless to ignore. But if that premise has lost all vitality, then judicial

397. See Chemerinsky, *supra* note 376, at 83-84. But see Tushnet, Schneider & Kovnor, *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 962 (1988) (casting doubt on two key assumptions concerning judges: (1) that they are unaffected by "electoral" incentives; and (2) that their length of service allows them to develop more consistent principles than legislators).

398. Professor Chemerinsky thinks this "misses the point." Chemerinsky, *supra* note 376, at 82. It does if the point is simply Chemerinsky's conclusion that aggressive judicial review is to be valued above all other methods of determining constitutional values. But if the point is that the people are ultimate sovereign, and their aggregate wishes are less likely to be implemented by courts than legislatures, the criticism is squarely on target.

399. Kirkpatrick, *Politics and the New Class*, in THE NEW CLASS? 47 (B. Bruce-Briggs ed. 1979).

400. *Id.* at 47.

401. Chemerinsky, *supra* note 376, at 100.

402. Bickel, *supra* note 376, at 18.

review is imperiled. Current attempts to rescue it seek either to challenge the death of objective, "natural" norms or to concede the lack of such norms and argue that the finality of judicial choice of constitutional values should not be upsetting because judicial review really lies in the mainstream of democracy.⁴⁰³

Neither of these approaches is adequate. The former relies primarily on devices like the doctrine of original intent⁴⁰⁴ or resort to specific traditions in American law.⁴⁰⁵ The obstacles to originalism as a means to capture objective constitutional norms are legion and have been thoroughly canvassed.⁴⁰⁶ The recent embrace by Justice Scalia and Chief Justice Rehnquist of "the most specific tradition available"⁴⁰⁷ as the lodestar of constitutional interpretation is almost risibly chimerical, for it requires an initial characterization of the issue as to which "specific tradition" is to be the guide, and that characterization can be made at any level of abstraction or by any selective use of fact to phrase the issue.⁴⁰⁸ Thus, any result can be justified by resorting to this style of reasoning.

By contrast, there is a different fallacy in the argument that—despite the lack of objective norms—judicial review is justifiable because it is really in the mainstream of democracy. The flaw in this argument arises due to an acceptance of the premise, inimical to self-government, that political institutions insulated from popular control are appropriate vehicles for policy choice. With that premise firmly in place, judicial review is reclaimed from its supposed counter-majoritarian role by a demonstration that it is really no more removed from the people than are all other

403. *See id.*

404. *See, e.g.,* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (intent can provide neutral theories for constitutional adjudication); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985) (examining shift away from interpretivist theory).

405. *See, e.g.,* Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (1989) (defending use of specific historical traditions in legal analysis).

406. *See, e.g.,* L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988) (omitting conflicts between specific intent of framers and broadly written clauses of Constitution); Dworin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (judges must make substantive political decisions in process of interpretation); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that framers did not intend binding future interpretation of their intent); Powell, *supra* note 2, at 659 (providing interpretive guidelines for originalists).

407. *Michael H.*, 109 S. Ct. at 2344 n.6.

408. In *Michael H.*, Justice Scalia asserted that the relevant question was whether there exists a specific tradition of state protection of the rights of a "natural father of a child conceived within and born into an extant marital union that wishes to embrace the child." *Id.* at 2344. But the question need not be so phrased. An equally "specific" inquiry is whether states have accorded protection to natural fathers who have formed attachments after birth with the child, lived with the child and her mother, and represented the child to be his own. Justice Scalia's initial value choice precluded this inquiry, for he was already determined to skew resolution of the issue in favor of the pre-existing legal construct of state-sanctioned marriage.

arms of government. Far from supporting the legitimacy of judicial review, this argument serves better to damn the present-day processes of popular representation.

The failure of these justifications—coming from either pole of the political axis—does not, and should not, result in acceptance of the death of judicial review. The problem lies not in the institution itself, but in the social context in which it operates. Judicial review originated in a society that generally agreed on two fundamental propositions—there were natural rights that transcended governments, and the political power of majorities was to be distrusted. If there is no longer agreement on these propositions, it is to be expected that judicial review today will reflect a different set of contemporary social realities. Western society today is both profoundly influenced by moral skepticism and riven by a clash between the moral skeptics and moral absolutists. Whether that is deplorable or cause for rejoicing is a judgment that need not be made here, but it is a fact with considerable implications for judicial review. At the same time, people hunger for more control of their lives. These twin realities in a democratic state dictate a restrained role for the deviant institution of judicial review.

In the absence of any shared set of values that inform the constitutional limits upon government, it is not surprising that the United States Supreme Court has begun to act with greater reluctance in fashioning constitutional principles. When the culture does not know its own values, it is an extraordinary act of hubris for the Court to pretend that it possesses that knowledge. With the collapse of the foundational premises for judicial review, the argument against delivering portions of constitutional substance into legislative hands is considerably weakened.

It is thus predictable that a period characterized by deep divisions concerning the proper relationship between moral values and the polity and a passion for popular control of our lives is one in which judicial review is without a clear, justifiable role. The United States Supreme Court has responded by fashioning an increasing number of doctrines that leave constitutional flesh to the popular will. Whether this phenomenon is the product of a “majoritarian paradigm” of constitutional law or the existence of an American analogue to the Canadian notwithstanding clause, the result is the same: Popular majorities are receiving a larger voice in the fashioning of constitutional law.

Canada’s choice to vest Parliament with an explicit override power responds more directly to the demand for popular sovereignty in constitutional matters. The very presence of an explicit legislative override power shapes the legal landscape in which the Supreme Court of Canada

exercises its judicial review power.⁴⁰⁹ Although the Canadian Supreme Court has vigorously engaged in constitutional judicial review, the substance of its decisions probably have been affected by the mere existence of the override. It may be that a consequence, if not the ultimate purpose of the explicit override is to cause the Supreme Court of Canada to interpret the Charter with the knowledge that its interpretations are subject to the legislative override. But this phenomena carries with it two drawbacks not present in the American analogue. First, the effects of judicial review are not as visible as in the American scheme. There is no easy way to determine whether the society approves of those effects or not. Exercise of the override power is, of course, highly visible, and normative judgments of that act are quick to emerge.⁴¹⁰ But the very contrast between the high level of visibility of *exercise* of the override power and the almost imperceptible effect on Supreme Court judgments of its mere *existence* renders the extent to which constitutional law is altered by the very existence of the notwithstanding clause invisible in Canada. It is thus unlikely that normative judgments can be fairly rendered about the silent effects of the mere existence of the override. Second, the textual explicitness of the override makes it impossible to eliminate, short of Charter amendment. The American version, being of judicial construction, can be more easily dismantled.

The legislative override—whether explicit, as in Canada, or implicit, indirect, and of judicial manufacture, as in the United States—may be a transitory phenomenon. In Canada, it may represent an aspect of adjustment from parliamentary supremacy to a more mixed system of judicial and legislative sovereignty. It is possible, however, that the legislative override may remain as a fixed part of the Canadian political landscape, for post-Meech Lake developments may dictate an even more decentralized form of federal union. In the United States, the legislative override is a reaction to the breakdown of the old premises upon which the tradition of judicial review was built. It may be that the American legislative override will persist, as a way of justifying judicial review. It is also possible that sufficient societal consensus can be reached about the fundamental restrictions upon government, which would allow the American legislative override to fade into the archives of American constitutional history. Whatever the ultimate result, it is too early to mourn the pass-

409. See, e.g., L. TRIBE, *supra* note 30, §§ 2-1 to 2-4, at 18-22 (discussing how the process of observation, or judging, both is shaped by and shapes the world in which the action occurs).

410. See, e.g., M. MANDEL, *supra* note 19, at 80-81 (discussing the outrage in English Canada concerning Quebec's use of the override to insulate its language laws from Charter review). On the other hand, it is likely that without the override power there would have been a popular explosion within Quebec in the wake of *Ford v. Quebec*, [1988] 2 S.C.R. 712 and *Devine v. Quebec*, [1988] 2 S.C.R. 790.

ing of the Constitution. Reports of the death of the Constitution are greatly exaggerated; it has merely acquired a new interpretive dimension.

CONCLUSION

The development of Canadian and American federalism is laden with irony. The initial constitutional text and structure of the United States government described a federal union composed of sovereign units, each of which possessed plenary residual power after a cession of certain limited and enumerated powers to the central government. The initial constitutional arrangements of Canada described a central government endowed with plenary residual power after a cession of certain limited and enumerated powers to the provinces. In the interpretation of text, however, the two constitutional schemes have effectively been reversed. Canada's federal system is today far more decentralized than the American system. One aspect of the Canadian preference for both regional autonomy and parliamentary supremacy is Canada's notwithstanding clause—the power vested in Parliament and the provincial legislatures to override key individual rights provisions in the Constitution. Examination of this override power reveals much of interest to both Canadians and Americans. The power derives in part from Canadian traditions of parliamentary supremacy in constitutional matters and deference to provincial autonomy. The grant of a virtual constitutional veto to the provinces (albeit limited in its substantive scope) is evocative of the ideas of federal union developed at length by John Calhoun in antebellum America, and it raises questions of whether a federal union can survive indefinitely with such a fractured and diffuse form of federal constitutional sovereignty.⁴¹¹ Canada's much more established tradition of provincial autonomy is at least suggestive that a Calhounesque federal union may be possible.

Surprisingly, American constitutional law contains some rough analogues to both forms of the Canadian legislative override. The Rehnquist and Burger Courts developed constitutional doctrines that preserve the outward form of national uniformity of constitutional entitlement, while simultaneously delivering to the states considerable legislative power to define the substance of those rights. The effect bears some similarities to the provincial legislative override. American constitutional law also con-

411. Another such element in the Canadian structure is the requirement that certain types of constitutional amendments must have the assent of every provincial legislature. See CONSTITUTION ACT, 1982, § 41. Given the inability of Canada to reach unanimity with respect to Meech Lake, and the resultant threat of disunion, these questions are accentuated. Moreover, section 38(3) of the Constitution Act, 1982, gives provinces the unilateral power to block Charter amendments, as applied to the dissenting province, if those amendments would derogate from the legislative or other powers of the province.

tains some rough analogues to the parliamentary override. By manipulating the jurisdiction of federal courts, Congress theoretically can strip the federal courts of constitutional power and vest that power, not in Congress or the state legislatures, but in the state judiciaries. The result is an American hybrid of the provincial and parliamentary overrides. When it comes to the allocation of legislative authority between the states and Congress, the Court already has acquiesced to congressional determination of that constitutional boundary, including congressional determinations that permit states to restrict constitutional rights—such as equal protection—that they would not otherwise be able to invade. Finally, the Court has acted most aggressively in consigning to Congress virtually plenary authority to define the entitlement rights that procedural due process protects and in treating congressional conceptions of procedure as presumptively in accord with due process.

The existence of these powers—explicitly in Canada and by judicial manufacture in the United States—raises questions about the place of judicial review in a democratic federal system. Much current constitutional theory is devoted to justification of judicial review, an institution that concededly chooses between competing constitutional values in a society that believes that no value choice is *a priori* preferable. Critics of judicial review often fault it for its failure to tether such value choices to some objectively ascertainable standard, but the alternatives proposed by the critics are equally amorphous. The debate exists because the fundamental premises that once supported the legitimacy of judicial review—belief in transcendent, “natural” legal principles and skepticism about the advisability of mass participation in government—have collapsed. The American creation of *sub rosa* legislative checks upon the judicial review power manifests a judicial attempt to capture and adjust to the temper of current circumstances. The explicit Canadian power recognizes the dilemma, but it is more directly informed by the Canadian political traditions of legislative supremacy and provincial autonomy.

Both legislative overrides may be temporary. The American analogue, being of judicial invention, is more susceptible to judicial abandonment. The prognosis for the Canadian override must be more guarded, given its more complex ingredients. Canada’s federal union has entered a new stage that poses tremendous countervailing strains on its political and legal culture. The ultimate question posed, in Canada as in the United States, is what sort of people are we and how do we collectively determine our constitutional vision?