Federal Spending Power in Three Federations: Australia, Canada and the United States

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Abstract: This paper will consider and compare the federal spending power in three 'mature' federations, Australia, Canada and the United States. One of the issues to be considered will be whether the federal spending power, as interpreted by the relevant courts, is sufficiently broad to deal with the obligations of a central government in current circumstances. In doing so, recurring important issues in fiscal federalism, including the allocation of responsibilities within federal systems and vertical fiscal imbalance, will be noted. The constitutional context in which this issue arises, including the fact that the constitution of each of the countries studied was conceived in times very different from those we face today, and the fact that the role and size of government has similarly radically changed since those times, is important. It is argued that a broad interpretation of the federal government's spending power is needed to provide the necessary constitutional flexibility that would otherwise be forbidden by the formal rigidity of the constitutions and the difficulty in making amendments, particularly in Australia and Canada.

Keywords: fiscal federalism, spending power, *Pape* v *Commissioner of Taxation*, vertical fiscal imbalance, federal system

I. Brief Introduction to Fiscal Federalism

> Most federal systems have not been designed for effective intergovernmental relations[1]

While this paper is primarily about the federal spending power in three federal systems, it is also necessary to briefly discuss the question of relative regulatory responsibility within federal systems. Of course, there is a clear relationship between a government's ability to

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1 Douglas Brown, 'Aspects of Multilevel Governance in Australia and Canada', 3, paper presented to conference 'Globalisation, Multilevel Governance and Democracy', Queen's University, 3 and 4 May 2002.

spend money and a government's ability to exercise control over particular functions. This also raises questions about the ability of a government to raise revenue.

It is generally considered that government functions can be classified into three components:

- stabilization function—the goals here include economic growth, full employment and price stability, and the broad tools available to achieve them include fiscal policy, monetary policy and exchange rate policy. It is generally accepted that in a federal system, this is a function best carried out by the federal government;
- distribution function—this refers to the need to equitably distribute income and wealth, typically through progressive taxation and social welfare spending, including health, education, housing. Generally, it is again considered that this function should be performed exclusively by the central government, because a sub-national government's attempts to perform this function may be met by evasive behaviour as capital and labour move to minimize their taxation obligations;
- allocation function—this refers to actions by government necessary to ensure efficient allocation of resources, including the provision of public goods, regulatory policies or taxes/subsidies to correct any market failure; here there is no general consensus as to which level of government, or both, in a federal system should have this function.[2]

In the context of these arguments, other principles are also said to apply. Briefly, there is the argument of subsidiarity, in other words that sub-national governments should, subject to efficiency considerations, be responsible for those services whose benefits are confined primarily to their geographic area and for which residents should have a choice over both the quantity and quality of service.[3] There is the argument that sub-national governments are better able to discern tax/service preferences of their residents and to respond appropriately, and the argument that competition between sub-national

2 Wallace Oates, *Fiscal Federalism* (Harcourt Brace: New York, 1972) 4–9; one of Australia's leading economists, Neil Warren, summarizes this orthodox position in his report *Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report* (NSW Treasury: Sydney, 2006) 5–6.

3 As De Tocqueville put it: 'in great centralised nations, the legislator is obliged to give a character of uniformity to the laws which does not always suit the diversity of customs and of district; as he takes no cognisance of special cases, he can only proceed upon general principles; and the population are obliged to conform to the requirements of the laws, since legislation cannot adapt itself to the exigencies and the customs of the population, which is a great cause of trouble and misery': *Democracy in America* (Saunders & Otley: London, 1835).

governments in terms of tax/service delivery leads to better outcomes, greater policy experimentation, greater choice for citizens etc.[4]

On the other hand, the argument for sub-national governments in terms of service delivery (and associated expenditure) is weaker where expenditure leads to spillover effects in other jurisdictions; the theory is that the sub-national government will not take these spillover effects into account in deciding on the quantity of the service that it will deliver,[5] so left to its own devices it will not decide on the optimal quantity of those services. Further, some of the beneficiaries of the service may not pay for the service in terms of taxation, which is generally not considered optimal. There is also the argument in terms of economies of scale generated by national rather than sub-national service delivery, and arguments why in some cases there should be uniformity in service delivery.[6] For example, in respect of some services, it may be that a minimum level nationwide should be provided, and the best way to make this happen is arguably by centralizing delivery of that service. Some research has cast doubt on whether the subsidiarity principle should be accepted.[7] Further difficulties arise where services are delivered by a combination of levels of government in terms of blurring of responsibilities, and one level of government seeking to transfer blame and risk to the other level of government.[8]

It has been noted elsewhere that forces of globalization, together with other factors, have tended to increase the range of issues seen to be national in character, reducing the range of issues seen as purely local.[9] There is debate at a philosophical level as to which level of

4 Oates, above n.2 at 11–13; Anne Twomey and Glenn Withers, *Federalist Paper I: Australia's Federal Future*, Report (Council for Australian Federation: Canberra, 2007) 9–14; C. Tiebout, 'A Pure Theory of Local Expenditure' (1956) 64 *Journal of Political Economy* 416.

5 G.R. Zodrow and P. Mieszowski, 'Pigou, Tiebout, Property Taxation and the Underprovision of Local Public Goods' (1986) 19 *Journal of Urban Economics* 357.

6 Oates, above n. 2 at 32, 53.

7 For example, R.M. Isaac, J.M. Walker and A.W. Williams, 'Group Size and the Voluntary Provision of Public Goods' (1994) 54 *Journal of Public Economics* 1, and R.M. Isaac and J.M. Walker, 'Group Size Effects in Public Good Provision: The Voluntary Contribution Mechanism' (1988) 103 *Quarterly Journal of Economics* 179; H.F. Ladd, 'An Economic Evaluation of State Limitations on Local Taxing and Spending Powers' (1978) 31 *National Tax Journal* 1; M. Bell and R.C. Fisher, 'State Limitations on Local Taxing and Spending Powers: Comment and Re-evaluation' (1978) 31 *National Tax Journal* 391; D. Bos, 'An Optimal Taxation Approach to Fiscal Federalism—Commentary' in C.E. McLure (ed.), *Tax Assignment in Federal Countries* (Centre for Research on Federal Financial Relations: Canberrra, 1983); Thomas Laubach, *Fiscal Relations Across Levels of Government in the United States* (2005) OECD Economics Department Working Papers No. 462, 13.

8 Isabelle Joumard and Per Mathis Kongsrud, *Fiscal Relations Across Government Levels* (2003) OECD Economics Department Working Papers No. 375, 23.

9 As the Business Council of Australia says in its recent report, *Reshaping Australia's Federation: A New Contract for Federal–State Relations* (2006), 'the world has changed considerably since federation in 1901. Issues that were once clearly the responsibility of the states have taken on a more national character.'

government is better able to undertake particular responsibilities. Access Economics puts it thus:

> Economists prefer the Federal Government to have charge where:
> 1. The implications of policies 'spill over' State borders (for example, policies affecting the likes of business operations, or long distance trucking, or water flows);
> 2. There are big economies of scale and scope with centralising policies (for example, macroeconomic policymaking, defence, and foreign affairs);
> 3. Having State-by-State differences in rules and regulations is a burden on those who regularly trade across State boundaries (for example, in regulating banks and companies);
> 4. There are big differences in capacities across States—for example, if only one State has huge oil deposits, it makes sense for resource taxes to lie with the Federal Government rather than with individual State Governments;
> 5. Where capital and people can readily move to avoid State-level policies that affect them. For example, . . . you can't have only some States levying death duties, as retirees will move. Similarly, you couldn't try to levy taxes on personal or company income or capital gains at the State level, or have notably different welfare entitlements by State, as those policy differences would be undermined over time by people moving. Hence the ideal federal system would promote national markets for people and for business inputs.[10]

It is generally considered to be good policy that a government which spends money has the responsibility of raising it. This argument is defendable in terms of that government being accountable to the people for the money it has spent, and that it may have an incentive to closely monitor its expenditure levels if it is responsible for extracting it from voters. The phrase 'vertical fiscal imbalance' (VFI) refers to the situation where there is a mismatch between expenditure commitments and revenue raising capacity within a federation. Others have pointed out that, as a general trend, VFI is worsening in those nations with both central and regional governments; in other words, the mismatch between spending and expenditure is growing rather than narrowing.[11] While the reasons for this mismatch are complex, certainly one of them is the limited access that sub-national governments enjoy to certain kinds of tax. There is extensive literature on the kinds of taxes best levied at one level of government or another; it is often said that taxes such as income, corporate and value-added taxes are best

10 Access Economics, *The Costs of Federalism: Report by Access Economics for the Business Council of Australia* (2006) 14.

11 Joumard and Kongsrud, above n. 8 at 6. This is partly because of the practical limit on the kinds of taxes that can be levied at sub-national level.

levied at the national level due to the mobility of the base, while property taxes are ideally levied at the sub-national level.[12]

As has been pointed out on many occasions, Australia's federal system is characterized by a high degree of VFI.[13] According to the OECD, in Australia state and local governments are responsible for 39.7 per cent of total government spending, yet raise only 17.2 per cent of the revenue, compared with respective figures in Canada of 58.7 per cent and 44.1 per cent, and the United States of 54 per cent and 31.7 per cent.[14] In other words, of the three federations studied in this paper, the gap between the amount raised and the amount spent is, by far, greatest in Australia, and is least in Canada.

Vertical fiscal imbalance is often seen to be problematic, in particular because governments that aren't responsible for raising money may be more careless in how they spend it.[15] VFI may blur the lines of accountability between different levels of government. It may lead cash-starved levels of government to resort to, or persist with, clearly inefficient kinds of taxation, leading to market distortions and misallocation of resources.[16]

12 *Ibid.* at 23–35; Warren, above n. 2 at 60–2; Laubach, above n. 7 at 23–30. As Access Economics put it succinctly: 'globalisation is resulting in a relative increase in transactions across borders—there is greater mobility among people, business operations, the sourcing of business inputs and capital. That means there is a steadily improving case for taxes to be raised at the Federal level—and hence there is a steadily building case for taking spending responsibilities away from the States': above n. 10 at 13.

13 Drummond says that Australia 'is by far the most centralised First World federation, and also the most centralised First World democracy': M. Drummond, 'Costing Constitutional Change: Estimating the Costs of Five Variations on Australia's Federal System' (2002) 61(4) *Australian Journal of Public Administration* 43 at 43.

14 *OECD Revenue Statistics*, various: IMF, *Government Finance Statistics Yearbook*, various; see also Ronald Watts, *Autonomy or Dependence: Intergovernmental Financial Relations in Eleven Countries* (2005) Working Paper 2005(3) IIGR, who calculated the central government shares of total government revenue and expenditure. In Australia, the figures were, respectively, 69 per cent and 54 per cent, in the United States, 67 per cent and 54 per cent, and in Canada, 44 per cent and 37 per cent: at 51.

15 Jourmard and Kongsrud, above n. 8; Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *University of New South Wales Law Journal* 509; Cliff Walsh, 'The Economics of Federalism and Federal Reform' (2008) 31(2) *University of New South Wales Law Journal* 553; Cliff Walsh, 'Vertical Fiscal Imbalance—The Issues' in D.J. Collins (ed.), *Vertical Fiscal Imbalance and the Allocation of Taxing Powers*, Australian Tax Research Foundation Conference Series No. 13, 41; Cliff Walsh, 'Federal Reform and the Politics of VFI' (1990) *Issues in State Taxation* 63; Cheryl Saunders, 'Fiscal Federalism—A General and Unholy Scramble' in Greg Craven (ed.), *Australian Federation—Towards the Second Century* (Melbourne University Press: Melbourne, 1992).

16 Russel Mathews and W.R.C. Jay, *Federal Finance: Intergovernmental Financial Relations in Australia Since Federation* (Thomson Nelson: Australia, 1972) 317–18; Cliff Walsh, 'Federal Reform and the Politics of VFI', above n. 15; Access Economics, *Study on the Distribution of Federal/State Financial Powers* (Access Economics: Australia, 1995) 9; *Final Report of the Constitutional Commission* (1988) Vol. 2, para. 11.254–5; see also Gibbs J in *Hematite Petroleum Pty Ltd* v *Victoria* (1983) 158 CLR 599 at 617.

VFI has generally become more pronounced in Australia since federation, as the taxes within the Commonwealth's control have grown in importance, and as states have given up certain forms of taxation. Fenna talks about the 'natural upward migration of taxing responsibility, as explained by the theory of fiscal federalism',[17] as well as the practical constraint on the levying of taxation at sub-national level due to the mobility of individuals that might be the subject of such taxation[18]; in practice this often means that sub-national taxes are best levied on immobile tax bases. This effectively means that more of the tax raising responsibility tends to belong at the national level. As Access Economics put it succinctly:

> People and money are becoming more mobile. Because of that, it makes increasing sense for taxes to be raised at the Federal level – as taxes are easier to avoid or get competed away at the State level.[19]

States in Australia have relatively narrow tax bases. Section 90 of the Constitution prohibits them from levying customs and excise duties; however all of the revenues from the federally raised goods and services tax go to the states. By agreement with the Commonwealth, the states vacated the income tax field in 1942 and have not returned to it, though they are legally free to do so, as they would be to levy corporate tax. They are left with payroll tax and land tax, both of which are relatively efficient taxes, as well as transactions taxes, which are highly inefficient taxes, as well as relying to a large extent on federal government grants.

In contrast, Canadian provinces raise revenue from a broader base of taxes, including personal income and corporate tax, sales tax, and property tax. Approximately 60 per cent of their taxation revenue comes from income and sales tax, with about 10 per cent from payroll and property tax, and the rest from inefficient taxes.[20] States in the United States rely on income taxation for approximately 39 per cent of their state tax revenue, with about 33 per cent from sales tax. About 25 per cent is derived from inefficient taxes, with low reliance on payroll and property tax.[21] Approximately one-third of state revenues is derived from federal government grants.[22]

Given the record in each federal system studied, and evidence in other federal systems, of a mismatch between revenue raising and expenditure commitments, it is natural to ask of any federation whether one level of government or the other in a federation should have more or less responsibilities. That is a question for another day.

17 Fenna, above n. 15 at 514.
18 In practice, this often means that sub-national taxes are best levied on immobile tax bases.
19 Access Economics, above n. 10 at 13: 'globalisation is resulting in a relative increase in transactions across borders—there is greater mobility among people, business operations, the sourcing of business inputs, and capital'.
20 Watts, above n. 14; Warren, above n. 2 at 66.
21 Laubach, above n. 7; Warren, above n. 2 at 67.
22 Warren, above n. 2 at 79.

The purpose of this paper is narrower; specifically, to investigate what powers the federal government in each jurisdiction studied has (or needs) to use this 'excess money'[23] in areas that have not been expressly assigned to it by the Constitution.

II. The Federal Government's Spending Power in Each Jurisdiction Studied

i. Canada

Unlike the other two federations studied, Canadian constitutional laws do not include an explicit power of the federal government to spend money. Section 91(3) of the Constitution Act 1867 provides a list of federal powers, including the raising of money through taxation, but does not expressly provide for the ability to spend the money.[24] There are a range of views as to the source and extent, if any,[25] of the federal government's spending power. These include that the power is justified by the royal prerogative and common law,[26] or is implicit in the federal government's legislative power over public property,[27] or is implicit in the existence of the Consolidated Revenue Fund,[28] or exists because the federal government has in fact exercised the power for many years,[29] or some other reason.[30] According to one leading jurist, the power depends on whether the spending is coercive or not:

> Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may

23 I use the term 'excess money' to mean money that the federal government has left over after it has fulfilled its spending commitments in areas that have been expressly granted to it by the terms of the Constitution.

24 Nor is there any express reference in the Constitution Act 1982.

25 Some commentators deny the federal government has such a power: see for example Andree Lajoie, 'Current Exercises of the "Federal Spending Power": What Does the Constitution Say About Them?' (2008) 34 *Queen's Law Journal* 141; Andrew Petter, 'Federalism and the Myth of the Federal Spending Power' (1989) 68 *Canadian Bar Review* 448; Andrew Petter, 'The Myth of the Federal Spending Power Revisited' (2008) 34 *Queen's Law Journal* 163; Marc-Antoine Adam, 'The Spending Power, Co-Operative Federalism and Section 94' (2008) 34 *Queen's Law Journal* 175.

26 Frank Scott, 'The Constitutional Background of Taxation Arrangements' (1955) 2 *McGill Law Journa*l 1.

27 S. 91(1A) Constitution Act 1867.

28 Section 106: E. Dreidger, 'The Spending Power' (1981) 7 *Queen's Law Journal* 125.

29 Peter Hogg, 'Analysis of the New Spending Provision (Section 106A)' in Swinton and Rogerson (eds), *Competing Constitutional Visions: The Meech Lake Accord* (Carswell: Toronto, 1988).

30 For example, Hoi Kong argues that s. 36(1) of the Constitution Act 1982, which allows federal and provincial government action to provide essential public services to all Canadians, is an alternative source: 'The Spending Power, Constitutional Interpretation and Legal Pragmatism' (2008) 33 *Queen's Law Journal* 305.

> attach to any grant or loan any condition it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient . . . or obligations which are voluntarily assumed by the recipient . . . There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.[31]

In an early decision, the Privy Council appeared to suggest limits on the ability of the federal government to spend:

> That the Dominion may impose for the purpose of creating a fund for special purposes and may apply that fund for making contributions to the public interest to individuals, corporations or public authorities could not as a general proposition be denied . . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.[32]

Not surprisingly, at a similar time Lord Atkin in the Privy Council described Canada's federal system in terms of 'watertight compartments'. As he put it, 'while the ship of state now sails on larger ventures . . . she still retains the watertight compartments which are essential to her original structure'.[33]

Despite these comments, in subsequent cases there have not been suggestions of limits on the spending power of the federal government. For example, in *Winterhaven Stables Ltd* v *Canada (AG)*,[34] the Alberta Court of Appeal validated provisions of federal income tax legislation which included provisions transferring money from the federal government to provinces for spending in areas falling within exclusive province control. In comments in several Supreme Court

31 Peter Hogg, *Constitutional Law of Canada* (Carswell: Toronto, 2007) 6.18–6.19. One of the cases Professor Hogg uses in justification is the *Reference Re Canada Assistance Plan* (BC) [1991] 2 SCR 525, a decision he views as 'clear affirmation of both of the Parliament's power to authorize grants to the provinces for use in fields of provincial jurisdiction and the power to impose conditions on the recipient provinces. Provided Parliament's intervention does not go beyond the granting or withholding of money, there is no unconstitutional trespass on provincial jurisdiction' (175–6).

32 *Reference Re Employment and Social Insurance Act* (Can) [1937] 1 DLR 684, PC (*Unemployment Insurance Reference*); see also Lord Watson in *Liquidators of Maritime Bank* v *Receiver General of New Brunswick* [1892] AC 437, PC, and Lord Haldane in *Bonanza Creek Gold Mining Co* v *R* [1916] 1 AC 566 at 580, PC.

33 *Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act* [1937] 1 DLR 673 at 684, PC. Hoi Kong argues that Lord Atkin's watertight theory of federalism has been overtaken by developments in doctrine and practice: above n. 30 at 312.

34 [1988] 91 AR 114.

decisions, judges have, admittedly in *obiter* comments, expressed a broad view of the federal spending power.[35]

ii. Australia

> There is not and never has been a rational basis for the federal spending power in Australia.[36]

Section 81 of the Commonwealth Constitution provides the federal government with a power to make appropriations of money 'for the purposes of the Commonwealth'. This section is complemented by a power in s. 96 to make conditional grants to states.[37] Section 81 has proven contentious, with different views expressed as to the meaning of the above phrase. Some judges have taken what might be called a 'narrow view', in other words that this phrase means areas over

35 For example, in *YMHA Jewish Community Centre of Winnipeg* v *Brown* [1989] 1 SCR 1532, L'Heureux-Dube J, speaking for the court, concluded: 'However, while Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area' (at 1533). Sopinka J in *Reference Re Canada Assistance Plan* (BC) [1991] 2 SCR 525, appeared to assume the existence of a federal spending power in areas of provincial jurisdiction: 'The written argument of the Attorney General of Manitoba was that the legislation "amounts to" regulation of a matter outside of federal authority. I disagree. The Agreement under the plan set up an open-ended cost sharing scheme, which left it to British Columbia to decide which programmes it would establish and fund. The simple withholding of federal money which had previously been granted to fund a matter within provincial jurisdiction does not amount to regulation of that matter' (at 567). La Forest J in *Eldridge* v *British Columbia* (AG) [1997] 3 SCR 624, suggested that the spending power had been constitutionalized (para. 25): '(The constitutionality of this kind of conditional grant [from the federal government made to fund provincial health insurance programmes] was approved by this court in *Reference Re Canada Assistance Plan* (BC) [1991] 2 SCR 525, 567).' The existence of the power was also assumed in *Auton (Guardian ad litem of)* v *British Columbia* (AG) [2004] 3 SCR 657 at 682 ('the federal government, however, has authority under its spending power to attach conditions to financial grants to the provinces that are used to pay for social programs'), and in *Chaoulli* v *Quebec* (AG) [2005] 1 SCR 791, para. 16: 'Although the federal government has express jurisdiction over certain matters relating to health … it is in practice that it imposes its views on the provincial governments in the health care sphere by means of its spending power'. The Supreme Court most recently declined to consider the issue in *Syndicat National des Employes de 'aluminium d'Arvida Inc* v *Canada* (AG) (Supreme Court of Canada, 11 December 2008).

36 Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369 at 407.

37 Cheryl Saunders makes the point that 'the federal spending power has developed differently in Australia from Canada or the United States primarily as a result of the presence of section 96 of the Constitution': above n. 36 at 374. In her article she also discusses the interrelation between the two sections. The High Court of Australia has never invalidated a s. 96 grant, usually on the basis that the states are legally free to accept or not accept the grant, and the fact they might have a large financial inducement to accept the conditions attached to the grant does not amount to unacceptable coercion: *South* v *Australia* (1942) 65 CLR 373; *Victoria* v *Commonwealth* (1957) 99 CLR 575. In the consideration of questions of coercion, practical or legal, there is some overlap between the Australian and American jurisprudence.

which the federal government has been given legislative power, primarily by s. 51 of the Constitution.[38] Other judges have taken a broader view, in essence that the Commonwealth can appropriate funds for whatever purposes it wishes.[39] A recent example of this is Gleeson CJ (as he then was) in *Combet* v *The Commonwealth*: 'It is for the Parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth.'[40]

Yet other judges have taken what might be considered an intermediate view, that the scope of the power is not limited to purposes for which the Commonwealth has express legislative power, but might include things that are appropriate targets of spending by a national government,[41] however this is described or determined.[42]

38 *Attorney-General (Vic)* v *Commonwealth* (1945) 71 CLR 237, *per* Williams J (at 282); *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338, *per* Gibbs J (at 373). There is some support for this position from a reading of the Convention Debates: Saunders, above n. 36 at 375–9. She concludes that 'although there was some uncertainty in the debates over the effect of s. 81 in either its original or final form, it seems unlikely on balance that it was intended to allow appropriation for any purpose' (at 377).

39 *Attorney-General (Vic)* v *Commonwealth* (1945) 71 CLR 237, *per* Latham CJ (at 253–4) and McTiernan J (at 274); *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338, *per* McTiernan J (at 369) Mason J (at 395–7) and Murphy J (at 417). Sir Robert Garran, in evidence given to the 1929 Royal Commission on the Constitution, said he had always considered that s. 81 was an 'absolute power of appropriation', an assumption upon which the Commonwealth had relied (*Report of the Royal Commission on the Constitution* (1929), 140). Similarly, the Constitutional Commission in its 1988 Report noted the practice whereby federal Parliament had made appropriations to persons or bodies for purposes not apparently connected with the purposes of the Commonwealth: *Final Report of the Constitutional Commission* (1988), vol. 2, 834. Sir Robert contrasted the phrase used in s. 81 with that used in the compulsory acquisition provision, s. 51(31), 'any purpose in respect of which the Parliament had power to make laws' (which has been interpreted to require another head of power pursuant to which the acquisition takes place). There is also some support for the broad view in the Convention Debates: Saunders, above n. 36 at 375–9.

40 (2005) 224 CLR 494 at 522. One justification for such a view is that appropriations often contain very little detail, limiting the ability of the court, even if it wished to, to scrutinize the purposes of the appropriation for constitutional reasons. As Gummow, Hayne, Callinan and Heydon JJ point out in *Combet* v *The Commonwealth* (2005) 224 CLR 494, the appropriation commonly only specifies an amount that may be spent rather than further define the purposes or activities for which it may be spent (at 577).

41 *Attorney-General (Vic)* v *Commonwealth* (1945) 71 CLR 237, *per* Starke J (at 266) who would allow the Commonwealth to spend on executive matters and 'matters arising from the existence of the Commonwealth and its status as a Federal Government', and Dixon J (with whom Rich J agreed (at 264)) who would allow the Commonwealth to spend on matters 'incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government . . . these are things which . . . should be interpreted widely' (at 269); see also *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338, *per* Barwick CJ (at 362) matters 'inherent in the fact of nationhood and of international personality' and/or matters 'within the executive power'; Mason J (at 397) and Jacobs J (at 412) to like effect.

42 This may be on the basis of the s. 61 executive power, s. 51(39) (incidental power) or an inherent nationhood power: see for example Mason J in *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338 at 397: 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and

This position reflects a distinction being made between the heads of power relevant to the question of whether legislative regulation is valid, and questions of the validity of an appropriation under s. 81. Specifically, on this view the Commonwealth may not need to point to a head of power other than s. 81[43] in order to spend money; but any regulation of the subject matter would require a source in one of the Commonwealth's other heads of power, primarily located in s. 51 but also importantly in this context, s. 61. Issues have also been raised as to the justiciability of the question of the validity of an appropriation,[44] again an issue quite separate from the question of the validity of any regulation of the subject matter.[45]

The High Court recently re-considered its views on these issues in *Pape* v *Federal Commissioner of Taxation*.[46] That case concerned the validity of the federal government's response to the 'global financial crisis'; this response included the payment of $900 to various taxpayers, in an effort to stimulate the economy and deal with the 'crisis'. A majority of the court (Heydon J dissenting) validated the measures. The case raised various issues, most particularly here the interpretation to be given to the s. 81 appropriations provision and the s. 61 executive power.

French CJ, Gummow, Crennan and Bell JJ concluded that s. 81 reflected established principles of responsible government, including the need for proposed expenditure to be approved by Parliament.[47] It was not a source of substantive power to the Commonwealth[48]; it contained words of limitation rather than words of empowerment.[49] They denied that the Commonwealth could, pursuant to s. 81, spend

which cannot otherwise be carried on for the benefit of the nation'; see also Jacobs J (at 412); *Davis* v *Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ), and Brennan J (at 111). In *Davis* Wilson and Dawson JJ agreed the Commonwealth had power under s. 61 to act consistent with its character and status as a national government (at 104), as did Toohey J (at 119).

43 In phrasing it in this way, I must acknowledge that the most recent statements of the High Court in *Pape* are to the effect that s. 81 is not a substantive head of power.

44 *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338 at 387 (Stephen J), Mason J (at 394), Jacobs J (at 410), Murphy J (at 424); *Davis* v *Commonwealth* (1988) 166 CLR 79 at 96 (Mason CJ, Deane and Gaudron JJ) and at 110 (Brennan J); *Pape* v *Federal Commissioner of Taxation* (2009) 83 ALJR 765 at 828 (Hayne and Keifel JJ). Sir Robert Garran argued that appropriations were not justiciable unless 'the purpose was one which could, by no conceivable means, have any interest for the Commonwealth qua Commonwealth': Garran, above n. 39 at 138.

45 However, in *Pape*, Hayne and Keifel JJ rejected the distinction between spending and engagement in activities (at 833).

46 (2009) 83 ALJR 765. The case is discussed in detail by Cheryl Saunders in 'The Source and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256.

47 (2009) 83 ALJR 765 at 786 (French CJ), 804 (French CJ), 804, 807 (Gummow, Crennan and Bell JJ); see also *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338 at 385–6 (Stephen J). This point is discussed further in Enid Campbell, 'Parliamentary Appropriations' (1972) 4 *Adelaide Law Review* 145.

48 (2009) 83 ALJR 765 at 787.

49 *Ibid.* at 787.

on whatever subject matter it wished.[50] The phrase 'purposes of the Commonwealth' meant purposes otherwise authorized by the Constitution or statutes made under it.[51] It was not confined to legislative power. Here, s. 61 was the relevant head of power which validated the appropriations.[52] The majority accepted formulations of the s. 61 power in earlier cases that it conferred on the Executive power to engage in activities and enterprises peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the nation's benefit.[53] This was the ambit also of the spending aspect of the s. 61 power. It was a valid exercise of s. 61 to spend money to avoid or mitigate the effects of the global financial crisis, and the expenditure was of a scale and required timeframe that it was peculiarly within the capacity of the national government.[54] The court reiterated that the Executive could not act under s. 61 merely because it believed that a matter was of national interest and concern.[55]

One difficulty in expressing the ambit of the Commonwealth's spending power in this way is that it creates uncertainty. As one specific example, judges will differ, and have differed, in their view on the question of whether welfare spending, a sizeable proportion of the Commonwealth of Australia's appropriations each year, fits the above description. This issue divided the High Court in *Victoria* v *Commonwealth*,[56] where Barwick CJ, Gibbs and Mason JJ, in dissent, did not agree that the Australian Assistance Plan, a Commonwealth welfare scheme, met the above description of a scheme that could only be

50 *Ibid.* at 807 (Gummow, Crennan and Bell); Hayne and Keifel JJ left open the question of whether 'purposes of the Commonwealth' meant any purpose determined by the Commonwealth (at 822).

51 *Ibid.* at 794. French CJ left open whether matters within the description of 'national concern' or 'national emergency' could enliven the s. 61 power (at 775); while Gummow, Crennan and Bell JJ claimed the Commonwealth could not rely on s. 61 to pass laws on any subject which the executive government regarded as being of national interest or concern (at 813); French CJ denied the executive power was to be equated with a general power to manage the national economy (at 798), as did Hayne and Keifel JJ (at 836). As indicated above, Hayne and Keifel JJ left open whether 'purposes of the Commonwealth' meant any purpose determined by the Commonwealth (at 822). They acknowledged that the phrase did not readily provide a criterion by which the validity of an appropriation could be determined (at 827), and that appropriations are ordinarily expressed with great generality, making it difficult in practice to apply a test based on the words (at 828).

52 *Ibid.* at 794.

53 *Ibid.*, French CJ (at 798), Gummow, Crennan Bell JJ (at 813); in *Vadarlis*, French J (as he then was) spoke of s. 61 validating a law 'central to the expression of Australia's status and sovereignty as a nation': (2001) 110 FCR 491 at 542.

54 (2009) 83 ALJR 765 at 774 (French CJ), 814 (Gummow, Crennan and Bell JJ); George Winterton criticized this test as it appeared in *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338 thus: 'the criteria of being "peculiarly adapted to the government of a nation" and being "unable otherwise to be carried on for the benefit of the nation" are political questions unsuited to judicial determination': 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421 at 427.

55 (2009) 83 ALJR 765 at 813 (Gummow, Crennan and Bell JJ).

56 *Australian Assistance Plan Case* (1975) 134 CLR 338.

carried out by a national government.[57] Of the majority judges who upheld the legislation, much of the reasoning was on the basis that an appropriation was not justiciable; however, Jacobs J alluded to the broad scope of the appropriations power:

> The purposes of the Commonwealth [within s. 81] may not only fall within a subject matter of general or particular power prescribed in the Constitution but may also be other purposes which now adhere fully to Australia as a nation externally and internally sovereign. The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries of a national scale are necessary and likewise planning on a national scale must be carried out. Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of services designed to meet those needs. Research and exploration likewise have a national, rather than a local, flavour . . . The Australian Assistance Plan is an expenditure of money in the exercise by the Commonwealth of its executive power to formulate and co-ordinate plans and purposes which require national rather than local planning and of its legislative power to appropriate funds accordingly . . . It is (also) an expenditure of money which is incidental to the execution by the Commonwealth of its wide powers respecting social welfare.[58]

Further, such a test increases the likelihood that a federal appropriation will be challenged on the basis that it is not within a head of power in s. 51, s. 61 or elsewhere. Such an outcome has been criticized by previous members of the High Court. For example, Murphy J in *Victoria* v *Commonwealth* claimed:

> To ascertain whether these appropriations are referable to one of the enumerated powers [other than s. 81] would involve exhaustive inquiry into the boundaries of the enumerated powers. The appropriation for those purposes not within the scope of the enumerated powers would, on the plaintiff's contention, be unconstitutional. Hundreds of items of appropriation since federation and many hundreds of millions of dollars would have been unlawfully appropriated and spent. The chilling effect that such an interpretation would have on governmental and parliamentary initiatives is obvious. It is one for stultifying government.[59]

57 *Ibid.* at 363 (Barwick CJ), 379 (Gibbs J) (on the basis that the s. 61 power was limited to executive matters within the legislative competence of the Commonwealth) and 401 (Mason J). French J (as he then was) took a broader view of the s. 61 power in *Vadarlis* (2001) 110 FCR 491 at 542. There is also debate as to whether the s. 61 power is limited to cases involving the exercise of the Crown prerogative; this is favoured by Winterton but cases such as *Davis* suggest the power is broader: above n. 54 at 425–33.

58 (1975) 134 CLR 338 at 412–13.

59 *Ibid.* at 418.

In the same case, Mason J stated:

> It is not lightly to be supposed that the framers of the Constitution intended to circumscribe the process of parliamentary appropriation by the constraints of constitutional power and thereby to expose the items in an Appropriation Act to judicial scrutiny and declarations of invalidity. Consequences more detrimental and prejudicial to the process of Parliament would be difficult to conceive. Any item in the Act would be subject to a declaration of invalidity after the Act is passed, even after the moneys in question are withdrawn from Consolidated Revenue and perhaps even after the moneys are expended, for an appropriation, if it be unlawful and subject to a declaration of invalidity, does not cease to have that character because acts have taken place on the faith of it.[60]

Mason J noted the practice in many jurisdictions to provide a short description of the particular items to be dealt with in an Appropriation Act. In many cases, this was because the items of expenditure had not been thought through at this point. Practically, it was impossible that this short description could now be used as a basis for testing the constitutionality of an appropriation, yet that is what would occur if an appropriation needed to be supported by a head of power outside s. 81 itself.[61]

iii. United States

Article 1, Section 8 of the Constitution provides Congress with power to 'lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States'. In relation to what the Article says about Congress's ability to appropriate (spend) money, two main views have competed for attention: (a) the narrow view, that the power of appropriation is limited to the purposes for which Congress has express legislative power elsewhere in the Constitution[62]; and (b) the broad view, that the Article is a grant of power to spend for purposes not necessarily expressly provided for in the Constitution.[63]

60 *Ibid.* at 394.
61 *Ibid.*
62 This is often referred to as the 'Madison view', a view supported by Thomas Jefferson.
63 This is often referred to as the 'Hamilton view': 'it is therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare and for which, under that description, an appropriation of money is requisite and proper': Alexander Hamilton, *Report on Manufactures to the House of Representatives* (5 December 1791), reprinted in 4 *The Works of Alexander Hamilton* (1885) 70–198. This was a view that Joseph Story also supported: 'If it [the debts and general welfare clause] is a mere appendage or qualification of the power to lay taxes, still it involves a power of general appropriation of the moneys so raised, which indirectly produces the same result': *Commentaries on the Constitution of the United States*, 5th edn (Little, Brown: Boston, 1891), s. 920, and at s. 727, 'appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or narrow

The first major case considering the clause was *United States* v *Butler*.[64] There proceeds of a tax on agricultural processors was used to subsidize farmers who agreed to take land out of production. The federal government had designed the programme to reduce food production, hoping that a diminished supply would stimulate the price of agricultural products. It argued that the Act was justified under Article 1, section 8.

The Supreme Court found, confusingly, that Congress's power to authorize expenditure of public moneys for public purposes was not limited by the direct grants of legislative power in the Constitution. However, the plan was unconstitutional, because it involved practical (though not legal) coercion of farmers to cease or reduce production, which was impermissible. Congress could not tax for purposes within the exclusive province of the states.

Apparently similar questions were answered differently in the 1937 decision of *Steward Machine Co* v *Davis*. Congress's Social Security Act established a national social security system funded by a tax on employers with eight or more staff, allowing employers to deduct most of their contribution to qualifying state unemployment plans. The aim of this provision was to accommodate states with existing social security programmes, and encourage others to establish programmes. Qualifying state unemployment plans were those where the states deposited all moneys collected into a federal fund. The federal government would then assist the state in administering its plan for the unemployed. Steward unsuccessfully challenged the legislation.

The court agreed that Congress could not use its spending power to coerce the states into participating in federal programmes; to do so would destroy the autonomy of the states and upset the balance of powers between the federal government and state governments. While at some point the court noted pressure could turn into compulsion,[65] on the facts there was no inducement; states could abstain if they wished. The court accepted a coercion test based on legalities rather than practicalities.[66] Since this decision, the authority of Congress to spend money on whatever it wishes has largely gone

sense'. Note that this power in the United States includes the power to make grants to states, a power specifically given to the federal government in Australia in a separate section of the Constitution (s. 96) to the appropriations power (s. 81): Saunders, above n. 36 at 374.

64 (1936) 297 US 1.

65 *Steward Machine Co* v *Davis* 301 US 548, 590 (1937).

66 As Cardozo J put it: 'every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in solution to its problems' (589–90). The court distinguished *Butler* on its facts.

unchallenged.[67] This broad view of Congress's spending power has, not surprisingly, been both endorsed[68] and criticized[69] by commentators.

The court has applied this test of coercion in subsequent cases. For example, in *South Dakota* v *Dole*,[70] the challenged legislation involved a federal statutory provision authorizing the withholding of 5 per cent of highway funds from any state not raising its drinking age to 21. The federal government was seeking greater uniformity in the drinking age across America and a higher age than was the case in many states in order to tackle road accident numbers. South Dakota argued the provision usurped state power to regulate alcohol, a power reserved to the states by the 21st Amendment. The Supreme Court rejected the challenge on the basis that the provision did not directly regulate states' drinking ages; it merely encouraged states to raise their drinking ages.[71] Chief Justice Rehnquist, not a noted centralist, concluded that 'objectives not thought to be within Article I's enumerated legislative fields . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds'.[72] The effect of this decision was that Congress could use the spending power not only to exercise rights not expressly granted to it by the Constitution, but could also exercise powers specifically denied to them.[73]

Other possible limits that have been suggested on the ability of Congress to spend pursuant to section 8 include that the measures not

67 For example, in *Helvering* v *Davis* the court agreed that questions could remain as to what was within the 'general welfare' and what was not, but that these were questions for Congress: 301 US 619 at 644 (1937). As Justice Holmes put it in *Hammer* v *Dagenhart* 247 US 251 at 281 (1918): 'it seems to me entirely constitutional for Congress to enforce its understanding [of good policy about anything] by all the means at its command'.

68 Reeve Bull, 'The Virtue of Vagueness: A Defense of *South Dakota* v *Dole*' (2006) 56 *Duke Law Journal* 279; Neil Siegel, '*Dole*'s Future: A Strategic Analysis' (2008) 16 *Supreme Court Economic Review* 165; Erwin Chemerinsky, 'Protecting the Spending Power' (2001) 4 *Chapman Law Review* 89; Samuel Bagenstos, 'Spending Clause Litigation in the Roberts Court' (2008) 58 *Duke Law Journal* 345.

69 See for example Celestine Richards McConville, 'Federal Funding Conditions: Bursting Through the *Dole* Loopholes' (2001) 4 *Chapman Law Review* 163; Lynn Baker, 'Conditional Federal Spending After *Lopez*' (1995) 95 *Columbia Law Review* 1911 and 'The Spending Power and the Federalist Revival' (2001) 4 *Chapman Law Review* 195.

70 (1987) 483 US 203.

71 *Ibid.* at 210–11; see also *New York* v *United States* (1992) 505 US 144; *Kansas* v *United States* 214 F. 3d 1196 (10th Cir, 2000), *cert. denied* 1231 S Ct. 623 (2000); *Rumsfeld* v *FAIR* 547 US 47 at 59–60 (2006).

72 (1987) 483 US 203 at 207; he made the same comment in *Rust* v *Sullivan* 500 US 173 at 193 (1991): 'the Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest', although they are not within the federal government's legislative power to control. The *Dole* approach was applied recently in *Pierce County* v *Guillen* 537 US 129 (2003).

73 Jeffrey Benz, 'What Spending Clause? An Examination of the Views of Hamilton, Madison and Story on Article 1 Section 8, Clause 1 of the United States Constitution' (2000) 33 *John Marshall Law Review* 81 at 85.

impact on essential state government functions, and there be some kind of 'germaneness' or relation between the conditions imposed on any spending, i.e. that they bear some relation to the purpose of the spending. In the first case, this limit has been discarded[74]; in the second case, the limit remains, but has been rarely applied to strike down spending.[75]

Part of the Court's deference to Congress in its judgment of what is for the 'general welfare' of the country is explained by Bagenstos thus:

> Any doctrine that would put the courts in the position of second-guessing Congress's determination of what is in the 'general welfare' will necessarily raise the concern that the courts are repeating what is understood to be the mistake of *Lochner* v *New York*—the judicial arrogation of authority to decide whether legislation is in face in the general interest.[76]

III. Forces Within Federal Systems

i. Requirements of the Nation Change from the Original Division of Powers

It is trite to observe that since the Constitutions of the countries studied were formulated, very significant changes have occurred in the economy, society and culture of those nations. All documents are products of their time; constitutions are no different. Certainly, at the time the original Canadian Constitution was written and at the time the Australian Constitution was written, liberalism was the dominant ideology. Liberalism is a strong theme in some of the early twentieth-century decisions of the United States Supreme Court.[77] The conception of the role of government was vastly different from what is expected today in a modern welfare state.[78]

74 The limit was first suggested (in the context of a federal Act imposing minimum wage and maximum hour controls, rather than federal spending) in *National League of Cities* v *Usery* (1976) 426 US 833, but this approach was discarded in *Garcia* v *San Antonio Metropolitan Transit Authority* (1985) 469 US 528.

75 A rare example is *Frost and Frost Trucking Co* v *Railroad Commission* (1926) 271 US 583, where the court found to be coercive (and invalid) a state law conditioning use of roads on acceptance of common carrier liability. David Engdahl in 'The Spending Power' (1994) 44 *Duke Law Journal* 1 at 56, claims the 'apothecaries of germaneness have too little science to devise a medicine that could work. The germaneness "cure" they peddle amounts to no more than cheap whiskey and snake oil'; see also David Engdahl, 'The Contract Thesis of the Federal Spending Power' (2007) 52 *South Dakota Law Review* 496.

76 Bagenstos, above n. 68 at 357.

77 A classic example is *Lochner* v *New York* 198 US 45 (1905).

78 Roderick Macdonald, 'The Political Economy of the Federal Spending Power' (2008) 34 *Queen's Law Journal* 249 notes 'the 19th century conception of the role of government, and the consequent allocation of responsibility as between provincial legislatures and the Parliament of Canada in 1867, proved ill-adjusted to the needs of 20th century states'. Sujit Choudhry makes the same point; interestingly he contrasts constitutions drafted in the nineteenth century with the 1996 South African Constitution, including its express provision for the welfare

Indeed, it is part of the genius of the documents that they have endured as long as they have, written in and for very different times from the times of today. Writing back in 1950, James Buchanan observed these changes, and the difficulties they posed for federal finance:

> The emerging fiscal problem has been only one of the many created by the progressive national integration of the economic system within a decentralised political structure.[79]

As Windeyer J put it:

> The colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated by war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had been formerly been occupied by the States was from an early date seen as likely to occur.[80]

This passage was expressly adopted in the joint reasons of the High Court in the recent decision *New South Wales* v *Commonwealth*,[81] where the court emphatically rejected an argument that the Australian Constitution should be interpreted in accordance with the views of the founding fathers. As the joint reasons put it: 'to pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage'.[82] Further, in the 2008 *Betfair* decision,[83] six members of the High Court agreed with the comment of O'Connor J in 1908 that 'it must always be remembered that we are

state, health care, social assistance, housing and economic development. He concludes that 'this comparison between a constitution negotiated in the mid-19th century and one negotiated at the end of the 20th century highlights the enormous gap between what we need our constitution to do and what its written text says': 'Constitutional Change in the 21st Century: A New Debate Over the Spending Power' (2008) 34 *Queen's Law Journal* 375 at 379.

79 James Buchanan, 'Federalism and Fiscal Equity' (1950) *American Economic Review* 583 at 585.

80 *Victoria* v *Commonwealth* (1971) 122 CLR 353 at 395–6.

81 (2006) 229 CLR 1 at 73 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

82 *Ibid.* at 97.

83 *Betfair Pty Ltd* v *WA* (2008) 234 CLR 418.

interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'.[84]

This is similar to the approach taken by the Canadian Supreme Court, which has recently placed on record that it 'takes a progressive approach to ensure that Confederation can be adapted to new social realities'.[85] It is similar to the broad approach taken by the United States Supreme Court. A prime example is the joint reasons in *New York* v *United States*:[86]

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities . . . the volume of interstate commerce and the range of commonly accepted objects of government regulation have . . . expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power . . . As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to fix the terms upon which it shall disburse federal money to the States.[87]

This trend is certainly not confined to the jurisdictions studied in this paper. Writing of global federalism trends, Hueglin and Fenna noted recently:

> Changing circumstances have meant that the original intentions of founders of federations may not fit with a modern economy because the classic legislative federations were established in an altogether different era when the size and scope of government were limited, and it was relatively easy to divide responsibilities and to imagine two levels of government operating in their own spheres with little clash or overlap . . . The mixed economy, the welfare state, the rise of environmental policy, and the enormous increase in taxation have all greatly complicated policy making in a system of divided jurisdiction—as have the

84 *Ibid.* at 453 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Keifel JJ); O'Connor J's words appeared in *Jumbunna Coal Mine NL* v *Victorian Coal Miners Association* (1908) 6 CLR 309 at 367–8.

85 *Re Employment Insurance Act 2005* [2005] 2 SCR 669 (Deschamps J for a unanimous court); see also *Same Sex Marriage Reference 2004* [2004] 3 SCR 698, again a unanimous decision.

86 505 US 144 (1992).

87 *Ibid.* at 156–7 (Rehnquist CJ, O'Connor, Scalia, Kennedy, Souter and Thomas JJ); see also *Prudential Insurance Co* v *Benjamin, Insurance Commissioner* 328 US 408 (1946): 'physical and economic change in the way commerce is carried on has called forth a constantly increasing volume of legislation exercising that (commerce) power' (at 413) (Black, Reed, Frankfurter, Douglas, Murphy, Rutledge and Burton JJ; Jackson J took no part in the consideration or decision of the case).

> vastly greater mobility of labour, geographical scope of economic activity, and quality of communication and transportation.[88]

This mirrors comments by other eminent jurists, from Australia,[89] the United States,[90] Canada,[91] and the Privy Council[92] that denounces an

88 T.O. Hueglin and A. Fenna, *Comparative Federalism: A Systematic Inquiry* (Broadview Press: Toronto, 2006) 315; *per* Breyer, Stevens, Souter and Ginsburg JJ in *United States* v *Morrison* (2000) 529 US 598: 'we live in a nation knit together by two centuries of scientific, technical, commercial and environmental change'.

89 Sir Owen Dixon: 'it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances' (*Australian National Airways Pty Ltd* v *Commonwealth* (1945) 71 CLR 29 at 81; see also *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 171 *per* Deane J, denying the suggestion that the 'dead hands' of those who framed the Constitution could reach from their graves to negate or constrict natural implications of the Constitution to deprive what was intended to be a living instrument of its adaptability and ability to serve future generations. There is a significant academic debate—see G. Hill, 'Originalist vs Progressivist Interpretations of the Constitution' (2000) 11 *Public Law Review* 159; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289; Michael Stokes, 'Interpretation and Change in Constitutional Law: A Reply to Jeffrey Goldsworthy' (1996) 21 *Australian Journal of Legal Philosophy* 1; Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240; Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Commonwealth Constitution* (Thomson Lawbook, Sydney, 2008) 123–5. As Graham Hart put it: 'it must often be found that a meaning of a basic document such as a constitution which conforms to the legal economic and political ideas of one generation by no means does so to those of another. No society is ever static and one that does not respond to each new challenge must perish. The problems can only be solved by giving effect to the language used, but we must expect each new generation to give a new effect': 'Some Aspects of Section 92 of the Constitution' (1957) 30 *Australian Law Journal* 551 at 561.

90 Chief Justice John Marshall: 'we must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs': *McCullough* v *Maryland* 4 Wheat 316 at 407, 415 (1819); Oliver Wendell Holmes Jr: 'the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago': *Missouri* v *Holland* 252 US 416 at 423 (1920).

91 Lord Sankey referred to the Canadian Constitution as a 'living tree capable of growth and expansion within its natural limits': *Edwards* v *A-G Can* [1930] AC 124 at 136; Peter Hogg: 'the idea underlying the doctrine of progressive interpretation is that the Constitution Act 1867, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures' (above n. 31 at 414); 'it is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written' (*ibid.* at 745).

92 Lord Wright, 'Section 92—A Problem Piece' (1954) 1 *Sydney Law Review* 145 at 167: 'a constitution is meant to operate for a great many years, or even centuries, and in the course of these years or centuries great changes not only in the circumstances of the nation may take place, but fresh views of construction, perhaps largely influenced by practical exigencies, may be raised and debated, and the fact that for many years a particular solution has been either expressly or tacitly rejected is not conclusive against its being accepted at some future time when the matter has been fully agitated'.

originalist approach to constitutional interpretation, and emphasizes the need for the Constitution to be interpreted in accordance with prevailing societal conditions and circumstances.

A common feature of both the Australian and Canadian Constitutions is the difficulty of amendment. In Australia, this requires a majority of the people in a majority of states, and an overall majority, to succeed.[93] Of 44 proposals put to the people to change the Constitution, only eight have succeeded. In Canada, domestic amending procedures did not even feature in the Constitution Act 1867; any amendments had to be made by the Imperial Parliament; it was only in 1982 that a domestic amending procedure became available.

It is a lot to expect of any document that it remain relevant and appropriate to a society and world completely transformed from the original circumstances in which it was written. Authors[94] have written of the major challenges facing Canada, including the building of its economy with a coast to coast flow rather than the north–south flow, and a changing conception of the role of government, in particular the rise of the social welfare state in the twentieth century. It is generally thought to be impractical for a provincial government to be the main provider of a social welfare network, given their limited revenue-raising ability and management capacity in relation to such programmes. Arguably, social welfare should not differ across different regions within the same nation, a point reinforced by the wording of s. 36(1) of the Constitution Act 1982. Further strains on the existing federal model were caused by the requirement to finance the effort involved in World War II; more recently, the global financial crisis has created similar difficulties.[95]

A partial solution to the problems caused by relatively static constitutions as the fundamental document of nations whose needs and challenges constantly evolve has thus been provided by the spending power of the federal government. The waxing of the spending power has occurred as the demands of a modern welfare state evolved, and

93 S. 128, Commonwealth Constitution.

94 See. e.g. Macdonald, above n. 78 at 277–80; Andrew Petter 'The Myth of the Federal Spending Power Revisited' (2008) 34 *Queen's Law Journal* 163 at 169: 'It is fanciful to think that a document crafted to address the conditions of the 19th century can, without modification, meet those of the 21st century'; and Choudhry, above n. 78 at 379: 'This comparison between a constitution negotiated in the mid-19th century and one negotiated at the end of the 20th century highlights the enormous gap between what we need our constitution to do and what its written text says'.

95 In similar vein, Roderick MacDonald writes of the economic difficulties associated with World War II, concluding that 'the federal government found itself politically unable to raise the revenue needed to finance the war in the absence of provincial co-operation. On both the spending and taxation fronts, the arrangements of 1867 appeared to be inadequate to deal with these two crises': above n. 78 at 279. Thomas Courchene claims that 'the Information Age has led to a situation where the policy areas that are in the national interest tend to fall within provincial jurisdiction': 'Reflections on the Federal Spending Power: Practices, Principles, Perspectives' (2008) 34 *Queen's Law Journal* 75 at 116.

the list of areas over which many believe a uniform, or more uniform approach, is required, has increased. As a result of the spending power, federal governments have been able to exercise influence and power over areas not assigned to them by the Constitution. Examples in Canada include the provision of old-age benefits and unemployment benefits, and in Australia include federal government spending in health and education.

It is argued then that one of the ways in which the fundamental changes in society and the economy that have occurred in the countries studied has been accommodated in the context of nations with constitutions that are very difficult to amend has been the 'fluidity' provided by the federal government's access to a broad spending power to act in areas where citizens legitimately expect a national response, but where the federal government has no direct legislative power in terms of the constitution.

ii. Functions Within a Federal System

It is often argued that it is only a national government that can pursue the most pressing economic functions within a federal system, in particular some kind of redistributive function, including a system of social welfare,[96] as well as responding to major economic challenges of the kind the world has been faced with recently. The classic economic theory of federalism developed by Wallace Oates was that macroeconomic management and redistributive functions were best handled by the federal government.[97] This remains the orthodox economic position.[98]

(a) Redistribution Function

Fenna describes the 'centralising forces on the expenditure side with demand for redistributive social programs financed from progressive taxation'.[99] Kent talks about use of the (federal) spending power being essential to Canadian federation 'otherwise many necessary public services could not be equably and efficiently provided'.[100]

As Saunders puts it:

> It is in relation to social welfare that the constitutional limitations on the general spending power are most likely to come into conflict with the philosophical aims of altruistic federal governments and the practicalities of efficient administration. In the first place there is a widespread,

96 S. 51(23A), Constitution, provides the Commonwealth with some legislative power in this area, but it does not include all welfare programmes.
97 Oates, above n. 2.
98 Warren, above n. 2.
99 Fenna, above n. 15 at 514.
100 Tom Kent, 'The Federal Spending Power is now Chiefly for People, not Provinces' (2008) 34 *Queen's Law Journal* 413.

> although by no means universal, feeling that the right to benefit from such major welfare schemes as invalid, old age, widows and orphan pensions, maternity and child endowment and social insurance should be uniform throughout Australia . . . Further, most welfare programmes are expensive, far beyond the capacity of poorer States to implement and now, possibly, beyond the capacity of any State. Inevitably therefore they must be funded by the Commonwealth by one means or another. In Australia, the choice lies between funding by way of grants to the States, or directly to respective beneficiaries. The choice is likely to fall upon direct funding, for both practical and political reasons. Spending by way of conditional grants to the States may be a rational choice in such areas as roads or housing, where State administrations with the necessary experience and technique are in existence already. The same rationale does not apply to the same extent to social welfare partly because technical expertise in administration is less important, and partly because most programmes of this nature initiated by the Commonwealth are new. Consequently it may be preferable to establish the necessary administration at federal level rather than to burden the States with an administration of a programme with which they are ill equipped to deal.[101]

Commenting on the Canadian situation, MacDonald writes that:

> When Canadians and their governments felt the need to create the institutions and programs of what became the welfare state, few provinces had the tax base, the population and the governance capacity to manage them.[102]

Interestingly, the acceptance of the ability of the federal government to redistribute income from one part of the federal system to another, including to address the unequal impact of its own taxation and expenditure arrangements on provincial governments, and to offset inter-unit spillovers of taxes and expenditure benefits of one state to another, is also described as an indicator of the continued viability of a federal system.[103]

Kong argues that 'it is generally accepted that a vertical fiscal gap between the federal and provincial governments is necessary to facilitate the pursuit of redistributive objectives within a federation'.[104]

A sub-national government is limited in its ability to carry out redistributive functions, including the provision of welfare, because wealthier citizens may move out of jurisdictions that pursue redistributive activities, and some poorer citizens may move into jurisdictions that pursue redistributive activities. This system may lead to the

101 Saunders, above n. 36 at 398.
102 Macdonald, above n. 78 at 280; see also Choudhry, above n. 78 at 379.
103 R. Dikshit, *The Political Geography of Federation* (Macmillan: India, 1975) 234–40.
104 Kong, above n. 30 at 350.

underprovision of the welfare that would otherwise be provided in a national system.[105]

In summary then, the position is that a federal government in federal systems needs to have access to a broad spending power in order to carry out the kinds of redistributive activities that economists tend to suggest must practically be carried out at a federal level.

(b) Stabilization Function/Economic Functions Within a Federal System

Here again, the orthodox economic position is that it is the national government that should be responsible for broad management of the economy, including fiscal policy, monetary policy and exchange rate policy. The level of government spending directly affects each of these policies.[106] While this is generally not in dispute, it is not reflected in the constitutions studied.[107] None of them confers direct[108] power on the federal government in respect of economic issues, again a product of the very different circumstances in which these documents were conceived, as compared with the realities of life today. Recent confirmation of the federal government's stabilization function occurred, somewhat ironically, in the High Court of Australia's *Pape* decision, where a majority of the court was satisfied that only the federal government had the capacity to respond to the challenges posed by the global financial crisis.

105 C. Brown and W. Oates, 'Assistance to the Poor in a Federal System' (1987) 32 *Journal of Public Economics* 307; J.K. Brueckner, 'Welfare Reform and Interstate Welfare Competition: Theory and Evidence' (1998) *Urban Institute—Assessing the New Federalism Occasional Paper No 21*; 'the empirical findings suggest that states do act as if welfare migration was common', leading states to underprovide, or attempt to discriminate against those coming from a different state: Joumard and Kongsrud, above n. 8.

106 Briefly, government spending affects the government's budgetary position (fiscal policy), to the extent that levels of government spending increase economic activity and possibly inflation, government spending can influence monetary policy, since a key objective of monetary policy is to control inflation. The exchange rate of a country is influenced by many factors, including that country's interest rates (monetary policy), and demand for that country's currency, which in turn depends on that country's general economic performance (which can be influenced by government spending). This is admittedly a very brief summary of much more detailed literature. More detail can be found at Wallace Oates, 'The Theory of Public Finance in a Federal System' (1968) 1 *Canadian Journal of Economics* 37; Oates, above n. 2 at 32–3; Wallace Oates, 'The New Federalism: An Economist's View', in *Studies in Fiscal Federalism* (Elgar: Northampton, MA, 1991) 93; A. Breton and A. Scott, *The Economic Constitution of Federal States* (ANU Press: Canberra, 1978).

107 More modern constitutions do address economic management; for example the South African Constitution of the mid-1990s gives the federal government direct power over 'economic development'.

108 Each of them confer a power to the federal government in respect of trade and commerce (s. 51(1) of the Australian Constitution, s. 91(2) of the Constitution Act 1867 and Article 1, Section 8 of the United States Constitution. The Canadian and Australian Constitutions also confer power to the federal government in respect of corporations.

The High Court of Australia has sometimes been impressed with economic arguments in its interpretation of the Australian Constitution.[109] In the recent *Betfair*[110] decision, the court noted:

> There have been significant developments in the last twenty years in the Australian legal and economic milieu in which s. 92 operates.[111]

Later, the court noted:

> The creation and fostering of national markets would further the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity.[112]

Similarly, in interpreting the Commonwealth's exclusive constitutional power over certain kinds of taxation, the High Court of Australia has interpreted the power broadly, with the effect of narrowing the tax base available to sub-national governments. Members of the High Court have expressly done so in order to give the Commonwealth broad control over the taxation of commodities so that the execution of their chosen tax policy is not thwarted by state action.[113] Former Chief Justice Mason noted how the Australian economy had changed radically since the 1890s, from a series of loosely connected, small economies to a melding into one national economy where logistical barriers between local economies have dissolved with improvements in communication and transport.[114]

Jurists in the United States have similarly noted the implications of unity in terms of economic management, and why sub-national governments cannot be relied upon to pursue stabilization functions within a federal system. Professor Tribe states that sub-national governments exist in order to protect and promote the interests of their

109 The author believes that economic arguments are relevant in interpreting the Constitution.

110 *Betfair Pty Ltd* v *WA* (2008) 234 CLR 418.

111 *Ibid*. at 452.

112 *Ibid*.

113 Dixon J in *Parton* v *Milk Board (Victoria*) (1949) 80 CLR 229 at 260; supported by Barwick CJ in *Western Australia* v *Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 17, who stated the wide view of s. 90 was consistent with the control of the national economy as a unity which knew no state boundaries, by a legislature without direct national control over the economy; Mason J in *Hematite Petroleum Pty Ltd* v *Victoria* (1983) 151 CLR 599 (together with Deane J) and *Philip Morris Ltd* v *Commissioner of Business Franchises* (1989) 167 CLR 399. In *Ha* v *New South Wales* (1997) 189 CLR 465 a majority of the High Court accepted this broad view of s. 90 for economic reasons (Brennan CJ, McHugh, Gummow and Kirby JJ).

114 'The Australian Constitution 1901–1988' (1988) 62 *Australian Law Journal* 752; Sir Anthony Mason 'Towards 2001—Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash University Law Review* 1 at 11: 'with the advent of rapid transportation and communication and the development of modern technology, trade within each State has become inextricably connected with interstate and overseas trade. And the nationalisation of the economy has necessarily expanded the concept of interstate trade to embrace activities and transactions that formerly had local significance only'.

own constituents, and they will (understandably) do this at the expense of citizens of other states.[115] Cardozo J noted:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.[116]

Pushaw notes that:

> The United States has been transformed from predominantly self-sufficient households in agrarian communities (i.e. not engaged in interstate commerce) to an integrated national economy based on commercial agriculture, manufacturing and service. And Congress and the Court cannot help but respond to such changes.[117]

The point then is that the federal government in a federal system must have access to a broad spending power in order to manage a modern economy. Economists generally recognize the need for the federal government to carry out stabilization functions or economic management within a federal system. Its spending power is an important tool in this regard.

IV. Conclusion

In conclusion, the following points can be made:

(a) federal governments in federal systems need broad spending powers in order to carry out (at least) the stabilization and redistributive functions that the orthodox economic view in this area suggest can be carried out most effectively by a national rather than sub-national government;
(b) a broad spending power to the federal government provides a counterweight to the trend of vertical fiscal imbalance that

115 *American Constitutional Law*, 3rd edn, Vol. 1 (Foundation Press: New York, 2000), 1051–2.
116 *Baldwin* v *GAF Seelig Inc* 294 US 511 at 523 (1935).
117 'Methods of Interpreting the Commerce Clause: A Comparative Analysis' (2003) 55 *Arkansas Law Review* 1185 at 1210; R. Friedman, 'before the Civil War, many Americans had greater allegiance to their state than to their nation, but that is true no longer. Now the lines have expanded . . . Most Americans expect their national government to be a muscular one, capable of addressing problems of broad impact': 'The Sometimes Bumpy Stream of Commerce Clause Doctrine' (2003) 55 *Arkansas Law Review* 981 at 1006. The United States' commerce clause jurisprudence is an important example of the Supreme Court's use of economics in assisting its interpretation of the Constitution. See for example J. Kallenbach, *Federal Co-Operation With the States Under the Commerce Clause* (University of Michigan Press: Ann Arbor, 1968); B. Cushman, 'Formalism and Realism in Commerce Clause Jurisprudence' (2000) 67 *University of Chicago Law Review* 1089 at 1101: 'as the national economy became increasingly integrated in the years following the Civil War, the court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a free-trade construction of the dormant Commerce Clause'; Richard Collins, 'Economic Union as a Constitutional Value' (1988) 63 *New York University Law Review* 43.

tends to develop in federal systems, with it being most pronounced in the Australian federal system;

(c) the text of the constitutions studied are all difficult to formally amend;

(d) this presents challenges when the society and economy for which the constitutions studied seek to provide a framework has changed as substantially as it has over time;

(e) the ability of federal governments to resort to a spending power to manage activities that many now argue needs to occur at a national rather than sub-national level has provided the necessary 'fluidity' in constitutional arrangements, given the difficulty of formal amendment.

As a result, courts in the nations studied must continue to uphold a broad interpretation of the federal government's spending power. This is less of a problem in the United States, where the clause has generally been given a broad interpretation by the Supreme Court with few difficulties as a result. It is more pressing in Canada, and a non-*obiter* decision confirming the existence of the federal spending power from the Supreme Court would be welcome. In Australia, it is most pressing, particularly with the most recent High Court pronouncement in *Pape* appearing to deny that the federal government has a general spending power, and forcing the federal government, at least in theory, to justify how every appropriation fits within the broad concept of an activity 'peculiarly adapted to the government of a nation'.