On the 'residuum of powers' in the Great Anglo-American Federations: A Neo-Bagehotian-Coasean Gloss.

Benjamen Franklen GUSSEN
University of Southern Queensland,
Darling Downs 4350
Queensland, Australia

Email: benjamen.gussen@usq.edu.au

ABSTRACT

In some constitutional designs, federation is based on the doctrine of 'residuum of powers,' where one level of government is privileged vis-à-vis the other, and where a concomitant enumeration of powers gives rise to a presumption of a restricted capacity to legislate outside powers so specified. The quintessential examples of this approach are the Federal Constitutions of the United States, Canada and Australia. The Coase theorem explains how and why efficiency in the allocation of these powers emerges regardless of the initial allocation of residuum powers. The analysis confirms this Coasean proposition in an evolutionary context. In all three jurisdictions, regardless of the initial allocation of powers, there is a neo-Bagehotian (evolutionary) shift from the canonical constitution and towards an 'efficient constitution'—an institution that avoids (transaction) costs. Bargaining between general and special purpose governments allocates powers such that transaction costs are avoided. The paper provides an efficiency definition based on the distinction between symmetric federalism (as seen in the United States and Australia) and asymmetric federalism (as seen in Canada). On aggregate, the locus of this efficiency is either central (as in the case of the United States and Australia), or distributed (as in the case of Canada). Specific examples from all three jurisdictions provide further illustrations. Normatively, further efficiency gains could come from developing (constitutional) legal doctrines that dialogue directly with this evolution.

I INTRODUCTION

In 1930, the Privy Council described constitutions as "living trees capable of expansion within [their] natural limits".[1] This 'living tree doctrine' is sometimes used to interpret the entire constitution, especially the vertical division of powers between the federal and state levels.[2] The issue is how to ascertain these 'natural limits'. The 'living tree' and 'natural limits' laid out by this doctrine can best be illustrated through an intercourse between Walter Bagehot's dichotomy of the dignified (theoretical) and efficient (technological or practical) constitutions,[3] and Ronald Coase's 'problem of social cost'.[4] The approach is within 'comparative law-and-economics', which through the lens of economic efficiency,[5] studies legal transplants (in our case, the residuum of powers) to explain their evolution over time.[6]

---

[1] See *Edwards v A G of Canada* (1930) AC 114, 136. This was a case where the Privy Council used the 'living tree' analogy to hold that the term 'persons' included women, and hence allowed them to be appointed to the Senate, even though at the time of writing the constitution, women were never considered eligible. The relevant quote follows: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits".

[2] See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart, 2015) 146.

[3] Walter Bagehot, *The English Constitution* (Champan and Hall, First ed, 1867). Another useful dichotomy is that of Thorstein Veblen where he distinguishes between the 'ceremonial' constitution (looking at the past) and the 'instrumental' (or 'technological') constitution (looking at the future). See Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (Penguin, 1994). See also David A. Reisman, *The Social Economics of Thorstein Veblen* (Edward Elgar 2012). Bagehot explains the distinction between the dignified (canonical) and efficient constitutions in the following terms (at 5):

> "No one can approach to an understanding of the English institutions, or of others which, being the growth of many centuries, exercise a wide sway over mixed populations, unless he divide them into two classes. In such constitutions there are two parts (not indeed separable with microscopic accuracy, for the genius of great affairs abhors nicety of division) first, those which excite and preserve the reverence of the population — the dignified parts, if I may so call them; and next, the efficient parts — those by which it, in fact, works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved every constitution must first gain authority, and then use authority, it must first win the loyalty and confidence of mankind, and there employ that homage in the work of government."

However, Bagehot was talking about two parts of the constitution, rather than an evolutionary process *per se*. Although his ideas in *Physics and Politics* suggest that he was alive to the cross-pollination between natural and social sciences. See Walter Bagehot, *Physics and Politics* (Dodo Press 2006 [1872]). It would be prudent however, to talk of a neo-Bagehotian 'efficient' constitution to emphasise the intention of looking at how the constitution evolves over time.

[4] Ronald Coase, 'The Problem of Social Cost ' (1960) 3 *Journal of Law and Economics* 1.

[5] While efficiency is a normative criterion for the economic analysis of law, there is no unanimity of opinion among scholars of law-and-economics on the definition of efficiency. The main influential definitions in the current literature are: (1) Kaldor-Hicks principle, (2) Pareto principle and (3) Posner's wealth maximization. Unlike the third definition, the first two maximize welfare or utility, and hence difficulties in measuring utility. See Qi Zhou, 'The Evolution of Efficiency Principle: From Utilitarianism to Wealth Maximization' (Available at: http://works.bepress.com/qi_zhou/5/, 2006). It is hence useful here to explain efficiency through a different taxonomy. First, pure or technical efficiency. This efficiency requires allocating powers to the government that is able to exercise the power at the lowest cost, while encompassing all affected by this policy (internalising all externalities). Allocative efficiency (links back to the Pareto and Kaldor-Hicks principles), which requires the allocation of powers to be responsive to the heterogeneous preferences of governments. The third type is interjurisdictional efficiency, which requires reducing the cost of coordinating policymaking among governments. Efficiency in the pure sense is useful for analysing mechanisms for the transfer of power between levels of government (for example section 51(xxxvii) in the Australia Constitution). Allocative efficiency is useful for comparing Canada (as an asymmetric cultural federation) to the other two (symmetric, territorial) federations. Efficiency of the third type is useful when comparing the enumeration techniques in the canonical Constitutions of Canada and Australia. While efficiency is relative, i.e. it depends on context, the fact that certain policies are provided at similar government levels in different countries is still consistent with an efficiency explanation. See Andreu Mas-Colell, 'Efficiency and Decentralization in the Pure Theory of Public Goods' (Pt Oxford University Press) (1980) 94(4) *The Quarterly Journal of Economics* 626. Maria Teresa Balaguer-Coll, Diego Prior and Emili Tortosa-Ausina, 'Decentralization and efficiency of local government' (2010) 45(3) *The Annals of regional science* 571. Iwan Barankay and Ben Lockwood, 'Decentralization and the productive efficiency of government: Evidence from Swiss cantons' (2007) 91(5) *Journal of public economics* 1197. Remy Prud'Homme, 'The dangers of decentralization' (1995) 10(2) *The world bank research observer* 201.

[6] See Ugo Mattei, 'Efficiency in Legal Transplants: an Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993). See also Theodore Eisenberg and Giovanni Ramello, *Comparative Law and Economics* (Edward Elgar 2016). For further clarity, it should be noted that the research programs of (Watsonian) 'comparative law' and (Coasean)

Efficiency is particularized through the concept of 'symmetry' as illustrated by 'symmetric' and 'asymmetric" federalism.[7] To give the analysis some structure, let us imagine federal polities as a network of n ($\in \mathbb{Z} > 1$) states or provinces. Where these constituent parts are symmetric (in terms of preferences), they use the same 'criteria' set ψ in their decisionmaking processes. Therefore, they arrive at the same decision for any given issue x. On the other hand, where these constituent polities are asymmetric, they use criteria sets ψ_i ($i \in [1, n]$) such that $\psi_i \ominus \psi_j \neq \emptyset$ ($i \neq j$). In the latter case, for a given issue x, there would be asymmetry in the decisions arrived at by these polities. As explained in section III, the *locus* of efficiency in a symmetric federation (such as Australia or even the United States), is different from that in an asymmetric federation (such as Canada). To be precise, in symmetric federations, efficiency migrates the decisionmaking to a central government (in evolutionary time), and by doing so avoids cost: $c(\psi)\ \forall\ x$. In contrast, under asymmetry, decisionmaking by a central government costs: $n\ c(\psi) - \sum_1^m c(\psi_i)\ \forall\ x, i \in [1, n], m \leq n$. The 'one-size-fits-all' approach would result in transaction costs at the sub-national level due to asymmetries.[8] Under these conditions the locus of efficient decisionmaking moves closer to the states or provinces.

The Coase theorem version that is of interest to this analysis is the following: vertical (federal and state) levels of government are able to bargain an efficient constitution, for allocating their respective powers,[9] irrespective of the original residuum allocation in the canonical constitution.[10] In other words, there is no need to amend the canonical constitution to correct for externalities (i.e. costs or benefits accruing to one level of government due to the exercise of powers or jurisdictional encroachment by the other).[11] The role of courts is to enable this bargaining process. Some canonical

---

'law-and-economics' furnish two different interpretations of change in law. The former explains the occurrence of change in legal systems through the concept of 'prestige' (or the tendency to borrow from more developed legal systems), while the latter uses 'economic efficiency' (where outcomes are reached through a net-benefit-maximising bargaining process). The latter suggests that legal systems respond to an external calculus, while the former rejects such causal nexus. The novelty in this paper is the argument that the 'residuum of powers' found in the constitutional designs of the US, Canada and Australia, was later transformed into an 'efficient constitution' (which is a unique product of each jurisdiction's *sui generis* contextual matrix). In other words, the praxis of the 'residuum of powers' transplant shows a divergent evolution—an adaptation to *sui generis* local conditions in each jurisdiction, driven (primarily) by economic efficiency.

[7] Thomas O. Hueglin, *Comparative federalism : a systematic inquiry* (University of Toronto Press Incorporated, 2006) 81.

[8] $n\ c(\psi) - \sum_1^m c(\psi_i) = n\left[\sum_1^m \left(c(\psi) - \frac{c(\psi_i)}{n}\right)\right] < 0\ if\ \frac{c(\psi_i)}{n} > c(\psi)$. Consequently, smaller number of constituent polities n, or a larger number of asymmetric polities m would shift the locus of efficiency to the local level.

[9] Residuum powers mediate between two polar ideals (in the Weberian sense; Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978).). The first is the confederal ideal where central government powers are sharply limited. The second polar type is the unitary ideal where the only powers of regional or local governments are administrative—delegated by the central government. Under this ideal type, the central government controls local government functions through funding instruments such as (general and specific) transfers. There are however difficulties with these polar types. The exaggerated power separation found in the confederal ideal is difficult to implement given incidental, implied, or emergency powers that (from time to time) might need to be claimed by central governments. On the other hand, ethical and economic considerations, require vesting elected local and regional governments with powers which they already have the competencies to assume. In practice, constitutional designs are hence intended to canvas only the spectrum between these two ideals. Assigning residuum powers is one way of achieving the same. The residuum declares one level of government as the general (purpose) government, while assigning a bundle of enumerated powers to the specific (purpose) government.

[10] The paper enlists four theoretical underpinnings to explain the evolution of legal systems. The first is Alan Watson's 'legal transplants' model for analysing the diffusion of legal constructs from one jurisdiction to another. The second is James Madison's concept of 'residuum powers' and its 'enumerated powers' conjugate. The third underpinning comes from Walter Bagehot's classification of 'dignified' and 'efficient' constitutions. The last underpinning is Ronald Coase's allocative efficiency theorem in the presence of externalities. See Watson, above n 6, ' Bill of Rights ', (1789) 5(11) *The Founder's Constitution* <http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html>. See also Hueglin, above n 7, especially Chapter 6, Bagehot, above n 3.

[11] In the 'legal transplants' model, the act of 'transplanting' is understood as the official promulgation of a borrowed law. For a general discussion of legal transplants, see David Nelken and Johannes Feest, *Adapting legal cultures* (Bloomsbury Publishing, 2001). The three federations represent case studies where one country (Canada and later Australia) borrowed from another country (the United States) or countries (Australia borrowing from both from the United States and Canada). While this Watsonian model was a scholarship about the sociology-of-law approach (where Watson argues that legal transplants occur at a rate higher than that of the evolution of the receiving society, which hence would vitiate any potential fit between legal systems and their social milieu), this paper entertains the model from a (comparative) law-and-economics approach. In this adaptation, the transplant ('the residuum powers' design) is embedded in a canonical text that introduces a form of 'fuzzy logic' occultation of the transplant. This logic allows for a (pragmatic) plasticity in the canonical design, closer to the spirit of the law-as-literature and law-as-communication movements. Fuzzy logic models uncertainty as the

constitutions are more conducive of bargaining (for example, the Australian Constitution is more efficient than the Canadian or American Constitutions). Out of the three constitutions, the Australian canonical constitution is the most efficient in this sense (see section IV for details).

In summary, the contention is that an efficient distribution of powers emerges regardless of the residuum found in the canonical constitutions. This is made possible through a bargaining process between the general and specific levels of government, enabled through provisions in the canonical constitution, but also through constitutional courts and political processes.

There are three constructs that underpin the evolution from canonical to efficient constitutions (as expounded in this paper). The first is Alan Watson's 'legal transplants' model for analysing the diffusion of legal constructs from one jurisdiction to another.[12] The second is James Madison's concept of 'residuum powers' and its 'enumerated powers' conjugate.[13] The last underpinning stems from Walter Bagehot's classification of 'dignified' and 'efficient' constitutions.[14]

In the 'legal transplants' model,[15] the act of 'transplanting' is understood as the official promulgation of a borrowed law. The Anglo-America federations discussed in this paper represent case studies where one country (Canada and later Australia) borrowed from another country (the United States) or countries (Australia borrowing from both from the United States and Canada). While this Watsonian model was a scholarship about the sociology-of-law approach (where Watson argues that legal transplants occur at a rate higher than that of the evolution of the receiving society, which hence would vitiate any potential fit between legal systems and their social milieu), the paper adapts the model for the transplant ('the residuum powers' constitutional design) as embedded in a canonical constitutional (text) that introduces a form of 'fuzzy logic' occultation of the transplant.[16] This logic allows for a (pragmatic) plasticity in the 'efficient' constitution, closer to the spirit of the law-as-literature and law-as-communication movements (see below).[17]

The theory of 'residuum of powers' provides an option for constitutional designs where there is need to divide sovereignty between different levels of government (namely the federal or central versus the state or provincial levels). This theory suggests that one level would be given restricted legislative powers, while the other would be given non-restricted legislative powers. The restriction of such powers is (usually) achieved by specifying the powers given to one level of government, which I refer to as the *subsidiary* level of government. The non-restricted government, the *primary* level of government, would then be presumed to have the capacity to legislate on all other matters not specified in the restricted powers 'menu'. Because the restricted powers are enumerated (written into the constitution), these are relatively narrower than the residuum powers held by the primary level of government, although still capable of giving rise to implied powers.

The theory of residuum powers represents a continuum between two polar ideals (in the Weberian sense).[18] The first is the confederal ideal where central government powers are sharply limited. The second polar type is the unitary ideal where the only powers of regional or local governments are those delegated by the central government. Under this ideal type, the central government controls local government functions through funding instruments such as (general and

---

degree of a membership in a set, as opposed to probability theory where uncertainty is modelled as the probability of a membership in a set. Fuzziness is an alternative to randomness. See Bart Kosko, 'Fuzziness vs Probability ' (1990) 17 *Interantional Journal of General Systems* 211. See for example, Richard Posner, *Law and Literature: A Misunderstood Relation* (Harvard University Press 1988); Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997); Benjamin Cardozo, 'Law and Literature ' (1925) 14 *Yale Review* 699; Mark Van Hoecke, *Law as Communication* (Hart Publishing 2002); Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014).

[12] Watson, above n 6.

[13] ' Bill of Rights ', above n 10. See also Hueglin, above n 10, especially Chapter 6.

[14] Bagehot, above n 3.

[15] For a general discussion of legal transplants, see David Nelken and Johannes Feest, *Adapting legal cultures* (Bloomsbury Publishing, 2001).

[16] Fuzzy logic models uncertainty as the degree of a membership in a set, as opposed to probability theory where uncertainty is modelled as the probability of a membership in a set. Fuzziness is an alternative to randomness. See Kosko, above n 11.

[17] See for example, Posner, above n 11; Scalia, above n 11; Cardozo, above n 11; Hoecke, above n 11; Maurice Adams and Heirbaut, above n 11.

[18] Weber, above n 9.

specific) transfers. There are of course difficulties with these polar types. The exaggerated power separation found in the confederal ideal is difficult to implement given incidental, implied, or emergency powers that (from time to time) might need to be claimed by central governments. On the other hand, ethical and economic considerations, require vesting elected local and regional governments with powers which they already have the competencies to assume. In practice, constitutional designs are hence restricted to the spectrum between these two ideals.

Decentralisation models help explain how constitutional designs gravitate toward a polar ideal (either confederal or unitary) while rounding off the sharp corners at that polar position. Administrative decentralisation (such as deconcentration, delegation and devolution) allows sub-national governments a role in implementing national policies, but not a legislative power. While, fiscal decentralisation, for example in the form of fiscal transfers from the central government to sub-national levels, does not require a re-division of powers. It could hence be implemented under the same 'residuum powers' design, but with considerably different outcomes. Under fiscal decentralisation, which usually goes hand-in-hand with administrative decentralisation, the central government maintains a monopoly on powers, and incentivises sub-national governments to participate under a principal-agent framework where local and regional governments are restricted to the 'four corners' of national policies set by the central government.[19]

The evolutionary aspects of 'residuum powers' are revealed through the Bagehotian dichotomy of the 'efficient constitution' versus the 'canonical (or dignified) constitution'. According to Walter Bagehot, in his scholarship on the British (unwritten) constitution, there is a distinction between canonical constitutions which are based on institutional authority, and efficient constitutions based on political bargaining. Bagehot therefore declares the fusion of the executive and legislative powers in the Cabinet to be the English 'efficient constitution'.[20] His dichotomy is used in this paper to distinguish between constitutional designs based on the theory of 'residuum power' (the canonical constitution) and the (political) evolutionary pressures on the construction of constitutions towards efficient outcomes (the efficient constitution). The adaptation of this dichotomy is updated to fit an aggregate understanding of efficiency as expounded by two quantitative proxies to the relative power of federal versus state (or provincial) governments (see section IV).

The next section elaborates these constructs in the context of the constitutions of the United States, Canada and Australia.

II THE CANONICAL (ORIGINAL) ALLOCATION OF POWERS

This part traces the 'residuum of powers' in the canonical Constitutions of the Unites States, Canada and Australia. It then explains how the canonical constitution influenced this residuum through different approaches to the enumeration of powers, especially the overlap and concurrency between powers assigned to different levels of government.

In the United States,[21] driven by the belief that the powers of the central government should be limited, the Founding Fathers assigned the 'general government' role to the states. Under the theory of 'residuum powers' this means restricting the federal government to a narrow (enumerated) set of powers. James Madison, one of the Founding Fathers and the chief drafter of the Constitution, describes the proposed power calculus as 'few and defined' federal powers, and 'numerous and indefinite' State

[19] A third type of decentralisation, political decentralisation, expands formal democratic channels to entrust individuals with a larger role in formulating and implementing policies, but does not inform the constitutional division of powers between different vertical levels of government.

[20] See Gary W Cox, *The efficient secret: The cabinet and the development of political parties in Victorian England* (Cambridge University Press, 2005) 5.

[21] For a general discussion of the US federal system, refer to Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart Second ed, 2015).

powers.[22] By the time the Articles of Confederation were adopted on 1 March, 1781, the same division of powers can still be discerned.[23] Interestingly however, the express allocation of residuum powers was not part of the US Constitution that came into force in 1789. Instead, this had to be delayed to the introduction of the Tenth Amendment of the Constitution in 1791. The United States Constitution details the subsidiary powers as follows:

> *"**Tenth Amendment:***
>
> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

The Tenth Amendment was the original 'residuum of powers' provision, later transplanted into Canada and Australia. It creates an ('numerous and indefinite') 'open set' where new powers can accrue to the States, while confirms the ('few and defined') 'closed set' of powers that accrues to the federal government. Notwithstanding, the approach for allocating powers in Canada is diametrically opposed to the one in the United States.[24] The Canadian Constitution was designed with the objective of making provinces the 'specific government'. The residuum powers were hence to go to the national

---

[22] James Madison, 'The Federalist No. 45: "The Alleged Danger From the Powers of the Union to the State Governments Considered" ' in Alexander Hamilton, James Madison and John Jay (eds), *The Federalist* (Barnes & Noble Classics 2006), 204. The relevant excerpt is the following:

> *"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defence, the less frequent will be those scenes of danger which might favour their ascendancy over the governments of the particular States."*

[23] In fact, the States residuum powers can be seen in the earliest constitutional propositions. Benjamin Franklin's Articles of Confederation, for example, which were proposed in general Congress in Philadelphia on May 10, 1775, stipulated the following:

> "ART. III
>
> That each Colony shall enjoy and retain as much as it may think fir of its own present Laws, Customs, Rights, Privileges, and peculiar Jurisdictions within its own limits; and may amend its own Constitution as shall seem best to its own Assembly or Convention."

Similarly, the powers assigned to the federal government were enumerated as follows:

> "ART. V.
>
> That the Power and Duty of the Congress shall extend to the Determination on War and Peace, to sending and receiving ambassadors, and entering into Alliances, [the Reconciliation with Great Britain;] the Settling all Disputes and Differences between Colony and Colony about Limits or any other cause if such should arise; and the Planting of new Colonies when proper.
>
> The Congress shall also make such general Ordinances as tho' necessary to the General Welfare, particular Assemblies cannot be competent to; viz. to those that may relate to our general Commerce; or general Currency; to the Establishment of Posts; and the Regulation of our common Forces. The Congress shall also have the Appointment of all General Officers, civil and military, appertaining to the general Confederacy, such as General Treasurer, Secretary, &c."

[24] See Webber, above n 2; W P M Kennedy, 'The Judicial Process and Canadian Legislative Powers' (1940) 25(2) *Washington University Law Review* 215. A H F Lefroy, *Canada's Federal System* (The Lawbook Exchange 2006).

government.[25] In other words, the Canadian approach indicated expressly the assignment of residuum powers, but went on to also enumerate some of these. Hence, in section 91, we find that

> *"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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 …"*

The section continues to indicated that there would still be enumeration of some thirty powers of the national government "for greater certainty", but without restricting the residuum powers assigned to the national government (i.e. the list in not exhaustive). The most exclusive federal powers came under subsections (7), (11), and (25) in relation to national security and international affairs.

The concept of residuum of powers seen in the United States Constitution under the Tenth Amendment, and in the Canadian Constitution under section 91, was later transplanted into Australia. In the 1898 Melbourne session of the second constitutional convention, before the first report, the clause appeared as follows:

> "All powers of the Parliament of a colony or province which at the establishment of the Commonwealth or afterwards became a State, except such powers as are by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, shall continue as at the establishment of the Commonwealth, or as at the admission or establishment of the States, as the case may be."

After the fourth report, the clause was altered to its present form in section 107 of the *Commonwealth of Australia Constitution Act 1900* (Cth):[26]

> *"**Section 107: Saving of Power of State Parliaments***
>
> *Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."*

---

[25] In fact, it has been suggested that the Canadian design was for a quasi-federalism that bestows on the central government a 'guardian' role (of supervision and control) over the provinces. Under the *Constitution Act 1867*, enumeration was applied to both, the primary and secondary levels of government. Canada's first constitution followed the Treaty of Paris of 1763, which ended the Seven Years' War between Great Britain and France. In the terms of the Treaty France ceded all their territories east of the Mississippi (which include 'New France' centred on the St Lawrence Valley and Acadia) to Britain. This constitution was established by the *Royal Proclamation of 1763*, issued by George III. The proclamation established a new government for New France and reorganised the territory as a new province, Quebec. It was envisaged that this arrangement would facilitate a gradual conversion of the territory to an English colony. This tension between the French and the British settlers was in fact the defining dynamic of Canadian constitutionalism and its evolution. After the American Revolution of 1783 there was a substantial inflow of English 'loyalist' settlers into Quebec. This lead to the Constitutional Act 1791, which divided Quebec into two provinces: Lower Canada, and Upper Canada. However, settlers' demands for responsible government lead to the Act of Union of 1840, which reunited the Lower and Upper Canada provinces into a new province, the Province of Canada. The Act of Union was amended in 1848 to reinstate French as an official language. The American Civil War (1861-1865) and fears from a possible encroachment by the United States provided more impetus for a federation of all British North American colonies. By 1864 constitutional conferences developed a detailed proposal for a Canadian confederation. This proposal was further refined in a conference in London in 1866-67, and lead to the adoption of the *British North American (BNA) Act 1867*. In 1982 the BNA was renamed as the *Constitution Act 1867*, with section 92A added to give the provinces greater control over non-renewable natural resources.

[26] For a general discussion see Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart 2011). According to Quick and Garran this clause appeared in the Commonwealth Bill of 1891 in the following terms:

> *"All powers which at the date of establishment of the Commonwealth are vested in the Parliaments of the several Colonies, and which are not by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliaments of the several States, are reserved to, and shall remain vested in, the Parliaments of the States respectively."*

The clauses in these Bills show that, as a transplant, this clause did not undergo considerable change from the original Tenth Amendment design.[27] It should however be noted that the language in the Tenth Amendment is more forward looking than section 107. The Tenth Amendment created an open set of powers that continue to accrue to the States. On the other hand, the language of section 107 suggests a closed set of powers, namely those that have already been powers of the States. In this sense this section is a 'continuance' section, while the Tenth Amendment seems to have a wider scope of 'crescendo' rather than simply 'continuance'. Similarly, the language of 'all matters coming …' in section 91 is closer to the 'open set' formulation seen in the Tenth Amendment, although of course the accrual of powers under section 91 is to the federal government, while the Tenth Amendment accrues these powers to the States.

The 1791 rendition explained residuum powers as those not delegated to the federal government or prohibited to the States by the Constitution. The second rendition, 76 years later, explains residuum powers as those not assigned exclusively to the Provinces, while providing clear examples of these powers through enumeration. The third rendition, 109 years after the first rendition, but only 33 years after the second, explains residuum powers as those not exclusively vested in the federal government. In all three renditions these residuum powers existed before the act of federation. The constitutional instrument was simply intended not to extinguish them. Note however, that in the United States and the Australian versions, these powers where assigned to the States, while in the Canadian case they were assigned to the federal government. This does not negate the proposition that the concept itself, namely the act of assigning residuum powers (irrespective as to which level of government) was transplanted from the United States into Canada, and later on into Australia. The last two renditions use the language of exclusivity—a succinct way of stating the non-delegation and non-prohibition language in the first rendition. The language of exclusivity was used because of the explicit (implied) power concurrency that was built into the Constitution of Australia (Canada). However, given the different enumeration approaches in these Constitutions, this exclusivity had quite different effects on the efficient constitutions in these jurisdiction (as discussed below).

The 'residuum of powers' design transplanted to Australia is more efficient than that transplanted into Canada due to the competition between the American and Canadian versions in the Australian case. In the case of Canada, there was no such competition (*qua* options) and the transplant was less efficient. This explains the higher intensity of change in Canada to reach efficiency (through the cultural competition between Quebec and English-speaking Canada).[28] This point will become clearer when we look at the operation of section 107 of the Australian Constitution (which has no counterpart in the other two canonical Constitutions).

The theory of residuum powers has a conjugate, namely the enumerated powers. This conjugate is found in the United States Constitution in Article I, section 8, which enumerates 18 heads of power (with subdivisions) that are exclusive to the federal government:

> *"**Article I, Section. 8:***
>
> *The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States;*
>
> *To borrow Money on the credit of the United States;*
>
> *To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;*
>
> *…*

[27] See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 2015).
[28] See Mattei, above n 6, at 10-11 for the point on efficiency and competition.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Under the *Constitution Act* 1867, the powers assigned exclusively to the provinces are enumerated in section 92. There are sixteen such powers. These powers are limited, and read narrowly where subsets of those powers are expressly conferred on the federal government. Under the Canadian Constitution, there are only three concurrent powers, namely old age pension, agriculture and immigration. These powers are stated in the following terms:

*"**Section 94A**. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter."*

*"**Section 95**. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."*

The word "concurrent" appears at the beginning of section 95 but not in s 94A (which was added in 1964).

Compared to the Australian Constitution (see below), the enumerated concurrent powers in Canada are much more limited. This resulted in the allocation of powers in Canada through what came to be known as the 'principle of exhaustiveness' that ensures no gaps in the distribution of power, at least one level of government is able to legislate on any given issue.[29] Moreover, in Canada, we find that both national and provincial governments have enumerated powers in the constitution. In total the Canadian Constitution has 48 enumerated powers. Of these 30 are assigned to the central government, [30] 16 are assigned to the provinces,[31] and three concurrent powers (under sections 94A and 95). In practice however, courts used the doctrine of 'double aspect' to enlarge these concurrent powers. Moreover, in essence, the 'exclusive' lists in section 91 and 92 were found to be in fact overlapping (see below).

This overlap was hence made explicit in the Australian rendition of enumeration, which came after both the Canadian and the United States constitutions. In the (canonical) Australian Constitution, the States retain very close to plenary authority. However, unlike the Canadian Constitution, there is no parallel list of state powers to counterbalance the construction of central government powers. Instead, the central government can only exercise specific exclusive powers, while most of the enumerated powers are held concurrently. As a result the federal powers have been given a broad interpretation.[32]

Another key difference between Canada and Australia is accentuated by the regional diversity that Quebec provides.[33] Australia is *ab initio* a territorial federation, constructed on the principles of democracy and pragmatism. Similar federations, specifically the short-lived New Zealand experience with federalism, were proven by technological advances to be redundant.[34] On the other hand, the raison d'être for the Canadian federation was cultural, driven by pressures to preserve diverse cultural interests in terms of history, language and religion. This difference seems to also have a lasting effect

[29] *Reference Re Same-Sex Marriage* (2004) 3 SCR 698, para 34; cited in Webber, above n 2, at 145.
[30] One of these powers, in subsection 91 (1), was repealed by the Constitution Act 1982, and substituted with subsection 4(2) and Part V of the 1982 Act. Subsections 91(1A) and 91(2A) were introduced in 1949 and 1940 respectively.
[31] Subsection 92(1) dealing with the amendment of provincial constitutions was repealed by the Constitution Act 1982, and replaced by section 45 of that Act.
[32] Webber, above n 2, at 145.
[33] Ibid 145.
[34] See Benjamen F Gussen, 'Subsidiarity as a constitutional principle in New Zealand' (2014) 12 *NZJPIL* 123.

on the residuum transplant. At the time of drafting the Commonwealth Constitution, the delegates to the constitutional conventions understood the theory of 'residuum powers' to determine the vertical balance of power between federal and state governments. However, unlike the *Constitution Act 1867* (Imp), the *Commonwealth of Australia Constitution Act 1900* (Imp) does not have a chapter dedicated for the division of powers. On the other hand, Part VI of the Canadian Constitution is titled: "Division of Powers". It is in this chapter that we find the rumination of the exclusive powers for the federal and provincial governments (sections 91 and 92 respectively), and the concurrent powers (sections 94A and 95). As to the Australian Constitution, enumeration comes under the 'concurrent' powers in section 51, Chapter I (The [Commonwealth] Parliament), in Part V (Powers of the Parliament):

> *"Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to …"*

But this section has to be read together with section 109:

> *"Section 109. Inconsistency of laws: When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

This is essentially the same "peace, order, and good government" (POGG) power that we see in section 91 of the Canadian Constitution. Although there is no equivalent for section 109 in the Canadian Constitution. Another key difference between the Canadian and Australian constitutions is that there is no counterpart to section 51(xxxvii): "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law". In fact, in Canada the Supreme Court prohibited the delegation of powers from one level of government to the other,[35] because "inter-delegation of powers between legislatures undermines public accountability and electoral responsibility for decisions and might make it difficult to unscramble the jurisdiction".[36]

While many of the concurrent powers in section 51 are national or social in nature, most of these powers are economic in nature. After all, it was free trade, people mobility, and economic union that motivated the canonical Constitution (sections 92 and 117). We hence find concurrent powers such as: interstate and overseas trade and commerce (i); postal, telegraphic, telephonic, and other like services (v); banking (xiii); insurance (xiv); bankruptcy (xvii); copyright (xviii); corporations (xx); welfare benefits (xxiii, xxiiiA); and industrial disputes (xxxv). In fact, national powers such as defence (vi) and currency (xii) were effectively made exclusive by section 114 and 115 respectively.

The (few) federal exclusive powers come under section 52 (Chapter I), sections 90 and 105 (Chapter IV: Finance and Trade), section 114 and 115 (Chapter V: The States), and section 122 (Chapter VI New States). The residual powers (to the States) are preserved in section 107 (Chapter V: The States), but no enumeration is given of these powers:[37]

> *"Section 107: Saving of power of State Parliaments*
>
> *Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."*

[35] *Attorney General of Nova Scotia v Attorney General of Canada* (1951) SCR 31. (*The Nova Scotia Interdelegation Case*).
[36] Webber, above n 2, at 169-70. Notwithstanding there is 'administrative inter-delegation' where both levels delegate their powers to an administrative agency, and there is 'incorporation by reference' where one level incorporates the rules applied by the other level. Similar arrangements are used to coordinate action where there is jurisdictional overlap.
[37] Generally these powers include education, health, housing and infrastructure, and planning. Civil and criminal law also come under the remit of the States.

Canada and Australia 'innovated' on the US design by creating implied and explicit concurrency in the powers assigned to the federal and state (provincial) governments.

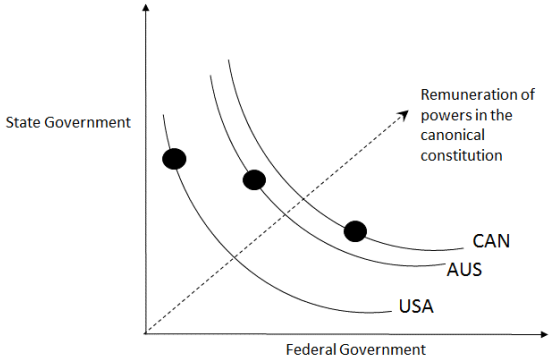

Figure 1: Summary of residuum and enumeration in the canonical Constitutions of the United States, Australia and Canada. The curves represent the canonical Constitutions. The 45° line indicates the (total) number of enumerated (head of) powers in the canonical Constitution. The residuum powers are represented the black bullets. There are 18 enumerations in the US Constitution compared to 40 in the Australian and 45 in the Canadian.

In summary, the concept of 'residuum of powers' was transplanted from the United States to Canada, and later on to Australia. In the US and Australia the residuum was given to the States, while in Canada, the Federal Government was assigned these powers. The conjugate to these residuum powers was the enumerated powers. There are 18 enumerated heads of powers under Article I, section 8, in the United States Constitution, compared to 30 heads of power under section 91, and 15 heads under section 92 in Canada; and 40 heads under section 51 in Australia.[38] The analysis so far can be summarised as shown in Figure 1 above.

Another way of looking at the different designs uses 'fuzzy logic' sets as shown in Figure 2 below. The figure compares the canonical Constitutions in Australia, Canada and the US based on the existence of concurrent powers. The x-axis represents the powers being allocated to either the federal or state (provincial) levels. The y-axis represents a truth value where 1 suggests the power belongs to one level, while a zero suggest that the power does not belong to that level. In the Australian Constitution we find an explicit list of concurrent powers (in section 51). This is represented by the black function in Figure 2. Note that Canada and the US do not have a similar provision. In Canada, the Constitution provides an implicit concurrency due to the parallel enumeration of powers in sections 91 and 92. As we will see in the following section, this has had a visible effect on the constitutional legal doctrine that enabled the evolution from the canonical to efficient constitution in these jurisdictions. The situation in the United States is quite different, as there is no concurrency in the Constitution. In the US the evolution to the efficient constitution required enlarging powers so they account for new situations. The logic is still 'crisp' (as opposed to 'fuzzy'). In the other two jurisdictions the powers overlap. In Australia and Canada, the issue is one of degree. This allows for a more efficient allocation process (see section III).

[38] There are more enumerated powers in other parts of these Constitutions. This provided list focuses on the concurrency aspects in Canada and Australia.

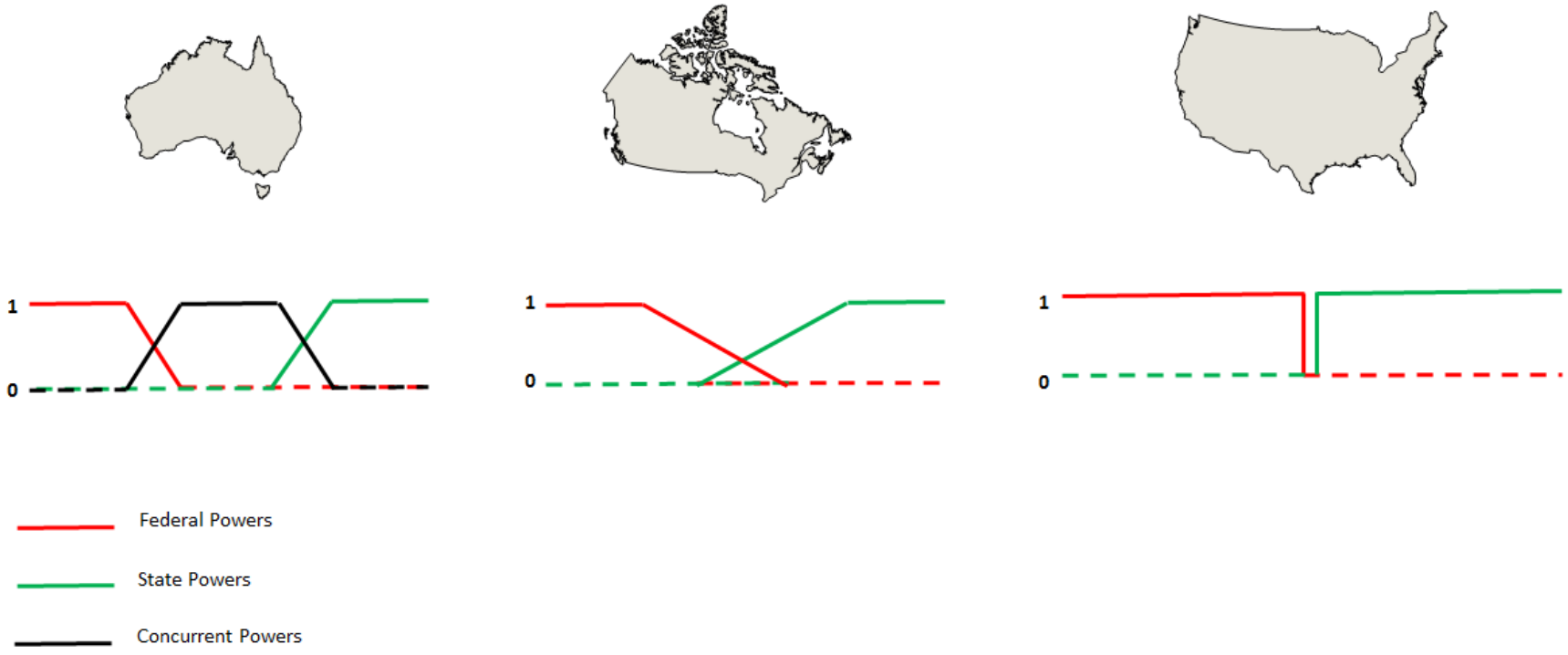

Figure 2: Summary of concurrency in the canonical Constitutions of the United States, Australia and Canada. The horizontal x-axis represents legislative powers, while the lines represent three functions of the allocation of these powers in the canonical Constitution. Each function maps the same legislative power value to a truth value of 0 to 1 range. As shown in the diagrams, only Australia has an explicit function of concurrency (due to section 51). Canada generates concurrency by implication (given the interaction between sections 91 and 92). There is a small set of concurrent powers in Canada, but these are not shown here for simplicity. The United States has no concurrency in the canonical Constitution. The process of evolution in the US goes through 'fuzzification' of these powers through the Supreme Courts.

III THE 'MACRO' VIEW

The legal transplants are the 'residuum powers' provisions (in the constitutional text), ascertained by comparison between the canonical constitutions (of the United States, Canada, and Australia). The canonical constitution is also found in the constitutional text enumerating the power heads for federal and state governments. On the other hand, the efficient constitution is gleaned from the way powers are divided in practice. Two proxies are employed to help quantify the gap between this constitution and the canonical one. The first is the natural logarithm of the ratio of federal government to state government annual revenue:

$$\ln\left(\frac{Federal\ Revenue}{State\ Revenue}\right)$$

Where ln( ) is the natural logarithm, used to differentiate between large and small federal governments as positive and negative ratios respectively. Under this proxy, the power of a level of government is correlated to its size in terms of revenue.

This proxy was applied to the United States, Canada, and Australia for the period from 1973 to 2015. This period was chosen to ensure that all three jurisdictions are analysed over the same period, although the time series for US and Canadian start earlier. While the series are in current dollars, because we are using a ratio allows for comparison between the three jurisdictions (in other words, the figures can be interpreted as adjusted for inflation). Note that in this time series *State Revenue* includes transfers. In the second proxy however, the revenues are shown net of transfers.

The results are shown in Figure 2. The first thing to observe is the sign of the time series. In Australia and the United States, the ratio has a positive sign, indicating that *Federal Revenue* is greater than *State Revenue*. On the other hand, in the case of Canada, starting from the 1970s we see a negative ratio indicating that provincial revenue (still measured as *State Revenue*) was greater than *Federal Revenue*. The second point is in relation to the start and end points in each series. The Canadian series starts from a small positive ratio but ends at a negative ratio, four times larger than the absolute magnitude of the ratio at the starting point. In other words, over the four decades from 1973 to 2015 Canada had a strong reversal in the level of federal revenue. The Australian series also starts at a ratio almost twice the one observed in 2015, but still maintains a positive ratio throughout. In the case of the United States however, the ratio at the beginning of the time series is in fact lower than the one observed at the end of the series. Moreover, the beginning and ending ratios in the United States are much higher than those observed in Australia and in Canada. In fact, the level of federal revenue in the US is almost three times that of the total revenue of the states. This compares to roughly a factor of 2 in Australia, and 0.7 in Canada.

Also of interest to our analysis is the trend of this ratio over time. A linear fitting of each series is hence shown in Figure 2. The intercept of each line gives a rough idea of the level of federal to state revenues at the beginning of each series. Again we find that the United States starts from a high ratio (1.1), relative to a moderate 0.6 in Australia and a very low 0.02 in Canada. The slopes of the fitting lines give an estimate of the trend in each jurisdiction over the four decades from 1973 to 2015. All slopes are negative, suggesting a trend towards reducing federal revenues relative to state revenues. Moreover, all slopes are roughly of the same order, suggesting that there is no major difference in centrifugal forces (towards more decentralisation). Nevertheless, the linear fitting slope for Canada (0.0077) is roughly 6 times that in Australia (0.0014) and roughly three times that in the US (0.0026). This suggests that federal revenues in Canada are getting smaller relative to provincial revenue faster than in the US and Australia. Australia seems to be the slowest in adjusting the ratio, but when

factoring in the starting point for the series, the United States ratio is the least to see significant reductions.

Within each series we also see peaks and trough throughout the four decades, suggesting political pressures to increase state and provincial revenues relative to federal revenue. For example, in Australia, we see a sharp decrease in the ratio in from the 1970s and until the mid 1980s. This corresponds to the policies introduced by the Coalition government under Malcolm Fraser. There was another reduction from the late 1980s until the early 1990s this time under the Labor Bob Hawke / Paul Keating governments. The third reduction can be seen from around 2008 (on the eve of the Global Financial Crisis or GFC) and until today, under both Labor and Coalition governments.

This third period can also be seen in Canada and the United States,[39] confirming the global nature of the GFC, and the concomitant (Keynesian) injection of further transfers into subnational governments. In Canada, after the Liberals arrived to power under Pierre Trudeau in the early 1970s, there was a sharp decrease in the ratio, and then a stabilization until roughly the GFC. In the United States we see a huge reduction in the ratio under Republicans, both under Ronald Regan's 'Federalism Revolution' (from the 1980s to the early 1990s), and under G. W. Bush from 2001 to the GFC.[40] There is a clear indication, especially in Australia and the United States that the proxy was changing with the political *zeitgeist*. In other words, the powers of the federal government, as a function revenue, changed relative to the states and provinces not through changes to the canonical constitution, but through the democratic process.

The second proxy for analysing the efficient constitution comes from comparing the total state revenue (without transfers) to the total transfers (from the federal government). The proxy measures the dependence of state governments on the federal government. Where the transfers are large relative to the rest of state revenue, the proxy suggests an administrative rather than a legislative federal constitution, notwithstanding the existence of legislative institutions at the state (or provincial) level. As for the first proxy, the time series for each jurisdiction covers the period from 1973 to 2015. Here however, the absolute levels (as shown on the y-axis) are not as helpful for comparison purposes. What is useful is the nature of the gap that developed between state (and provincial) revenues net of transfers, and the transfer.

Note first that the net revenues seem to increase in all three jurisdictions at roughly the same rate (in terms of the slope of the times series in Figure 3). The transfers, however, seem to have different growth rates. The strongest rate is in Australia, while the growth in transfers in Canada is the lowest. In fact, in the case of Australia, one can distinguish two growth rates. One from 1973 to 2000, and the other from 2000 to 2015. The growth rate in transfers in the second period is much higher than the rate from 1973 and 2000, largely due to the signing of the 1999 *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*.[41]

In the case of Australia, we see a much smaller gap, compared with Canada and the US. The gap in Australia started to widen in the 1990s but closed back in the early 2000s. In comparison, the gap in Canada continued to widen since 1973, with net provincial revenue outstripping the moderate increase in transfers. In the case of the United States, we see the gap starting to widen since the 1980s (with the 'Federalism Revolution'), but where the increase in transfers is at a higher rate. The US gap closed back sharply with the GFC, but opened up again soon after. When comparing these three jurisdictions on the 'transfers gap', it becomes evident that Australia is moving away from 'sovereign powers' and towards 'delegated powers'—what is sometimes referred to as an administrative form of federalism, but in reality suggests a (sustained) progression towards the unitary ideal.[42] The results show the exact opposite in the case of Canada, where the provinces seem to assert more powers vis-à-vis the plenary powers vested in the federal government by the canonical constitution. The US however seems to tell a more complex story. The 'Federalism Revolution' has definitely moved the efficient constitution closer to the canonical one, but there still seems to be doubt as to how the political tug-of-war between Republicans and Democrats will eventually decide the evolutionary trajectory of the US efficient constitution.

---

[39] Although in the US there was a return to an increase in the ratio as early as 2009.
[40] See for example, Erwin Chemerinsky, 'The Federal Revolution ' (2001) 31 *New Mexico Law Review* 7.
[41] See the Council of Australian Governments at http://www.coag.gov.au/node/75 .
[42] Hueglin, above n 7, especially Chapter 2.

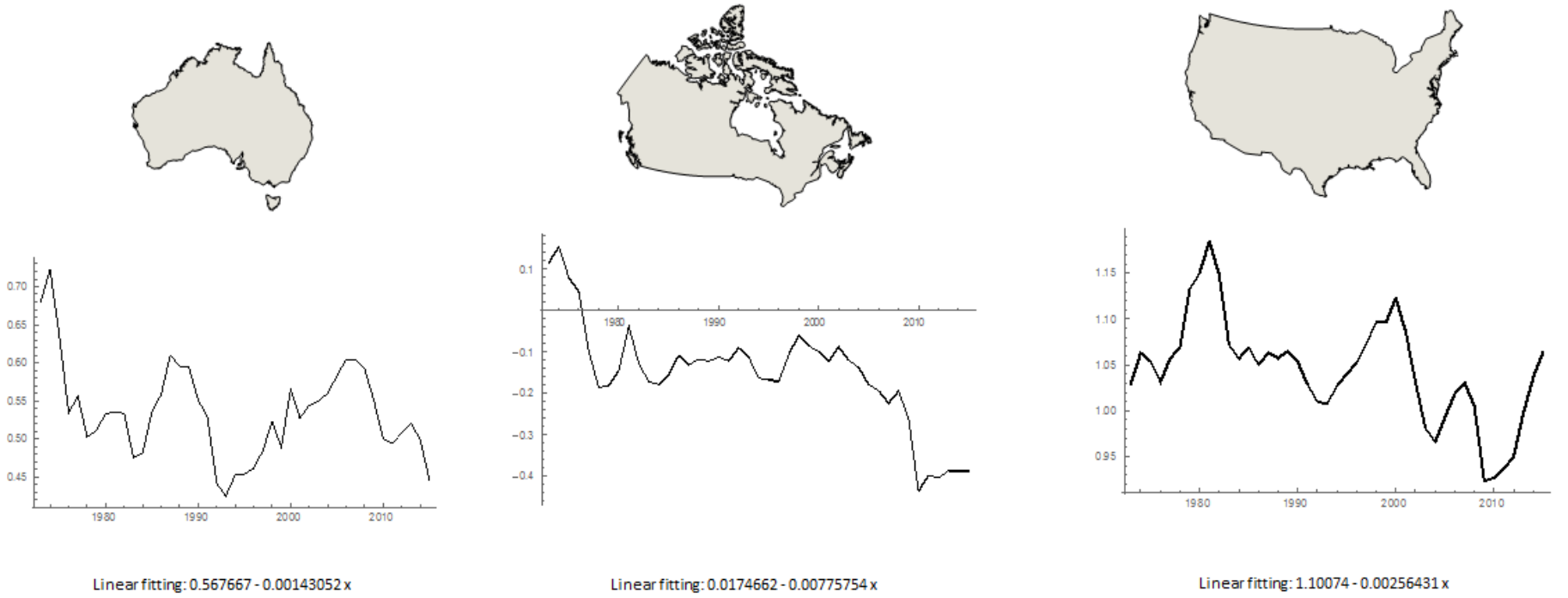

Figure 2: The results of the first proxy in the Australia, Canada and the United States. The time series for Australia was obtained from the Australian Bureau of Statistics cat. No. 5204030, series A2422879T and A2423186V covering the period from 1973 to 2015. The time series for Canada was obtained from Statistics Canada, the Canadian socioeconomic database, Tables 380-0542, 384-0047, and 385-0001, covering the period from 1973 to 2015. The United States time series was obtained from the historical tables of the Office of Management and Budget (Table 14.1), the White House, for the period from 1973 to 2015.

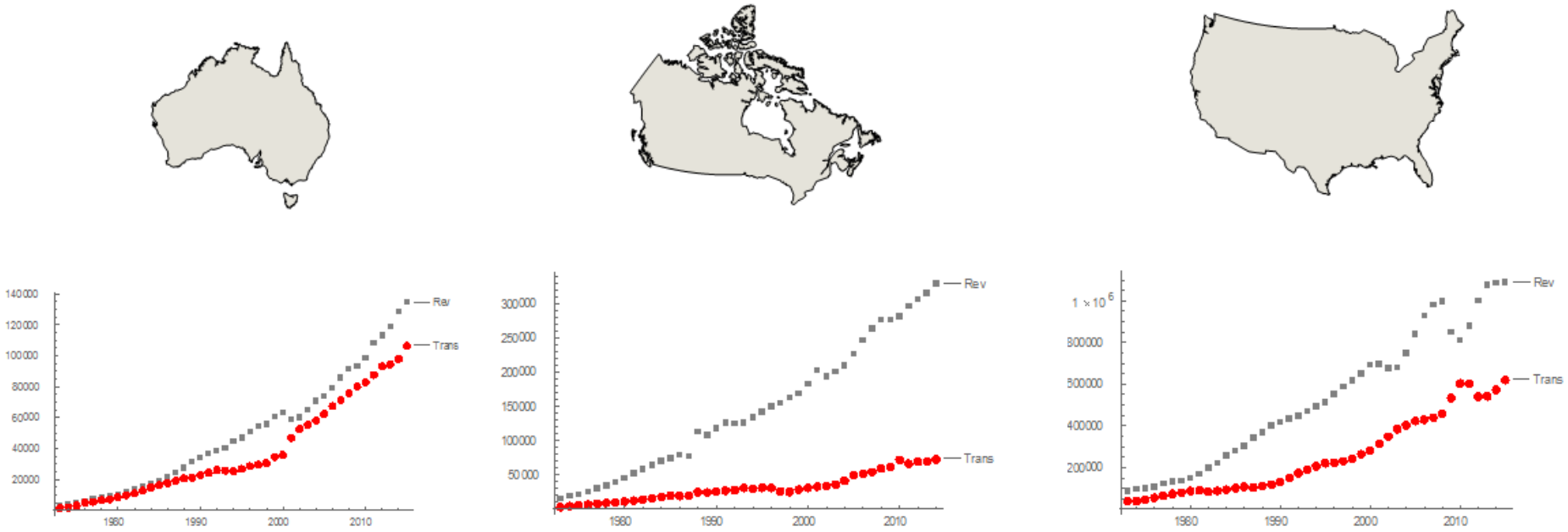

Figure 3: The times series shows state (or provincial) revenue (in current prices) net of transfers. The top black line represents the net revenues, and the bottom red line represents the transfers. The time series for Australia was obtained from the Australian Bureau of Statistics cat. No. 5204030, series A2422879T, A2423186V, A2519147X and A2519305V, covering the period from 1973 to 2015. For Canada, the time series comes from Statistics Canada, the Canadian socioeconomic database, Tables 384-0022, 384-0023, and 385-0001 covering the period from 1973 to 2015. The series for the US was obtained from the historical tables of the Office of Management and Budget (Table 12.2), the White House, for the period from 1973 to 2015

IV THE EFFICIENT ALLOCATION OF POWERS

This section canvases specific examples of the evolution of the residuum of powers from the provisions in the canonical Constitutions (of the United States, Canada and Australia) and into their efficient neo-Bagehotian form. The emphasis is on showing how efficiency can explain evolution from the canonical to the efficient constitutions.

Unites States

The efficient 'constitution' in the United States evolved along a trajectory towards plenary federal powers. While there was discernible tension between the Supreme Court and the Congress on the interpretation of the Constitution, it was inevitable that the Court was going to adopt an expansive interpretation of federal powers. This was strongest in areas affecting economic activity, especially commerce.[43] To see how the constitution evolves to an efficient form, it is useful to provide some examples.

---

[43] Since its early days, under Chief Justices John Jay, John Rutledge and Oliver Ellsworth (1789-1801), the Supreme Court seemed to limit the powers of the States. In 1792, the State of Georgia was sued by a private US citizen (residing in South Carolina) over payments due for goods supplied during the Revolution. Georgia argued it was a sovereign state, and hence it could not be sued without consenting first. The Court ruled that the Constitution (Article 3, Section 2) abrogated the 'sovereign immunity' of the States, and granted the Court the power to hear the case. See *Chisholm v Georgia* (1793) 2 US 419. The legal ramifications from this case were however terminated with the ratification of the Eleventh Amendment in 1795, which removed the federal jurisdiction to hear such cases. Nevertheless, the case illustrates the early beginnings of the efficient constitution.

The US Supreme Court adopted a wide definition of commerce under Article I, Section 8: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "To make all Laws which shall be necessary and proper for carrying … Powers vested by this Constitution in the Government of the United States ..." Under Chief Justice Marshall (1801-1835), there were a number of cases that condoned the expansionary role that Congress was seeking. For example, in 1819, when the State of Maryland attempted to impede the operation of out-of-state banks, the Supreme Court invoked the 'Necessary and Proper Clause' to grant to Congress 'implied powers' to enable the implementation of 'express power'. The Court held that Maryland cannot impede the valid exercise of these powers but the federal government. See *McCulloch v Maryland* (1819) 17 US 316. In 1824, Chief Justice John Marshall defined commerce as 'intercourse' broadly defined, and by doing so enabled Congress to issue navigation licences for steamships operating between New York and New Jersey. In effect, this ended a monopoly that New York had given earlier for navigation on that route. See *Gibbons v Ogden* (1824) 22 US (9 Wheat) 1.

However, under Marshall's successor, Chief Justice Roger B. Taney (1836-1864), in the decades leading up to the Civil War, the Supreme Court took a more balanced approach. Now the Court was more alive to the 'residuum power' design in the (canonical) Constitution, and was actively deciding cases to crystallise the division of sovereignty between the federal and state levels (what came to be known as 'dual federalism'). For example, in a case decided in 1837, the State of New York passed legislation to gather information on all passengers arriving by sea. The federal government argued that the New York statute was infringing on their power to regulate commerce. But the Supreme Court accepted New York's argument that the statute was in fact a police measure, and hence was part of their residuum powers. See *New York v Miln* (1837) 36 US 102.

After the Civil War (1861-1865), politics became a major driver of 'residuum powers'. This ushered the dawn of the efficient constitution era, where the canonical constitution became as malleable as the federal government needed it to be. Aided by Abraham Lincoln's vision for a more active federal government, and the economic expansion that followed, Congress took a more aggressive role in regulating commerce, starting with the 1887 Interstate Commerce Commission regulating railroad rates on shipping agricultural produce to urban areas. This could be seen as the genesis of transition from the 'dual federalism' before the War, and the 'cooperative federalism' that dominated (and continues to dominate) the canonical Constitution after the War. Nevertheless, the US Supreme Court was still, at least sporadically, following a 'residuum' interpretation of the Constitution. For example, the Court held that the Sherman Antitrust Act 1890 did not apply to the sugar industry, since sugar manufacturing was not commerce. See *United States v EC Knight Co* (1895) 156 US 1. A similar distinction was made in the pre-New Deal era, barring Congress from regulating the mining industry. *Carter v Carter Coal Co* (1936) 298 US 238. Similarly, during the Great Depression, Justice Louis Brandeis confirmed that States "may … serve as a laboratory; and try novel social and economic experiments..." *New State Ice Co v Liebmann* (1932) 285 US 262. (Brandeis J dissenting). Even during World War II, the US Supreme Court affirmed the textual truism of the Tenth Amendment (assigning residuum powers to the States). For example, Justice Harlan Fiske Stone observed that the Amendment: "states but a truism that all is retained which has not been surrendered." *United States v Darby* (1941) 31 US 100, 124.

By the second decade of the twentieth century, however, even with the Supreme Court's attempts to rein in federal powers, the canonical constitution could not help prevent the federal government from acquiring plenary powers that by now

The first example looks at the bargaining process in relation to the *Sherman Anti-Trust Act* of 1890. The example shows how efficiency considerations shifted the residuum of powers from the States to the Federal Government. However, the reasoning from the Supreme Court for this shift develops legal doctrines that do not talk to these efficiency considerations.

---

pervaded all areas of regulation, including those where the States are the primary lawmakers (such as family or criminal law). The adoption of the Sixteenth Amendment in 1913 which allowed Congress to collect income tax, enabled much wider spending powers, which inevitably lead the Supreme Court to a Hamiltonian (nationalist) interpretation of the Welfare Clause under Article I, section 8: "The Congress shall have 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 …"Under that conditional spending programs that flourished after wards, theoretical 'residuum power' migrated to an efficient constitution where the federal government reduced state governments to an administrative role. The Court seems to have opted for a more pragmatic approach where doctrinal instruments were devised to help the Court dispense its own vision for a modern economy while still upholding federal regulatory statutes. See for example W Howard Taft, 'Three Needed Steps of Progress ' (1922) 8 *American Bar Association Journal* 34. Cited in Tushnet, above n 21. For example, in *Champion v Ames* (1903) 188 US 321, the Court upheld a congressional ban on interstate transportation of lottery tickets, but in *Hammer v Dagenhart* (1918) 247 US 251, the Court invalidated a statute prohibiting the interstate transportation of goods produced by child labour. See for example Taft, above, cited in Tushnet.

By the third decade of the twentieth century, the Federal Government was introducing social liberal programs that came to be known as the 'New Deal'. The economic logic of these programs brought to an end the 'dual federalism' doctrinal regime. Part of this approach was a preference for 'control and command' rather than the market mechanism. One such example was the creation of the National Recovery Administration which promoted 'fair competition' codes in industries. The poultry industry was no exception. However, some retail purchasers refused to follow the industry code and refused to pay the fines arguing that their activities were not part of interstate commerce, and hence, would not come under federal powers. The Supreme Court agreed. This was one of the last attempts by the Court to stop the tide of federal plenary power. See *ALA Schechter Poultry Corp v United States* (1935) 295 US 495. (The 'sick chicken' case).

This was one of the last attempts by the Court to stop the tide of federal plenary power. By the time *Wickkard v Filburn* (1942) 317 US 111 was decided, only politics mattered. The Supreme Court was now interpreting the Constitution based on the economic fashion of the day, albeit indirectly.

The influence of the efficient constitution on the canonical Constitution continued with what came to be known as the 'Federalism Revolution'. During this period the Supreme Court inched closer to the 'residuum powers' original design, not because of the canonical constitution, but because of doctrinal innovations flowing from what came to be known as 'Regan economics' under the political regime that dominated the United States in the 1980s. Under Chief Justice William Rehnquist (nominated by Ronald Regan) the Supreme Court struck down a number of national statutes for being unconstitutional. For example, in 1990 the Supreme Court upheld the State of Oregon's ban on the consumption of a psychoactive drug during Native American religious ceremonies, arguing that the Free Exercise Clause of the First Amendment was not violated. See Employment Division, Department of Human Resources of the *State of Oregon v Smith* (1990) 494 US 872. Congress disagreed and passed the *Religious Freedom Restoration Act of 1993* to prevent the Court's interpretation. The Court responded by declaring that the Act was unconstitutional under the Fourteenth Amendment (which gives Congress the power to carry out the rights it provides to individuals against State violation). See *City of Boerne v Flores* (1997) 521 US 507. In addition, in 1995, the Court invalidated the *Gun-Free School Zones Act of 1990* (GFSZA), because it did not deal with interstate commerce. See *United States v Lopez* (1995) 514 US 549. However, in *Gonzales v Raich* (Rehnquist dissenting), the Court declared constitutional interference by the federal government (under the *Controlled Substances Act of 1970* (CSA)) with the state of *California Compassionate Use Act of 1996*, legalising the use of marijuana for medical purposes. *Gonzales v Raich* (2005) 545 US 1. (The CSA is Title II of the *Comprehensive Drug Abuse Prevention and Control Act of 1970*). Similarly, in 1996, the Court held that the Eleventh Amendment overrode any power Congress might have under Article I to abrogate state 'sovereign immunity': Seminole Tribe of Florida v Florida (1996) 517 US 44; *Alden v Maine* (1999) 527 US 706. In 1997 the Court held that Congress could not 'commandeer' State and local law enforcement resources to enforce national law: *Printz v United States* (1997) 521 US 898.

By the time President Obama came to office, the Supreme Court was again upholding the Congress power under the *Patient Protection and Affordable Care Act of 2010* (ACA), or what is commonly known as Obamacare. See *National Federation of Independent Business v Sebelius* (2012) 567 US 183.

Twenty six states questioned the constitutionality of the ACA. This case was brought by the National Federation of Independent Business (NFIB), the State of Florida, and others against Kathleen Sebelius, the Secretary of the US Department of Health and Human Services. One of the provisions of the Act challenged by the litigation was the 'individual mandate', requiring individuals to purchase health insurance, or pay a penalty. Another key provision was the 'Medicaid expansion provision', which conditioned the continued receipt of federal Medicaid funds on States expanding their eligibility requirements for the program. While the Court (now under Chief Justice John Roberts) found, with a majority of 5-4, that the mandate was a constitutional exercise of the federal taxing power (but unconstitutional under the Commerce Clause or the Necessary and Proper Clauses of the Constitution), the Court found the expansion provision unconstitutional as it did not come under the Congress spending power. However, the provision was found to be severable from the Act, which was left intact. The political influence on the canonical constitution was now in full swing, as can be discerned from media reports that Chief Justice Roberts changed his position between March and the announcement of the decision on June 28, 2012. See Jan Crawford, 'Roberts Switched Views to Uphold Health Care Law', (CBS News, July 1, 2012).

In *EC Knight Co*,[44] the American Refining Company acquired EC Knight and three other competing refineries, which resulted in controlling 98% of the American sugar refining industry. The Federal Government sued EC Knight under the *Sherman Anti-Trust Act* of 1890, to prevent the acquisition. The company argued that because their activities (refining) are classified as manufacturing, and hence local in nature, they would not come under the (interstate) Commerce Clause in Article 1, Section 8. The Supreme Court agreed, and elaborated that any action against monopolies should be taken by individual states.[45] The decision confirmed the residuum of powers as found in the canonical Constitution. The Court simply "recognised [the States] possession of [the] power", and reiterated the exclusive "power of Congress to regulate commerce *among* the several states". In *EC Knight* there was no elaboration of the efficiency gains that could result from 'migrating' the power to a central legislator. The Court was following strictly the residuum of powers in the canonical Constitution.

Contrast the decision in *EC Knight* with the meatpacking industry decision in *Swift and Co v United States*.[46] *Swift*, which came ten years after *EC Knight*, was about six meatpacking companies (the 'Big Six') that controlled 50% of the national market (one of whom was Swift), and were engaged in price fixing and in illegal activities to maintain a price floor. After a number of federal injunctions against the Big Six, they decided to merge into one company. In this case, the Supreme Court expanded the meaning of interstate commerce to cover the merger. The Court explained the context for the decision in terms of the 'value chain' extending beyond the physical (local) location of the slaughterhouse.[47] The chain extended from the farm to the retail store, and was in effect across a number of States. Its regulation would therefore come under the Commerce Clause. In *Swift* the efficient regulation of meatpacking, including the health and safety aspect of the industry, required centralising monitoring activities. The case ushered a number of other federal interventions, including the *Pure Food and Drug Act*, and the *Meat Inspection Act* of 1906.

The decisions in *EC Knight* and *Swift* explain how the residuum of powers evolves from a canonical form, to an efficient constitution through 'fuzzification'. As shown in Figure 2 (above), the

---

[44] *United States v EC Knight Co* (1895) 156 US 1.

[45] The Court reasoned as follows (at 11):

> "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this Court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community—is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several states is also exclusive."

[46] *Swift & Co v United States* (1905) 196 US 375.

[47] The Court reasoned as follows (at 375):

> "A combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against, or only in conjunction with, each other in order to regulate prices in and induce shipments to the livestock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States is an illegal combination within the meaning and prohibition of the act of July 2, 1890, 26 Stat 209 [the Sherman Anti-Trust Act of 1890], and can be restrained and enjoined in an action by the United States.
> It does not matter that a combination of this nature embraces restraint and monopoly of trade within a single State if it also embraces and is directed against commerce among the States. Moreover, the effect of such a combination upon interstate commerce is direct, and not accidental, secondary, or remote, as in *United States v. E. C. Knight Co*, 156 US 1.
> …
> When cattle are sent for sale from a place in one State, with the expectation (376) they will end their transit, after purchase, in another State, and when, in effect, they do so with only the interruption necessary to find a purchaser at the stockyards, and when this is a constantly recurring course, it constitutes interstate commerce, and the purchase of the cattle is an incident of such commerce."

analysis evolves from 'crisp' values that allow for a power to either be the purview of one level of government or the other, to 'fuzzy' values that permit conclusions beyond a true/false dichotomy.[48] This process does not introduce uncertainty (probability) into the analysis. Rather, it allows for a construct to belong to more than one set (rather than the probability theory approach of exclusive set membership). This fuzzification process is especially important in the US context given that the canonical Constitution does not have a concurrency category similar to that seen in the Australia (canonical) Constitution, or even the implicit concurrency in the Canadian Constitution. In the American case, fuzzification has to be introduced by enlarging the plenary power of the Federal Government, as seen in *Swift*.[49]

It is useful to contrast *EC Knight* and *Swift* with *United States v Lopez*,[50] where the Supreme Court returned to a residuum of powers analysis closer to the canonical Constitution. *Lopez* came ninety years after *Swift*, and was in relation to section 922(q)(1)(A) of the *Gun-Free School Zones Act* of 1990. The section makes it a federal offence "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone". On March 10, 1992, Alfonso Lopez, who was then a 12th grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 calibre handgun and five bullets. Acting upon an anonymous tip, school authorities confronted Lopez, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises.[51] The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the *Gun Free School Zones Act* of 1990.[52] Lopez argued that section 922(q) was an unconstitutional exercise of Congress' power to regulate interstate commerce. The Federal Government argued that the section was a valid exercise of the Commerce Clause power, i.e. that the section regulated a matter which 'affected' interstate commerce. The possession of a firearm in an educational environment would most likely lead to a violent crime. Violent crimes impose social costs. They raise insurance costs, limit the willingness to attend schools, and inhibit learning; and this in turn would lead to a weaker national economy. The Supreme Court sided with Lopez.[53]

The *ratio* in *Lopez* does not entertain the gains in economic efficiency from monitoring such potential crimes under State versus Federal legislation. However, the decision could be understood as comparing the efficiency of policing the conduct of citizens in this context at the state versus federal levels. The key fact is that in the United States there is no national police force, although there are agencies such as the FBI. Policing is organised on state and local basis. Moreover, with the increased emphasis on fighting and preventing terrorism at the national level (since the 1990s), it is more

---

[48] Fuzzy sets could also be understood in terms of the distinction drawn between connotation (the core meaning in the canonical Constitution) and denotation (the evolving meaning in the efficient constitution).See Leslie Zines, *The High Court and the Constitution* (The Federation Press 2008). Professor Zines gives the following example in explaining the meaning of these terms (at :

> "A term may typically denote X which has qualities A, B, C, and D; Y has qualities A, B and C but lacks quality D. Does Y come within the term? Put in other ways: is D part of the essence of the term? If the answer is yes, then the term does not denote Y. If, on the other hand, D is regarded as merely an 'accidental' as distinct from an 'essential' quality of the term it will denote Y."

[49] *Swift* was a precursor to New Deal economics, where efficiency was expected to come from managing competition, and hence increasing economic growth.

[50] *United States v Lopez* (1995) 514 US 549.

[51] See Tex. Penal Code Ann. §46.03(a)(1) (Supp. 1994).

[52] 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

[53] The Supreme Court, in a 5 to 4 decision, opined as follows (at 559):

> "We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce"

The Court went on to canvas previous examples of substantial effect on interstate commerce, and ruled out such effects in this instance.

efficient that more responsibility falls to state and local police forces. In other words, there is capacity to absorb the requirements imposed by a *Lopez* scenario at the state level, rather than needing to add more resources at the federal level to achieve the same outcome. The division of labour between national agencies and police forces at the state level results in efficiency gains.

Another example of the evolution towards the efficient constitution in the US comes from *Carter and Carter Coal Co,*[54] which was about the application of *The Bituminous Coal Conservation Act* of 1935 to the States. The Act declares that the mining and distribution of bituminous coal affect general welfare such that the industry should be regulated. The Act explains that such regulation is necessary because interstate commerce is directly and detrimentally affected by the industry and its practices, and that the right of the miners to organize and collectively bargain for wages, hours of labour and working conditions should be guaranteed in order to prevent constant wage-cutting and disparate labour costs, detrimental to fair interstate commerce, and in order to prevent the obstructions to that commerce that arise from disputes over labour relations at the mines. The Act elaborates a scheme for the creation of a national commission, the organization of numerous coal districts, the setting up of numerous boards in the districts, and the fixing of all prices for bituminous coal, and of the wages, hours and working conditions of the miners, throughout the US. The Act imposed an excise tax at the rate of 15% of the sale price or market value at the mine of all bituminous coal produced in the country, subject to a draw-back of 13 1/2% allowed to those producers who submit to the price-fixing and labour provisions of the Act. The Carter Coal Company felt that it could not afford the tax imposed by the Act, and had no option but to accept its regulation on prices and wages. James Carter who was a shareholder in the Company, argued that coal mining was not interstate commerce, and hence would not come under the Commerce Clause. The Supreme Court agreed that Congress has no power to regulate the industry.[55]

Compare this to the reasoning in *Wickard v Filburn*.[56] In *Wickard,* Roscoe Filburn, an Ohio farmer, was growing wheat to feed the animals on his own farm, but in quantities more than permitted under a Federal Government ceiling established to stabilise wheat prices and supplies. The Federal Government imposed a penalty on Filburn, which he refused to pay, arguing that his wheat was not for sale outside Ohio, and hence would not come under the Commerce Clause (under Article 1, Section 8 of the Constitution), and in turn would not come under the jurisdiction of the Federal Government. The court rejected the argument since the extra wheat reduced the amount that Filburn would have bought on the open market for animal feed, and since this market is a national market, it was within the purview of the Commerce Clause, and could hence be regulated by the Federal Government. The actions of thousands of farmers like Filburn, the Court added, would be a substantial factor in the price of wheat on the open market—even if individual effects are trivial.[57]

---

[54] *Carter v Carter Coal Co* (1936) 298 US 238.

[55] The Court explained its reasoning as follows:

> "[The tax] is not a tax, but a penalty to coerce submission, and cannot be upheld as an expression of the taxing power (at 239) …
>
> The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to all purposes affecting the Nation as a whole with which the States severally cannot deal, or deal adequately, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have always been definitely rejected by this Court (at 240).
>
> The States, in respect of all powers reserved to them, are supreme. And since every addition to the national legislative power to some extent detracts from or invades the power of the States, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom (at 240)."

[56] *Wickard v Filburn* (1942) 317 US 111.

[57] The Court summarised the economic rationale for the restrictions on Wheat prices in the following terms (at 125):

> "The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states, on average, have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply, as well as for wheat for export and carry-over.

Prior to *Wickard*, the Court focused on the locus of commercial activity, namely whether the activity was local or not. *Wickard* rejected this approach as too formulaic,[58] and opted instead for the test of 'substantial economic effect'.[59] The effect of *Wickard* was to extend the Commerce Clause into areas that were only indirectly related to interstate commerce, and in this sense *re-allocated* some of the State residuum powers (in the canonical Constitution) to the Federal Government. While *Wickard* rejected the locus of the activity approach as too formalistic, in reality, it migrated the locus of residuum powers from the States (under the canonical Constitution), and towards the Federal Government (under the efficient constitution).

The outcome in *Wickard* could be understood as one based on the efficiency of symmetry. In order to be able to control wheat prices, it is essential that the same regulatory instrument regulates local production, since such production would (in the aggregate) have substantial effect on price. The alternative of maintaining the original allocation of residuum powers where intrastate commerce would be the exclusive remit of States would have produced an inefficient outcome. *Wickard* was in fact about an activity that comes under the residuum powers of the States, namely the regulation of intrastate commerce. This was also the approach by the Supreme Court before *Wickard*.[60] But this original allocation of residuum powers under the Canonical Constitution was not efficient in a twentieth century setting, at least not as envisaged when it was first introduced in the eighteenth century. What Wickard represents is a 'bargaining process' between the federal and state levels, where an efficient outcome was secured. In a Coasean sense, it did not matter who had the 'property right' to regulate Filburn's activities. What mattered is that the parties (the federal and state governments) were able to bargain an outcome (through the courts system), and this led to an efficient allocation of the relevant powers.

The aggregate effect of Supreme Court decisions can be seen in Figure 2 (above), which suggests an evolution towards more efficiency. Given the symmetric nature of US federalism, the locus of this efficiency is centralisation.

Canada

The same evolution to efficiency can be seen in Canada, although due to the asymmetric nature of federalism there, the efficient constitution is much closer to the canonical Constitution in the United States (see below). This is a reminder that efficiency is context-based. While the canonical Constitution was intended to establish a quasi-federation,[61] bargaining between the federal and

---

> The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 percent of total production, while, during the 1920's, they averaged more than 25 percent. The decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars, and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion."

This was the context that led to the passing of the *Agricultural Adjustment Act* of 1938, which limited the areas that farmers could devote to wheat production. Filburn won at the Federal District Court. The Supreme Court ruled in favour of the Federal Government. The Court opined that the term 'among several States' did not stop at State borders, but could be introduced into the interior of State boundaries (at 120).

[58] At 124.

[59] At 125.

[60] See for example *Carter v Carter Coal Co* (1936) 298 US 238., *Veazie v. Moor*, 14 How. 568, 573-574; *Kidd v. Pearson*, 128 U.S. 222, Employers' Liability Cases, 207 U.S. 463; *Hammer v. Dagenhart*, 247 U.S. 251; *Railroad Retirement Board v. Alton R. Co*., 295 U.S. 330; *Schechter Corp. v. United States*, 295 U.S. 495; *United States v. Dewitt*, 9 Wall. 41; Trade-Mark Cases, 100 U.S. 82; *Hill v. Wallace*, 259 U.S. 44; *Heisler v. Thomas Colliery Co*., 260 U.S. 245, 259-260; *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178-179; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165.

[61] There are a number of provisions that are in favour of this interpretation. For example, under section 90 of the Constitution Act of 1867 the federal government holds a veto power over provincial legislation. Moreover, under the works and undertakings power in section 92(10)(c), the Federal Parliament can acquire jurisdiction from the provinces by declaring the subject matter to be 'for the general advantage of Canada'. In addition, the Lieutenant Governors holding executive powers

provincial governments (through political practice and judicial decisions) evolved the Constitution into an efficient form. Unlike Australia (see below), Canadian constitutionalism however experienced an enduring influence of the 'compact theory' where the canonical Constitution was understood as the product of an agreement between the French and the English. This brought provincial rights to the forefront.[62]

In the very early years after the BNA, the courts seemed to confirm the canonical constitution.[63] However, similar to what we found in the United States, courts soon provided an interpretation that moved the efficient constitution away from the canonical one.[64] In the case of Canada, the transition to the efficient constitution was ushered by the Privy Council's desire to affirm provincial autonomy (and largely preserved under the Supreme Court of Canada from 1949 onwards).[65] This autonomy was sustained through the emergence of the 'pith and substance' and 'ancillary effects' doctrines that decide under which head of power a piece of legislation falls, and the 'paramountcy doctrine' under which the federal law takes precedent where legislation does conflict (remember that Canada does not have a section similar to section 109 in the Australian Constitution).[66]

By the second decade of the twentieth century there was a clear inclination away from the 'pith and substance' doctrine, and towards what came to be known as the doctrine of 'interjurisdictional immunity'. The doctrine determines where legislation from one level of government may be

in the provinces are appointed and removed by the General Governor (sections 58 and 59), and are paid by the Parliament of Canada (section 60).

[62] See *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921*, Royal Commission on Bilingualism and Biculturalism

[63] For example, in 1874, the Privy Council was clear that the concluding words of section 91 restricted the scope of section 92(16). See *L'Union St. Jacques v. Bélisle* (1874) LR 6 PC 31.

[64] See generally John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press 2002).

[65] Richard Risk, 'The Scholars and the Constitution: P.O.G.G. and the Privy Council' (1995) 23 *Manitoba Law Journal* 496.

[66] In 1875 the Privy Council examined in more detail the vertical division of power under the BNA. See *Dow v Black* (1875) LR 6 PC 272. The case considered the constitutionality of a New Brunswick statute which authorised the issuing of a debenture to induce a railway company to build a railway connecting New Brunswick with Maine in the United States. The Judicial Committee ruled that the Act was within the authority of the Province of New Brunswick and did not relate to the inter-provincial railways under sections 91(29) and 92(10) of the *Constitution Act 1867*, which are reserved to the federal government. In 1879 the Privy Council refused to hear an appeal from a judgment of the Supreme Court of Canada, arguing that nothing in the BNA raises doubt as to as to the power of the federal government to impose new duties or give new powers to the provincial courts. See *Valin v. Langlois* (1879) 5 App Cas 115. In 1880, the Judicial Committee of the Privy Council held that the BNA conferred on the federal government the power to interfere with property, civil rights and procedure within the provinces under the bankruptcy and insolvency heads of power: *Charles Cushing v Louis Dupuy* (1880) 5 AC 409. Another example comes from 1883, when the Privy Council ruled that the Province of Ontario was not a delegate of the Imperial Parliament, and had the same authority as that Parliament. See *Hodge v The Queen* (1883) 9 App Cas 117. See also the analysis in Quick and Garran, above n 27. In this case, the Legislative Assembly of Ontario delegated authority to pass a resolution that prohibits the use of billiard tables during any time the sale of alcohol was permitted. The appellant was convicted for allowing a billiard table to be used during the hours authorised for the sale of liquor. The issue was whether the Act by the Assembly conflicts with the Dominion power over trade and commerce (section 91(27)). In the Privy Council, Lord Fitzgerald held that the Act fell within the power of the province, and that section 92(15) punishment by fine, penalty or imprisonment was applicable. This case created the doctrine of 'double aspect' where it was stated that "… The principle … is [that] subjects which in one aspect and for one purpose fall within sect. 92 , may in another aspect and for another purpose fall within sect. 91." (Quick and Garran at 130). Similarly, in 1892 a question arose as to the priority of the Province of New Brunswick over other simple contract creditors in connection with the liquidation of a bank. See *Liquidators of the Maritime Bank v Receiver General of New Brunswick* (1892) AC 437. The Privy Council held that under the *Constitution Act 1867* the Provinces continue to enjoy the rights they had prior to 1867. They opined that "[t]he object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy" (at 441-442).

applicable to another level.[67] Later however, the Supreme Court of Canada restricted the application of 'interjurisdictional immunity', opting instead for the paramountcy doctrine.[68]

An important distinctive feature of the Canadian Constitution is the coordinate status given to the federal and provincial governments in the economic sphere. Each level is the decision maker in its own constitutional economic powers.[69] In contrast, in the United States and Australia the federal economic powers were either designed or interpreted to be very extensive.[70] Notwithstanding, similar to the United States and Australia, the federal government in Canada is able to levy a broader range of taxes than the provinces. Similar to the other two jurisdictions, during the Second World War, also the federal government assumed control over all income taxation, and largely maintained this position after the War,[71] and bolstered its dominance of provincial revenues through a full suite of 'transfers' and 'equalization payments' (under section 36 of the *Constitution Act 1982*).

It is useful to detail some examples to illustrate how the efficient constitution emerged from the canonical Constitution. The general trend suggests a move away from the 'crisp' sets of power found in the (canonical) Constitution, and towards a 'fuzzification' that tolerated a large degree of overlap.[72] Thus while there is only two genuinely concurrent powers in Canada: under sections 94A and 95, there is in practice a substantial overlap. This overlap was not justified in terms of efficiency, but through the development of legal doctrines such as the 'ancillary doctrine' under which one level of government can intrude on the other's jurisdiction, provided the intrusion is part of an integrated scheme that comes under the intruder's jurisdiction. A good point to start the analysis is the case of *Citizens Insurance Co of Canada v Parsons*.[73] In this case the Privy Council departed from a textual analysis of the canonical Constitution, and ushered the emergence of the efficient constitution in Canada. William Parsons, without disclosing an insurance policy in effect at the time, obtained a similar policy from Citizens Insurance Co. The latter refused to pay when Parsons' store burnt down, arguing that the nondisclosure violated Ontario's *Fire Insurance Policy Act* of 1877.[74] In accordance with the requirements in the Act, the policy had this clause (at 234):[75]

> "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent."

The reason for this condition was explained by the Supreme Court as follows: "The respondents had an interest in knowing in what other companies insurances were effected, as the respondents were entitled to cancel the contract of insurance made by them, and might have done so if they had known that the insurance had been effected in a company with the management of which the respondents were not satisfied."

Parsons argued that the Act was *ultra vires* provincial jurisdiction, because of federal jurisdiction over trade and commerce under section 91(2). Citizens argued that this was a contractual dispute under the property and civil rights in section 92(13). The Privy Council sided with the

---

[67] An example of the application of this doctrine came before the Privy Council in 1914, when a company incorporated under federal legislation was not licenced or registered under provincial legislation. The Privy Council held that the provincial law did not apply to companies federally incorporated. See *The John Deere Plow Company Limited v Theodore F. Wharton and others* (1914) UKPC 87. Similarly, in 1921 the Privy Council held that a provincial law requiring companies to hold a licence before acquiring land did not apply to companies federally incorporated. See *The Great West Saddlery Company Limited and others v The King* (1921) UKPC 27.

[68] *Canadian Western Bank v Alberta* (2007) 2 SCR 3. See also Peter W. Hogg and Rahat Godil, 'Narrowing Interjurisdictional Immunity ' (2008) 42 *Supreme Court Law Review* 623.

[69] Webber, above n 2, at 151-158.

[70] See Tushnet, above n at 155-82, and Saunders, above n 26, cited in Webber, above n 2, at 158.

[71] Webber, above n 2, at 167.

[72] Bruce Ryder, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations ' (1991) 36 *McGill Law Review* 308.

[73] *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96.

[74] RSO 1877, ch. 162.

[75] See *Parsons v Standard Fire Insurance Co* (1880) 5 SCR 233.

Supreme Court of Canada in championing provincial rights and rejecting Parsons' argument.[76] The Courts were basically arguing that this insurance contract was local in nature. It did not affect interprovincial trade. This was also the starting point for Courts in the United States (although unlike Canada where the canonical residuum of powers is with the Federal Government, in the US, the residuum under the canonical Constitution resides with the States).

But the reasoning could also be seen through the lens of efficiency. This was a contract issue. Had the Court decided in favour of Parsons, it would have infringed on the terms of the insurance policy between Parsons and Citizens Insurance Co, which stipulated that Parsons had to disclose the other policy, in accordance with the Ontario Act. This in turn would have added extra costs on similar contracts.

Later cases such as *General Motors of Canada Ltd v City National Leasing* and *Kirbi AG v Ritvik Holdings Inc* elucidate the relevance of the economic reasoning.[77] In *General Motors of Canada Ltd v City National Leasing*, City National Leasing (CNL) filed a suit against General Motors (GM) for price discrimination contrary to section 34(1)(a) of the Canadian *Combines Investigation Act* of 1910, which gave rise to an action by CNL under section 31.1. GM counterargument was that section 31.1 was *ultra vires* Parliament, being (in pith and substance) legislation in relation to provincial jurisdiction for property and civil rights. The Supreme Court of Canada found that the Act was *intra vires* Parliament under section 91(2) of the *Constitution Act 1867*, and that section 31.1 was within the legislative competence of Parliament. The SCC based its decision on the efficiency of national regulation of competition. The Court cites with approval work by leading authorities on Canadian constitutional law,[78] who argue that centralised regulation is the key to efficiency in the production of goods and services. The Court continued on to assert Parliament's power over trade and commerce, and that this power affects the entire nation.

In *Kirbi AG v Ritvik Holdings Inc* (the Lego Case), Kirbi held the patents for LEGO construction sets. When the patents expired in Canada, Ritvik began manufacturing and selling bricks interchangeable with LEGO. When Kirbi tried to assert a trademark, the Registrar of Trademarks refused registration. Kirbi claimed an unregistered mark and sought a declaration that it had been infringed by Ritvik pursuant to section 7 (b) of the Trademarks Act, and the common law doctrine of passing off. It requested a permanent injunction to prevent Ritvik from marketing infringing products and sought damages. In the SCC, Ritvik challenged the constitutionality of section 7 (b), arguing that the provision is *ultra vires* Parliament under section 91(2) of the *Constitution Act 1867*. In essence, Ritvik argued that the creation of civil causes of action is a matter of property or civil rights in the

---

[76] In doing so, the Privy Council departed from the grammatical structure of the canonical Constitution. Sir Montague Smith noted the following (at 10-12):

> "The words 'regulation of trade and commerce,' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mid of the legislature, when conferring the power on the dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary... Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion."

[77] *General Motors of Canada Ltd v City National Leasing* (1989) 1 SCR 641. *Kirkbi v Ritvik Holdings Inc* (2005) 3 SCR.
[78] Peter W. Hogg and Warren Grover, 'The Constitutionality of the Competition Bill ' (1976) 1(2) *Canadian Business Law Journal* 197, 199. The judgment states (at 679):

> "[The paper] provide a useful discussion of the diverse economic, geographical, and political factors which make it essential that competition be regulated on the federal level:
>
> It is surely obvious that major regulation of the Canadian economy has to be national. Goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries. Indeed, a basic concept of the federation is that it must be an economic union. An over-all national policy is the key to efficiency in the production of goods and services."

provinces. The Court found that the section was in fact *intra vires* Parliament. The Court's rationale was expressed in the following terms:[79]

> "The protection of unregistered trade-marks is integral to the legitimacy, legal standards and efficacy of registered trade-marks. The Trade-marks Act is clearly concerned with trade as a whole, as opposed to within a particular industry. There is no question that trade-marks apply across and between industries in different provinces. Divided provincial and federal jurisdiction could mean that the provincial law could be changed by each provincial legislature. This could result in unregistered trade-marks that were more strongly protected than registered trade-marks, undermining the efficacy and integrity of the federal Parliament's Trade-marks Act. The lack of a civil remedy integrated into the scheme of the Act, applicable to all marks, registered or unregistered, might also lead to duplicative or conflicting and hence inefficient enforcement procedures".

The rationale was again embedded in the efficiency of symmetry, and the necessity of the national scale for the enforcement of trademarks.

While *General Motors of Canada Ltd v City National Leasing* and *Kirbi AG v Ritvik Holdings Inc* indicate a tendency towards centralisation, on aggregate, "the default regulatory jurisdiction in Canada [lies] with the provinces".[80] The justification for this jurisdiction comes from the property and civil rights under section 92(13), and affects the entirety of private law, including contacts. Looking at the aggregate suggests a shift in the locus of residuum powers to the Provinces. This is confirmed by the analysis summarised in Figure 2 above.

Australia

The general efficiency trend in the Australian is to make policy at the national level and leave implementation to the States, which moves Australia to an 'integrated federalism' model, as seen in Germany, although without the accountability institutional safeguards seen in Germany.[81] This is in line with the efficiency of symmetry framework introduced earlier in the paper, where the symmetric nature of Australian federalism requires assigning more powers to the central government. The residuum of powers found in the canonical Constitution was reversed due the efficiency of symmetry as exhibited under a number of factors,[82] salient among these is the development of a national economy and globalisation. While pragmatism,[83] national identity,[84] and 'responsible government',[85] could have contributed to the weakening of States, it was economic efficiency that propelled the federal government into the plenary powers it enjoys today. However, this rationale is occulted by the constitutional doctrines used to interpret the canonical constitution. The rest of this part delineates examples of this trend.

The first comes from the corporations' power, s 51(xx), which empowers the Commonwealth to legislate with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". In 1989, when the Commonwealth enacted the *Corporations Act*

---

[79] At para 29.

[80] Webber, above n 2, at 151. In Australia the HCA is the counterpart for the Supreme Court in the US and Canada.

[81] Saunders, above n 26, at 254. See also Hueglin, above n at 235.

[82] As suggested by Cheryl Saunders, "… a vast network of co-operative arrangements between governments, underpinned by imbalance in favour of the Commonwealth, has not only shifted the centre of gravity of the federation but has begun to affect its essential design." Saunders, above n 26, at 229.

[83] The pragmatist approach (problem defined and problem driven) was linked to efficiency by Cheryl Saunders in the following terms: "A third and somewhat more speculative influence on the operation of the federal principle in Australia in the pragmatism that affects thinking about most constitutional issues. It may causally be linked to the influence of utilitarianism on early Australian constitutional ideas …" See ibid at 227. The utilitarian interpretation of this pragmatism leads to a contemplation of Pareto and Kaldor-Hicks efficiencies, as well as to efficiencies arising from efficiency. See for example Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) *Yale Faculty of Law Scholarship Series, Paper 4202* <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5210&context=fss_papers>.

[84] *Victoria Commonwealth (Payroll Tax Case)* (1971) 121 CLR 353. *New South Wales v Commonwealth (Workchoice Case)* (2006) 229 CLR 1.

[85] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See also the *Engineers' Case*.

1989 (Cth), which covered not only corporations already in existence but also processes of incorporation, the High Court of Australia (HCA) declared that the Commonwealth did not have sufficient power to legislate in relation to the formation of companies.[86] Still, having different sets of rules in each State for incorporation, and different registers for existing companies, created red-tape and legal hurdles for business. The potential (symmetry) efficiency gain allowed for a bargaining process that persuaded the States to refer their powers over incorporation processes to the Commonwealth. This outcome was built into the canonical Constitution through section 51(xxxvi):

> "Section 51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> …
>
> (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;"

This led to a Corporations Agreement (on 23 March 2001) and the passing of the current *Corporations Act 2001* (Cth) and the *Australian Securities and Investment Commission Act 2001* (Cth) (both assented to on 28 June 2001).

This example suggests that the Australian Constitution is more efficient when it comes to reducing transaction costs by allowing for decisionmaking to be shifted to the central government. The American and Canadian Constitutions do not have a provision similar to section 51(xxxvi). The canonical design envisages possibilities where efficiency consideration would require 'trading' powers between the vertical levels of government, especially where power needs to be referred to the Federal Government.

Notwithstanding, the tension between the American and English approaches to constitutional design, especially the tension between federalism and the doctrine of 'responsible government', led to a 'legalist' (literal) rather than an 'originalist' (compact) interpretation of the constitution.[87] In other words, the Australian canonical Constitution is interpreted using textual analysis and settled legal principles, rather than through standards outside existing law.[88] This legalism "lends itself to some development of the law to achieve just and workable outcomes, although without acknowledgement of choices consciously or unconsciously made", and "can accept that considerations … are susceptible to characterisation as political …"[89]

---

[86] *New South Wales v Commonwealth* (1990) 169 CLR 482.

[87] See Anthony Mason, 'The High Court of Australia: A Personal Impression of its First 100 years' (2003) 27 *Melbourne University Law Review* 864. For originalism, see J Goldsworthy, 'Constitutional Interpretation: Originalism ' (2009) 4(4) *Philosophy Compass* 682.

[88] Owen Dixon, 'Concerning Judicial Method ' (1956) 29 *Australian Law Journal* 468. According to Colin Howard, Australian legalism is about "the judiciary maintaining complete impartiality between contending parties, above all in politically motivated litigation." See Colin Howard, 'Sir Owen Dixon: Giant Who Enriched the Law' (1986) 15 *Melbourne University Law Review* 575, at 576. The paramountcy of this approach was argued by Jeremy Waldron in the following terms" "… the existence of a canonical text will not serve the interests of predictability unless the text is relatively stable, intelligible, and learnable." See Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 84.

[89] Saunders, above n at 91. One can identify five phases of constitutional interpretation in Australia depending on how legalism was employed. From 1903 to 1920, under Chief Justice Sir Samuel Griffith, the HCA adopted the reserved State powers and immunities doctrines. Commonwealth powers were interpreted so as not to affect the residuum powers. Se for example *Huddart Parker & Co Pty Ltd v Moorebead* (1909) 8 CLR 330. However, the period between the World Wars (1920-1944), under Chief Justice Adrian Knox, saw a shift to a 'natural' interpretation of the canonical Constitution, with emphasis was on the constitutional text, and common law principles. See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129. *South Australia v Commonwealth (First Uniform Tax case)* (1942) 65 CLR 373. This approach continued under Chief Justices Sir Isaac Isaacs, Sir Frank Gavan Duffy, and Sir John Latham. Implications (from standards external to the canonical Constitution) returned during the period from 1944 to 1981, under Chief Justice Sir Own Dixon (1952-1964), and Chief Justice Sir Garfield Barwick (1964-1981). From 1981 to 1998 under Chief Justices Sir Harry Gibbs, Sir Anthony Mason, and Sir Gerald Brenna, the Court was closest to an explicit adoption of economic efficiency as a doctrinal approach, when it supplemented textual analysis with considerations of purpose and policy. The last phase started roughly in 1998 and continues to this day. Under Chief Justice Murray Gleeson (1998-2008), and later on under Chief Justice Robert French (2008), the HCA reaffirmed its commitment to legalism and its emphasis on text and structure to the exclusion of other considerations.

This legalism ushered a shift towards the efficient constitution as can be illustrated by the *Engineers Case*,[90] probably one of the most important cases ever decided by the HCA. This case concerned a plaint by the Amalgamated Society of Engineers (a federal union of engineers representing the Australian branch of the British union) under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) for award relating to employers across Australia, including three (State) governmental employers: the Minister of Trading Concerns of Western Australia (WA), the (WA) State Implement and Engineering Works, and the (WA) State Sawmills. The long title of the Act states that it relates to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State—the exact same wording found in section 51 (xxxv).[91] The governmental employers carry out operations (for profit) in which members of the union are employed. The federal Act intended State undertakings to be subject to the Commonwealth Court of Conciliation and Arbitration powers. The HCA said that the Commonwealth has the power (under section 51(xxxv)) to bind the States in industrial disputes extending beyond the limits of one State. The counter argument was that the legislative power within a State was reserved to the States under section 107 (i.e. under the residuum of powers, or the doctrine of 'implied prohibitions'). The essence of the counterargument was that section 107 took precedence over section 51. Alternatively, the counterargument was for construing the Commonwealth powers narrowly. The HCA answer was that section 107 does not support a general 'reserved powers' implication (at 154):

> "But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the powers preserved by sec. 107, may in a given case depend on sec. 109. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way."

In the *Engineers' Case*, the HCA abandoned the doctrine of residuum powers and adopted instead an approach based on text, context and previous authority—in agreement with the principles of statutory interpretation. The rationale for section 51 (xxxv) was explained by Mr. C. C. Kingston, who proposed the Courts of Conciliation and Arbitration at the 1891 Australasian Federation Conference (6 April), in the following terms (at 780):

> "… in view of the extent of the organisations which take part in these industrial disputes, having ramifications throughout the whole of Australia, it is impossible for anyone colony to legislate for the creation of a tribunal which can deal satisfactorily with them … At the present moment various schemes are occupying the attention of the different local legislatures having for their aim the supply of facilities for the prevention of these disputes; but I am sure that everyone who has felt it his duty to consider the question will recognise the force of the argument, that local legislation cannot satisfactorily deal with the question."

There is a clear efficiency rationale behind section 51(xxxv), even though the same is occulted from HCA's doctrinal analysis. Integrating this rationale into legal analysis would provide a clear normative signal as to how the HCA should adjudicate the vertical division of powers as found in the canonical Constitution.

Prior to the *Engineers' Case* the HCA followed a division of powers much closer to the canonical residuum of powers. For example, in *Australian Boot*,[92] the Australian Boot Trade Employees Federation brought a plaint against employers in the boot trade in New South Wales, Victoria, Queensland, and South Australia. The Commonwealth Court of Conciliation and Arbitration made an award, and the Federation applied under section 38, subsections (f) and (g), of the

---

[90] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129.

[91] The subsection reads: " **Section 51** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: **(xxxv)** conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;"

[92] *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266.

Commonwealth Conciliation and Arbitration Act 1904 (Cth) for a declaration that the award was a common rule for the bootmaking industry within these four States, and Tasmania. A large number of employers objected to the application arguing that the Act was unconstitutional because the Commonwealth Parliament had no powers to declare a common rule. The power to declare a common rule in section 38(f) of the Act was a legislative power, and hence ultra vires section 51(xxxv) of the Constitution giving the Commonwealth Parliament the authority to confer a judicial power on the Court of Conciliation and Arbitration. The Federation counter argued that the common rule was incidental to section 51(xxxv) industrial arbitration, and would hence come under section 51(xxxix) powers covering incidental matters. The common rule was "necessary to effectual settlement of existing disputes and to the effectual prevention of future disputes".[93] The HCA opined that it was irrelevant whether the powers were legislative or judicial as the Act was based on models in New South Wales and New Zealand which possessed plenary powers of legislation as to industrial matters within their territorial jurisdictions.[94] The Court went on to estate that it was "immaterial whether any differences existed between the parties to be affected by the common rule".[95] However, the Court stated that:[96]

> "Where an authority is empowered to prescribe general rules for the governance of the community or any part of it the power so conferred is in its essence legislative. Sec. 38 (f) is then, as in my opinion it was intended to be, an attempted delegation of legislative authority to the Court to deal with matters over which, as has been pointed out by this Court on several occasions, the Parliament itself had no jurisdiction."

According to the Court, the Parliament had no jurisdiction because the common rule was not incidental to attainment of the object of arbitration for the settlement of industrial disputes as that term is used in subsection xxxv.[97]

The clearest link to efficiency in the judgment comes from Higgins J who, finding that the provision for a common rule is invalid,[98] linked the powers conferred as directed to one common end—the efficiency of the new federal government.[99] However, Higgins J added that "the usefulness of a power may be a ground for the amendment of the Constitution—it is not proof that the power by implication exists".[100] Higgins J was hence alive to the efficiency argument, but of the opinion that the same cannot be a legal reason for shifting a power, in this instance, from the States to the Federal Government. The judgment does not talk to efficiency directly, but invokes 'national identity' in its place. The Court states that "the mere fact that controlling economic crises is a matter of national interest does not lead to the conclusion that the Commonwealth has any power to control them apart from the powers expressly granted to it",[101] but acknowledge the stated purpose of the Act to "strengthen the Australian economy during a severe global recession".[102]

After *Engineers* however, the HCA was open to using efficiency as a criterion for shifting powers to the Federal Government, even though indirectly. For example, in *Pape*,[103] in the aftermath of the Global Financial Crisis (GFC), the Federal Government passed the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth), which allowed a one-off payment of upto AUD$900 to Australian Taxpayers. Bryan Paper challenged the constitutionality of the Act, arguing that the Commonwealth

[93] At 314.
[94] At 316 per Griffith CJ.
[95] At 318.
[96] At 318 per Griffith CJ.
[97] At 323 per Barton J.
[98] At 345.
[99] At 343.
[100] At 344.
[101] At para 504.
[102] At para 1.
[103] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

had no power to make such payments. The Federal Government countered that the Act was supported by, *inter alia*, the power under section 51, subsection xxxix as being incidental to the exercise by the Commonwealth Government of its executive power under section 61. By a margin of 4-3, the HCA agreed with the Federal Government. The judgment goes on to emphasise the national identity rationale for the decision:[104]

> "The executive power of the Commonwealth conferred by s 61 of the Constitution extends to the power to expend public moneys for the purpose of avoiding or mitigating the large scale adverse effects of the circumstances affecting the national economy disclosed on the facts of this case, and which expenditure is on a scale and within a time-frame peculiarly within the capacity of the national government".

The Court emphasised that the link between the GFC, efficiency, and the national scale, in the following terms:[105]

> "the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out above is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here."

Similarly, fiscal pressures create the strongest drive towards centralism due to the dependence of the States on the Commonwealth's wider funding powers. The funding powers of the latter are a classic issue of efficiency in revenue collection and debt raising encouraging centralisation, while efficiency in expenditure encourages decentralisation. Control of the purse would therefore negate the intent of strict constitutional allocation of roles.[106]

V CONCLUSION

The proposition delineated in this paper is an application of the Coase theorem to evolutionary constitutional context in the United States, Australia, and Canada. Put succinctly, the initial allocation of (residuum) powers as found in canonical constitutions is irrelevant. The distribution of powers (between national and constitutionally recognised sub-national governments) evolves towards an efficient constitution that allocates powers in order to reduce transaction costs. The bargaining process leading to this efficiency takes place through various channels, including the courts system, political processes, as well as through provisions in the respective canonical Constitutions. The canonical designs in Canada and Australia allow for implied and explicit concurrency of powers, which livens bargaining between federal and state or provincial governments. On the other hand, in the US, this process of 'fuzzification' has to be introduced by the Supreme Court.

On aggregate, for symmetric federations such as the United States and Australia, this efficient allocation gravitates plenary powers towards the Federal Government, while in asymmetric

---

[104] At para 8, per French CJ. The judgment provides a clear rationale flowing from the GFC and the efficiency of the national scale for mitigating its effects. See paras 18-33.
[105] At para 233 per Gummow, Crennan and Bell JJ.
[106] See for example Kevin Guerin, *Subsidiarity: Implications for New Zealand*, NZ Treasury Working Paper Series 02/03 (NZ Treasury, 2002) at 8-9, for a discussion on Australia in the context of the principle of subsidiarity.

federations such as Canada, the allocation is provincial. This trend can be seen in the relative level of federal versus state (or province) revenue. In the analysis, the evolution towards efficiency is illustrated through specific examples from all three jurisdictions.

In summary, the practical application of the canonical constitution, what Bagehot refers to as the efficient constitution, provides a different picture of the seat of 'plenary powers' (as assigned under 'residuum powers'). Figure 4 provides a summary of these findings.

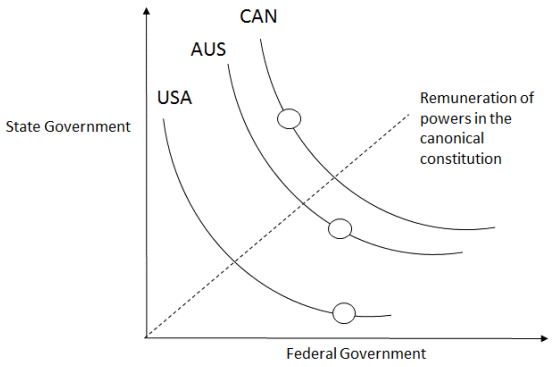

Figure 4: Summary of residuum and enumeration in the canonical Constitutions of the United States, Australia and Canada. Just like in Figure 1, the curves represent the canonical Constitutions. The 45° line indicates the (total) number of enumerated powers in the canonical Constitution. The white circles represent the 'residuum of powers' as revised under the efficient constitution.

The figure suggests a reversal of the canonical 'residuum of powers' in all three jurisdictions. The insight is the complementarity between the Watsonian 'prestige' rationale and the Bagehotian efficiency rationale. The legal transplant (the 'residuum powers') was diffused from a more developed legal system (the United States) to less developed systems (Canada and Australia), as predicted by Alan Watson. But this did not preclude the evolution of the legal system (the constitution) beyond this diffusion. First, there was a differentiation in the canonical Constitutions of Canada and Australia in relation to the enumeration of powers. Canada introduced implicit concurrency, while Australia introduced an explicit version of concurrency. Moreover, in all three jurisdictions we see a transition towards a Bagehotian efficient constitution (the constitution as implemented in practice through legal and political instruments) and away from legal transplant found in the canonical constitution.

As technology advanced over the twentieth century, national (and global) economies became increasingly interconnected. In turn, what was efficient in the eighteenth century became inefficient in later years. Efficiency is always shifting. Not so the canonical Constitutions which give effect to this efficiency.

References

ALA Schechter Poultry Corp v United States (1935) 295 US 495

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case) (1920) 28 CLR 129

Attorney General of Nova Scotia v Attorney General of Canada (1951) SCR 31

Australian Boot Trade Employees Federation v Whybrow & Co (1910) 10 CLR 266

Bagehot, Walter, *The English Constitution* (Champan and Hall, First ed, 1867)

Bagehot, Walter, *Physics and Politics* (Dodo Press 2006 [1872])

Balaguer-Coll, Maria Teresa, Diego Prior and Emili Tortosa-Ausina, 'Decentralization and efficiency of local government' (2010) 45(3) *The Annals of regional science* 571

Barankay, Iwan and Ben Lockwood, 'Decentralization and the productive efficiency of government: Evidence from Swiss cantons' (2007) 91(5) *Journal of public economics* 1197

' Bill of Rights ', (1789) 5(11) *The Founder's Constitution* <http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html>

Canadian Western Bank v Alberta (2007) 2 SCR 3

Cardozo, Benjamin, 'Law and Literature ' (1925) 14 *Yale Review* 699

Carter v Carter Coal Co (1936) 298 US 238

Champion v Ames (1903) 188 US 321

Charles Cushing v Louis Dupuy (1880) 5 AC 409

Chemerinsky, Erwin, 'The Federal Revolution ' (2001) 31 *New Mexico Law Review* 7

Chisholm v Georgia (1793) 2 US 419

Citizens Insurance Co of Canada v Parsons (1881) 7 App Cas 96

Coase, Ronald, 'The Problem of Social Cost ' (1960) 3 *Journal of Law and Economics* 1

Coleman, Jules L., 'Efficiency, Utility, and Wealth Maximization' (1980) *Yale Faculty of Law Scholarship Series, Paper 4202* <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5210&context=fss_papers>

Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921, Royal Commission on Bilingualism and Biculturalism

Cox, Gary W, *The efficient secret: The cabinet and the development of political parties in Victorian England* (Cambridge University Press, 2005)

Crawford, Jan, 'Roberts Switched Views to Uphold Health Care Law', (CBS News, July 1, 2012)

Dixon, Owen, 'Concerning Judicial Method ' (1956) 29 *Australian Law Journal* 468

Dow v Black (1875) LR 6 PC 272

Edwards v A G of Canada (1930) AC 114

Eisenberg, Theodore and Giovanni Ramello, *Comparative Law and Economics* (Edward Elgar 2016)

General Motors of Canada Ltd v City National Leasing (1989) 1 SCR 641

Gibbons v Ogden (1824) 22 US (9 Wheat) 1

Goldsworthy, J, 'Constitutional Interpretation: Originalism ' (2009) 4(4) *Philosophy Compass* 682

The Great West Saddlery Company Limited and others v The King (1921) UKPC 27

Gussen, Benjamen F, 'Subsidiarity as a constitutional principle in New Zealand' (2014) 12 *NZJPIL* 123

Hammer v Dagenhart (1918) 247 US 251

Hodge v The Queen (1883) 9 App Cas 117

Hoecke, Mark Van, *Law as Communication* (Hart Publishing 2002)

Hogg, Peter W. and Rahat Godil, 'Narrowing Interjurisdictional Immunity ' (2008) 42 *Supreme Court Law Review* 623

Hogg, Peter W. and Warren Grover, 'The Constitutionality of the Competition Bill ' (1976) 1(2) *Canadian Business Law Journal* 197

Howard, Colin, 'Sir Owen Dixon: Giant Who Enriched the Law' (1986) 15 *Melbourne University Law Review* 575

Huddart Parker & Co Pty Ltd v Moorebead (1909) 8 CLR 330

Hueglin, Thomas O. , *Comparative federalism : a systematic inquiry* (University of Toronto Press Incorporated, 2006)

The John Deere Plow Company Limited v Theodore F. Wharton and others (1914) UKPC 87

Kennedy, W P M, 'The Judicial Process and Canadian Legislative Powers' (1940) 25(2) *Washington University Law Review* 215

Kirkbi v Ritvik Holdings Inc (2005) 3 SCR

Kosko, Bart, 'Fuzziness vs Probability ' (1990) 17 *Interantional Journal of General Systems* 211

L'Union St. Jacques v. Bélisle (1874) LR 6 PC 31

Lefroy, A H F, *Canada's Federal System* (The Lawbook Exchange 2006)

Liquidators of the Maritime Bank v Receiver General of New Brunswick (1892) AC 437

Madison, James, 'The Federalist No. 45: "The Alleged Danger From the Powers of the Union to the State Governments Considered" ' in Alexander Hamilton, James Madison and John Jay (eds), *The Federalist* (Barnes & Noble Classics 2006)

Mas-Colell, Andreu, 'Efficiency and Decentralization in the Pure Theory of Public Goods' (Pt Oxford University Press) (1980) 94(4) *The Quarterly Journal of Economics* 626

Mason, Anthony, 'The High Court of Australia: A Personal Impression of its First 100 years' (2003) 27 *Melbourne University Law Review* 864

Mattei, Ugo, 'Efficiency in Legal Transplants: an Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3

Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014)

McCulloch v Maryland (1819) 17 US 316

National Federation of Independent Business v Sebelius (2012) 567 US 183

Nelken, David and Johannes Feest, *Adapting legal cultures* (Bloomsbury Publishing, 2001)

New South Wales v Commonwealth (1990) 169 CLR 482

New South Wales v Commonwealth (Workchoice Case) (2006) 229 CLR 1

New State Ice Co v Liebmann (1932) 285 US 262

New York v Miln (1837) 36 US 102

Pape v Federal Commissioner of Taxation (2009) 238 CLR 1

Parsons v Standard Fire Insurance Co (1880) 5 SCR 233

Posner, Richard, *Law and Literature: A Misunderstood Relation* (Harvard University Press 1988)

Prud'Homme, Remy, 'The dangers of decentralization' (1995) 10(2) *The world bank research observer* 201

Quick, John and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 2015)

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

Reference Re Same-Sex Marriage (2004) 3 SCR 698

Reisman, David A., *The Social Economics of Thorstein Veblen* (Edward Elgar 2012)

Risk, Richard, 'The Scholars and the Constitution: P.O.G.G. and the Privy Council' (1995) 23 *Manitoba Law Journal* 496

Ryder, Bruce, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations ' (1991) 36 *McGill Law Review* 308

Saunders, Cheryl, *The Constitution of Australia: A Contextual Analysis* (Hart 2011)

Saywell, John T., *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press 2002)

Scalia, Antonin, *A Matter of Interpretation* (Princeton University Press 1997)

South Australia v Commonwealth (First Uniform Tax case) (1942) 65 CLR 373

Swift & Co v United States (1905) 196 US 375

Taft, W Howard, 'Three Needed Steps of Progress ' (1922) 8 *American Bar Association Journal* 34

Tushnet, Mark, *The Constitution of the United States of America: A Contextual Analysis* (Hart Second ed, 2015)

United States v Darby (1941) 31 US 100

United States v EC Knight Co (1895) 156 US 1

United States v Lopez (1995) 514 US 549

Valin v. Langlois (1879) 5 App Cas 115

Veblen, Thorstein, *The Theory of the Leisure Class: An Economic Study of Institutions* (Penguin, 1994)

Victoria Commonwealth (Payroll Tax Case) (1971) 121 CLR 353

Waldron, Jeremy, *Law and Disagreement* (Oxford University Press 1999)

Watson, Alan, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993)

Webber, Jeremy, *The Constitution of Canada: A Contextual Analysis* (Hart, 2015)

Weber, Max, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978)

Wickard v Filburn (1942) 317 US 111

Zhou, Qi, 'The Evolution of Efficiency Principle: From Utilitarianism to Wealth Maximization' (Available at: http://works.bepress.com/qi_zhou/5/, 2006)

Zines, Leslie, *The High Court and the Constitution* (The Federation Press 2008)