Characterisation in Federations: Six Countries Compared

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Preface

This book originated in my dissatisfaction with what I saw as the obvious deficiencies in the law of my home country, Australia, relating to the interpretation of the division of powers between the federation and the States as it has been developed by the High Court of Australia over the last eighty-five years. I had made myself familiar with Canadian law on the same topic; and having discovered that they do it much better there, I became curious about whether other countries did it better too. On starting to investigate this topic, I was astonished to discover that there was little comparative material available on the general topic of approaches to characterisation in the various federations of the world.[1] While federalism is primarily a political and social phenomenon,[2] it requires legal infrastructure to make it work, and comparative analyses of this essential part of the infrastructure are missing.

The very welcome revival in interest in federalism as 'a liberating and positive form of political organisation'[3] made this gap in the literature particularly surprising. It is very pleasing to be able to contribute in some way towards filling it. In doing so, I have discovered that my dissatisfaction with Australian law has only increased. At the same time, however, I have also discovered that there are one or two things that are done well in the Australian law on this topic and which might profitably be presented to the wider world (and not as examples of what not to do).

This book is however not a textbook. It is rather an extended essay highlighting what I consider to be the most important and debatable features of the approaches to interpreting the federal division of powers in the six jurisdictions I have selected. There is no attempt at giving a complete coverage of everything. This essay emphasises the chief differences in approach across my six countries rather than uncontroversial or routine matters.[4] Those interested in the detailed contents of the lists of powers in any federation, the facts of the cases, or the interpretation

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1 An honourable mention should however go to the necessarily brief treatment in Craig/Walters, "The Courts, Devolution and Judicial Review" [1999] PL 274, 288-302.

2 Watts, *Comparing Federal Systems* (2nd ed., School of Policy Studies Queen's University, Montreal 1999), p. 15.

3 Watts, *Comparing Federal Systems*, p. 3.

4 The most obvious example of this is that there is no attempt here to collect "motherhood" or "boilerplate" statements such as those to the effect that granted powers must always be interpreted in context.

of individual powers, for example,[5] are advised to consult the law reports or the standard works on the country or countries concerned.

Nor does this essay aim at giving a comprehensive bibliography of everything ever written about characterisation in my six federations. Assembling a bibliography used to be a difficult task; with the advent of computer-based searches, it has become much simpler. No great service would therefore be performed by providing a comprehensive bibliography here.

On the other hand, a topic which I should like to have covered is that of federal powers implied from the fact of nationhood; but for a variety of reasons – some connected with the course of my research, others with the focus and length of the book – that topic will have to be left for another day.

Thanks are due to various governments which gave permission for the texts of their Constitutions to be reproduced in the Appendix. Further acknowledgements are contained there. I regret that the relevant provisions of the Indian Constitution could not be reproduced as an answer to requests for permission was not forthcoming from that government. Needless to say, a decision had to be made about how much to reproduce; the Amendments to the United States Constitution that confer power on Congress were omitted, for example, for reasons of space. A complete picture of the text of the Constitution of each country can be obtained only by referring to it in full. In these days of Internet searches this is not difficult, and accordingly the extracts reproduced in the Appendix were confined to what is necessary to provide a handy reference.

I wish to thank Prof. Jeff Goldsworthy LL.D., Prof. H.P. Lee, Dr Jeannie Paterson, Dr Dale Smith, Pat Dening, Patrick Emerton, Mark Jackson, Rupert Watters and an anonymous referee for their painstaking and extraordinarily useful comments on various portions of the draft of this book. Warm thanks are due to o. Univ.-Prof. Dr Bernd-Christian Funk and, in particular, Univ.-Ass. Dr Konrad Lachmayer for their most useful advice and assistance during an all-too-short trip to Vienna in January 2005, and for the latter's most helpful comments on a draft of the chapter dealing with Austria. I also wish to thank the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, which enabled a day's work to be as productive as a week's work might be elsewhere, and the Law Library of Monash University, without whose excellent collection and helpful staff this book would not have been possible.

Needless to say, all these people bear no responsibility for the opinions I express in this book, nor for any errors or omissions that may exist.

Thanks are also well overdue to the staff of the guest house of the Humboldt-Universität zu Berlin, who have facilitated a number of useful study periods in the great city of Berlin, including the one which produced two chapters of this essay. Thanks are due also to Dr David Steele for assisting with the preparation of the manuscript, and to Sandra Pyke, who prepared the index.

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5 Another example is the connotation/denotation distinction in Australian constitutional law. For an excellent discussion of this, see Zines, "Characterisation of Commonwealth Laws" in Lee/Winterton (eds.), *Australian Constitutional Perspectives* (Law Book, Sydney 1992), pp. 34-39.

A special word of thanks should also go to all those who inspired me to learn the German language, without which two chapters of this book would not have been possible. I should like to make special mention of Ernst Hebart as a particularly inspiring teacher.

I gratefully acknowledge the assistance of the Faculty of Law, Monash University, Melbourne, which provided two small grants to enable research on this topic to be completed and published.

All translations from the German language in the text (other than extracts from constitutional texts) are my own work. The Appendix contains the semi-official translations of the constitutional provisions concerned provided by the German and Austrian governments and reproduced by their kind permission; occasionally there are differences between the translations from German in the text and those in the Appendix. Where this occurs, it is because I considered my translation more accurate or elegant, and retained it also as a way of emphasising that the translation of legal texts is very rarely an exact affair admitting of only one right answer.

There are no names of parties in cases in the German and Austrian sections of this book, as their practice is to publish cases anonymously.

It should also be pointed out that my decision to provide the citations of cases from the English-speaking world in accordance with English conventions is a deliberate one, not one made from ignorance of other practices.

The law is stated as it was available to me in Berlin at the end of January 2005, and in Melbourne at the start of March 2005, although I was able to include one or two later developments.

Greg Taylor
Melbourne, 8 June 2005

Table of contents

1. Introduction

The word "characterisation" has been denounced as a word 'uncouth for grammarians and those who care for English undefiled, [but] accepted and useful in the jargon of Australian constitutional law'.[6] It may be doubted whether the word deserves such obloquy: a glance at the Oxford English Dictionary[7] shows that it has a variety of senses outside the law and can be traced back to 1570. More important for this essay, however, is the fact that the word is used in the constitutional law of many federal countries.

Characterisation is the process by which it is determined whether a law enacted by a constituent unit of a federation is included within the subject-matters about which the constitutional division of powers between levels of the federation permits that unit of the federation to legislate. In its narrow sense it involves assigning a "character" or a description to a law, saying what the law is about. In its broader meaning the process of characterisation includes in addition questions relating to the scope of grants of legislative power – that is, the interpretation of the words of the power-conferring or power-denying provision to determine what they mean, how far they extend.[8]

A familiar example is a power over "trade and commerce". Some version of this power – often, but not always, restricted to inter-State trade and commerce – is found in the constitutions of several federal countries as a power lodged with the federation.[9] If it is suggested that a law might (or might not) be capable of being supported under this heading, and the Courts decide the issue one way or the other, they must, in the first place, be acting on a definition (stated or assumed) of "trade and commerce". (Does it, for example, include manufacturing that is preparatory to selling the manufactured goods?) In other words, they determine the scope of the power. Having done so, they must characterise the law (in the narrow

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6 *Worthing* v. *Rowell & Muston* (1970) 123 CLR 89, 130.

7 2nd ed., Clarendon Press, Oxford 1989, *s.v.* "characterization". It may also be found in Johnson's dictionary, where the first meaning assigned to it is 'To give a character or an account of the perfonal qualities of any man'.

8 Booker/Glass/Watt, *Federal Constitutional Law: An Introduction* (2nd ed., Butterworths, Sydney 1998), p. 48; Hogg Q.C., *Constitutional Law of Canada* (4th ed. (looseleaf), Thomson Carswell, Scarborough 1997-2004), p. 15-6.

9 For further details, see Taylor, "The Commerce Clause: Commonwealth Comparisons" (2001) 24 Boston Coll Int & Comp LR 235. In Germany the principal provision is Art. 74 (1) (11) of the Basic Law, which confers powers on the federation over economic affairs and then goes on to provide several examples of what is included. In Austria, there is a power over trade and industry in Article 10 (1) (8).

sense) by comparing the law with the definition of trade and commerce (stated or assumed) and deciding whether the law matches the description (informed by the definition) of trade and commerce.

If the process is described in that way, it might be thought that characterisation in the narrow sense would be a relatively simple part of the process of determining the validity of a law, and that most of the effort would be concentrated on determining the scope of the power (defining "trade and commerce" in the example given rather than considering whether a law was on that topic once defined). However, the history of judicial review in Canada and Australia, especially, shows that a great deal of thought has been devoted to questions of characterisation in the narrow sense. Questions that Courts must answer include: does it matter if a law might legitimately be described as one about something else as well as trade and commerce? Is the legislature's aim or purpose in enacting the law relevant, or only the formal legal operation and effect of the law it enacts? Is it relevant to consider the effect of characterising a law as one about "trade and commerce" on the distribution of powers amongst the constituent units of the federation, so that a law should not be thus characterised if doing so would deprive the other level of government of too much power? Or should that consideration be ignored, the words "trade and commerce" used as the only measuring-stick, and the question accordingly approached on the same basis as one might approach the characterisation of a municipal by-law[10] – without any attempt to consider the effect of the decision on this issue on the balance between central and local powers?

These are questions which involve important issues about the interpretation of constitutions, the federal idea, and the manner in which the meaning of language is ascertained and applied. They are also very important on the ground, because the answers to them determine who gets to exercise power in federations. Surprisingly few comparative analyses have been produced on this topic. Twenty years ago, one work was produced by Dr Christopher Gilbert.[11] It dealt with Canada and Australia. It was the subject of extraordinarily unreasonable criticism by one author[12] given that it was the first major work of its kind in the field and that it performed the task set for it well.

However, the time has come to look at the question again. This is partly because twenty years have passed since Dr Gilbert published his analysis, and many interesting developments have occurred in Canada since then. One need only mention the pair of cases constituted by *MacDonald* v. *Vapor Canada*[13] and *General*

[10] This author believes that he has seen this excellent comparison made elsewhere by someone else, but (if this recollection is accurate) cannot locate the source.

[11] *Australian and Canadian Federalism 1867 – 1984: A Study of Judicial Techniques* (Melbourne U.P., Melbourne 1986), esp. Chh. 2 – 5, 10.

[12] The reference is to the so-called errors and omissions mentioned in Thomson, "Comparative Constitutional Law: Entering the Quagmire" (1989) 6 Arizona Jo Int & Comp Law 22, 40. It is scarcely likely that Dr Gilbert was unaware of the provisions cited there, for example. He has simply omitted them in the interests of keeping to the point.

[13] [1977] 2 SCR 134.

Motors of Canada v. *City National Leasing*.[14] In addition, the net should be cast a bit wider than just Australia and Canada.

Characterisation doctrine exists in a number of world federations. The selection of the six countries I have chosen for investigation needs little explanation.[15] All are long-standing federations in which full-scale judicial review of legislation on federalism grounds has been practised routinely and frequently for decades, and in which it has accordingly been possible for general doctrines relating to characterisation to emerge and assume definite contours.

I should gladly have dealt with the law of several other federal or quasi-federal countries, all of which are developing countries within the Commonwealth of Nations, but the information available to me suggests that the questions dealt with here do not play a great role in their jurisprudence.[16]

A special word is also necessary about the United States. That country has also recently made a new beginning in judicial review on federalism grounds: such review was to all intents and purposes suspended between 1937 and 1995,[17] mostly as a result of flagrant abuses of power by the Supreme Court of the United States in the years leading up to 1937. The United States might have been omitted from consideration if the existence of settled characterisation doctrine were the only criterion for inclusion. But of course that country is far too important, and recent developments there far too interesting, to justify its omission.

The revival of federalism-based judicial review in the United States since Dr Gilbert's work was published makes it possible to consider what solutions to dilemmas associated with characterisation have been adopted by the Supreme Court of the United States – or, perhaps more accurately, what assumptions about the process of characterisation that Court is silently making as part of its renewed concern for federalism, and where those assumptions fit in the spectrum of approaches to characterisation. The revival of judicial review on federal grounds in the United States, although welcomed by this author at least,[18] has not been accompanied by any consideration on the part of the Supreme Court of the United States of the choices to be made when characterising laws. To some extent this is not surprising, given the risible nature of the connexion alleged between the laws recently invalidated by the Supreme Court of the United States and the federal powers under which those laws were said to be supported. But, as we shall see, the time may well come when the Court is faced with a case which can only be dealt with if it – knowingly or unknowingly – adopts an approach to characterisation.

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14 [1989] 1 SCR 641.

15 After writing these words and indeed virtually the whole book I discovered that my list of six was the same as Geoffrey Sawer's list of five full federations plus India: Sawer, *Modern Federalism* (2nd ed., Pitman, Carlton 1976), p. 147. Although much has happened since that work was written, I have chosen to concentrate on longer-standing federations whose law has had time to develop.

16 See however below, fn 507.

17 Tribe, *American Constitutional Law* (3rd ed., Foundation, New York 2000) vol. I p. 816.

18 "The United States Supreme Court Re-Considers its View of the Commerce Clause" [2001] PL 281 (with references to other views).

Another country in which characterisation has been undertaken without much reflection on the choices implicit in the process is Germany. The opportunity is taken here to look beyond the usual English-speaking suspects and to consider the process of characterisation in another large federal country in which, somewhat surprisingly given the usual eagerness of German lawyers to deal with theory, the process of characterisation has proceeded largely unreflectively and unreflected upon.

Austria is a country whose constitutional law is virtually unknown to the outside world. It follows an extraordinarily interesting originalist method of characterisation which will be the subject of detailed analysis below. It will be suggested that certain features of the Austrian constitutional system make the originalist approach an apt one in that country.

Attention will also be paid to the constitutional law of India. Doubts have been expressed by a constitutionalist of the highest standing[19] about India's title to be considered a federal country, chiefly owing to the wide-ranging powers of intervention that the centre enjoys in the affairs of the States. I do not wish to enter that debate here.[20] Nevertheless, the division of powers and characterisation doctrine are matters which are the subject of much jurisprudential analysis in India, which also deserves to be known to the wider world. India is, after all, the world's largest federation (in name at least) as well as the world's largest democracy. The maintenance, over a period of almost sixty years, of a democratic and (apparently) federal system in a country as diverse as India is surely one of the most impressive achievements of the twentieth century. For that reason alone, India fully deserves a place in this essay. Something will also be said about the approach to characterisation adopted in Pakistan, which is similar to that in India.

Finally, the opportunity is also taken to say something about the law of Scotland, South Africa and Malaysia.

In those countries characterisation doctrine is a work in progress owing to the recent date of the creation of regional legislatures and/or the lack of case law setting out an approach to characterisation. The arrangements for devolution to Scotland are particularly interesting, as they provide the only example known to me of a statutory provision laying down the correct approach to characterisation to be followed by the Courts. In all other countries, the Courts have been thrown on their own resources.

The law of each of those three countries is also of inherent interest for a number of reasons, as will be seen, and accordingly a discussion of the three works in progress – Scotland, Malaysia and South Africa – has not been omitted. Until the shape of their law is settled by the emergence of a substantial body of case law, however, they cannot be included in a full-scale comparison. For the same reason, the law of Pakistan is not treated at length.

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[19] Wheare, *Federal Government* (4th ed., O.U.P., 1963), pp. 26-28; see also *Bommai* v. *Union* [1994] AIR SC 1918, 1947-1950.

[20] See however Watts, *Comparing Federal Systems*, pp. 14, 27.

2. Australia

a. Doctrine

In basic structural outline, the Australian Constitution follows the American pattern and contains in essence one principal list of federal concurrent powers (in s 51 of the Constitution), and also a short list of federal exclusive powers (s 52). There is no list of State powers. The States have the residue of unassigned powers.

There are however some important differences between the Australian list of concurrent federal powers and the American list. For one thing, the Australian list is longer – it contains forty items – and more detailed. It includes some matters (the outstanding example is perhaps marriage, divorce and the custody of children – s 51 (xxi), (xxii)) which do not appear on the American list. It also confers powers 'with respect to' the listed areas, and then simply names them, unlike the American list which often inserts a verb indicating what sort of things can be done to the area concerned. Thus, the American power equating to the Australian power 'with respect to [...t]rade and commerce with other countries, and among the States' (s 51 (i)) is a power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.

There are few exclusive powers in the Australian s 52. The two powers named there are the seat of government of the federation and places acquired by it for public purposes, and departments of the public service transferred to it by the Constitution. A few other provisions of the Constitution make federal power exclusive; by far the most important of them is s 90, conferring exclusive federal power over duties of customs and of excise, and the granting of bounties on the production or export of goods. Under s 115 a State may not 'coin money, nor make anything but gold and silver coin a legal tender in payment of debts'. With the exception of prohibitions on State action and federal exclusive powers, State power continues (s 107) but subject to pre-emption by federal legislation (s 109). But there is no list of State powers – as we shall see, quite a significant omission for characterisation doctrine.

Modern Australian characterisation doctrine traces its origins to the early 1920s and the seminal case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*[21] – the famous *Engineers Case* – although important parts of it are found in their fully evolved form only much later.[22] The doctrine shows its age, and nowa-

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21 (1920) 28 CLR 129.

22 Zines, "Characterisation", p. 33; Zines, *High Court and the Constitution* (4th ed., Butterworths, Sydney 1997), p. 32 (pointing out that the rule against considering legislative

days seems in at least one important respect to be distinctly outdated, although it is settled doctrine in Australia and not in the least danger of being overthrown. A comparison of Australian doctrine with that current in Canada will show, oddly enough, that it is the Canadian doctrine, formulated under a constitution over thirty years older than the Australian, which seems both more satisfactory from the point of view of the maintenance of the division of powers in federations and more in tune with modern approaches to the meaning of legislation. However, this is partly because the Canadian Constitution contains lists of both federal and provincial powers, while the Australian Constitution lists only federal powers, not State ones.

The *Engineers Case* contained a simple message as far as ascertaining the scope of power is concerned. In it, the High Court of Australia stated that, in deciding the meaning and extent of federal powers granted by the Constitution, no assumption should be made that any particular power was retained by the States. Earlier attempts in the first two decades of the Constitution's operation to develop principles for determining the scope of power which took account of powers supposed to be withheld from the grant to the federation on the grounds that they were expected to remain with the States were condemned as disloyal to the text, the product of judicial law-making and leading to uncertainty.

The Court stated:

> The more the [earlier] decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognised principle of the common law underlying the Constitution, but on implication from what is called the principle of "necessity", that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty [...].
>
> [...]
>
> [W]here the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power to indicate it in the Constitution.
>
> [I]t is a fundamental and fatal error to read s 107 as reserving any power from the [federation] that falls fairly within the explicit terms of an express

purpose is not found in the *Engineers Case*). Here, no attempt is made to trace the historical evolution of the doctrine presented.

> grant in s 51, as that grant is reasonably construed, unless that reservation is explicitly stated.[23]

The Court accordingly rejected the approach of the preceding decade and a half to the question. Henceforth, each federal power was to be read broadly and in its "natural" meaning without regard to the effect that doing so would have on State power and without *a priori* presuppositions that any particular area of governmental authority belonged to the States.

There certainly is something in the points made in the extract about the uncertainty and confusion in the early decisions of the Court about the unexpressed limitations on federal power. This is not the place to go into the detail of those difficulties. It may however be said that it was perhaps unfair to condemn case law of less than two decades' vintage for not yet having settled into a definite pattern. When we come to look at Canadian case law, we shall see that these things take time and effort on the part of the Courts, but with sufficient investment dividends do become apparent.

The *Engineers Case* did not lay down any principle under which the Courts could operate in characterising a law in the narrow sense – determining what a law is about. The principles have evolved since and are equally notable for their simplicity. The basic principle is that the relevant consideration is the legal operation of the law rather than its purpose. (We shall see later that there is a group of powers which form an exception to this principle, but there are few of them and they can safely be ignored for a moment.) The legal operation of the law is determined by 'the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges'.[24] Can it be said that the law operates on – changes the rights, duties, powers or privileges attached to – the subject-matter of the power granted to the federal legislature? This question is to be distinguished from the purpose of the law and also from its practical, as distinct from legal, effect on rights, duties, *etc.*[25] Such considerations are irrelevant in the task of characterising a law.

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23 (1920) 28 CLR 129, 141f, 154.

24 *Bank of New South Wales* v. *Commonwealth* (1948) 76 CLR 1, 187; more recently, see *Grain Pool of Western Australia* v. *Commonwealth* (2000) 202 CLR 479, 492; for further statements to the same effect see Zines, "Characterisation", p. 52.

25 *South Australia* v. *Commonwealth* (1942) 65 CLR 373, 424. The refusal to consider practical as distinct from legal effect is most important in relation to the power over inter-State trade and commerce. Here, the Court's refusal to consider practical effect has meant that the post-1937 jurisprudence of the Supreme Court of the United States on the commerce clause has not been followed in Australia. This is therefore one of the few instances in which legalistic characterisation doctrine has advantaged the States rather than the Commonwealth: Zines, "*Engineers* and the 'Federal Balance'" in Coper/Williams (eds.), *How Many Cheers for* Engineers? (Federation Press, Sydney 1997), pp. 85f. See also Mason C.J., "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 FLR 1, 17.

The irrelevance of the purpose of a law to characterisation extends not only to the motives of those who enacted it – which are after all likely to be rather varied and might include such motives as pleasing the voters or attracting corporate donors – but also to what might be called the "official" purpose of the law, the place and function of the norms it creates within the more or less coherent system of law which is itself a cog in the machine "society".

What has just been said will become clearer when contrasted with the Canadian practice. Even so, some Australian decisions illustrate the distinction clearly enough. In *Murphyores* v. *Commonwealth*[26] a federal law prohibited the export of sand from a particular island off the coast of Queensland until the requirements of the federal *Environment Protection (Impact of Proposals) Act* 1974 were satisfied. Concern existed about the environmental consequences of mining (rather than actually exporting) the sand. As the State government declined to act, the federal authorities intervened and prohibited the export of sand mined on the island concerned. Now the federation has no power over environmental matters in Australia. If, therefore, the purpose of the law – the protection of the environment – had been the decisive criterion in characterising it, there would have been a strong argument for its invalidity. However, the direct legal operation of the law was to prohibit the export of a certain item of trade. The law therefore fell within s 51 (i) of the Constitution, which confers power on the federation over inter-State and international trade and commerce. The purpose of the law – to protect the environment – was apparent on its face (indeed, from its name), but irrelevant to its characterisation.

b. Criticism: ignoring purpose in characterisation

It should be said that there are certain advantages to this system. It makes deciding cases much easier than it would be if purpose and unexpressed assumptions about powers retained by the States had to be considered as well. It makes a claim that the Courts have regard to legal criteria only, and not to the merits of the law being characterised, somewhat easier to maintain. It is an approach that makes the Court look as non-political as possible because it minimizes the need to go behind the formal legal operation and terms of the law. It also avoids a certain circularity which would be present if the ruling doctrine demanded that a law which has a legal operation on trade and commerce should also concern itself as a matter of purpose, or in reality, with trade and commerce. After all, trade and commerce are not ends in themselves, and the legislature will often want to restrict, regulate or prohibit the carrying on of trade and commerce because it considers that trade and

In *Grain Pool*, (2000) 202 CLR 479, 492, the Court appears to have held that practical operation is relevant, although the cases cited for this general proposition in fn 65 of the judgment suggest that this is an unwarranted import from the incidental power, discussed below; it may possibly also be a consideration relevant only to the federal power considered in that case because of the nature of patents *etc.* (see the reference to 'practical affairs' at 502).

[26] (1976) 136 CLR 1.

commerce of a particular type has a detrimental influence on society. To demand that the legislature should restrict itself to selecting criteria for the restriction *etc.* of trade and commerce that are connected with trade and commerce as a matter of reality, or in purpose as well as in form, would isolate trade and commerce from the impact they have on society and require the drawing of disputable distinctions between the effect of trade and commerce on society "as" trade and commerce and, perhaps, the merely "incidental" effects of trade and commerce divorced from their character "as such". It does not take much reflection to see that this might produce much dubious dogma. It is certainly far easier to look at trade and commerce in more formal terms. (That does not of course remove all need for judicial choice – is, for example, manufacturing also trade and commerce, or merely preparatory to it? – but, again, the judicial choice required here is of a familiar kind.)

On the other hand, ease of application is not the sole criterion of the merit of constitutional doctrine. Judges are paid to do hard intellectual work. The refusal of the Australian Courts to consider the purpose of a law as distinct from its formal legal operation also might be said to perpetuate a formalist conception of law as a phenomenon isolated from society, rather than what it is – namely a means to an end in a broader, and highly complex, society in which legislative power is divided between two levels of government on the basis of subject-matters. It also encourages the level of government which is restricted to a list of defined powers – the federation – to search around for "fig leaves" within its list of powers to cover its desire to go beyond them.

Surely it would sometimes be possible to determine whether the legislature is merely fastening on an aspect of an integrated transaction in order to achieve ends that are actually beyond its assigned powers. A power over trade and commerce, for example, might sensibly be used to enact a commercial code, laws about contracts in trade and commerce, prohibitions of restrictive trade practices and so on, but not to protect the environment.

Dawson J., for example, has expressed the view that a law applying to persons who are the subject of federal power (such as aliens, that is in essence non-citizens) would not be valid if it was merely 'a law upon some area of activity which is engaged in by persons generally', not just the persons over whom the federal Parliament has power, and that 'the way in which the law operates upon them must be such that they impart their character to the law'.[27] One might require something along the same lines of a law about an activity (such as trade and commerce): it must not be about something which anyone can do, but the law must in some way have significance for trade and commerce because it deals with a special characteristic of trade and commerce which they do not share with all, or at least most, other activities that the human race engages in, or which define the activity as trade and commerce. Such suggestions, however, have never been taken further, and some intricate thought, and above all experience in operating such a rule that can be provided only by case law, would be required if they were to become the accepted view.

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27 Re *Dingjan;* ex parte *Wagner* (1995) 183 CLR 323, 345f.

Current Australian doctrine is unsatisfactory for another reason too. It is glaringly inconsistent with the fairly recent (re-)discovery by the High Court of Australia that, in considering whether constitutional *prohibitions* are infringed, it has no option but to look to the substance and the practical effect, and not just to the legal form, of the laws which are alleged to infringe the prohibitions.[28] Even in relation to a topic as closely connected with questions of structure as the separation of powers, it has been held to be legitimate to take into account the purpose of a law which is alleged to infringe the doctrine. Very recently, in dealing with an argument that a law usurped judicial power by providing for punitive detention without trial, Kirby J. had this to say – and the emphases are in the original:

> The determination of the character of a federal law, judged by the criterion of whether it is punitive or not, cannot rest on the purpose of the law alone; still less its asserted purpose. It always remains for a Court to decide, in case of a contest, whether the *character* of the law is one that prescribes conduct that is, or may become, punitive. In making that assessment, a Court will have regard not only to the claimed or apparent *purposes* of the law but also the objective *effects* of the law and its practical operation.[29]

Compared with this more modern doctrine, the rule against considering purpose in characterisation in federalism cases looks very isolated, like the relic of a bygone era of formalist "legalistic" interpretation that it is.

As has just been said, one of the defects of the Australian approach to characterisation (in the narrow sense) is that it isolates the law from the social facts with which it has to deal and refuses to regard as relevant obvious real-world consequences which were the legislature's purpose in acting at all. In this respect, the theory perhaps owes something to Kelsenian[30] conceptions of law that were current when it was in the process of development. It appears to regard the law as a self-contained system of norms which mostly react with each other and occasionally act on states of affairs, and thus to assume that there can be such a thing as a closed system of norms which can be described as a phenomenon existing in splendid isolation from the society which those norms regulate and to which they provide facilities.

Professor Lederman Q.C. has described the error involved in this way of thinking most acutely, speaking of the more sophisticated approach the Courts of Canada have adopted to the interpretation of the Canadian Constitution. The contrast with the Australian approach is revealing:

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28 *E.g. Ha* v. *New South Wales* (1997) 189 CLR 465, 498. See Winterton, "The High Court and Federalism: A Centenary Evaluation" in Cane (ed.), *Centenary Essays for the High Court of Australia* (Butterworths, Sydney 2004), p. 211; Walker, "The Seven Pillars of Centralism: *Engineers Case* and Federalism" (2002) 76 ALJ 679, 694, 704.

29 Re *Woolley;* ex parte *Applicants M276/2003* (2004) 210 ALR 369, 419. See also at 385, 391, 393.

30 Or Austinian: see Gilbert, *Australian and Canadian Federalism*, p. 12.

> It is important to insist that these enumerated classes [of legislative power] are categories of legal rules and not of facts for the implications of this are too frequently forgotten. Thus concrete facts alone cannot provide the mass of data appropriate for grouping under these categories, since facts as such are legally neutral. Or, to put it the other way around, facts alone cannot be characterised by subsumption within these classes as they are not classes of fact. They are classes of laws depending on normative or prescriptive criteria [...].[31]

Thus there is no escape from making a *judgment* that a law is about (or 'with respect to') trade and commerce (for example) based on an assessment informed by 'normative and prescriptive criteria' of what trade and commerce are and what it is for a law to be a law 'with respect to' something. One cannot simply look at a law and make that judgment without any theoretical apparatus, however simple it may be. The legal operation of the law is a neutral fact until an informed judgment is made of the significance of that fact.

If we observe something that is trade and commerce, that does not mean that any law that regulates that activity is about trade and commerce. It might really be about something else, such as the environment. Whether that is so cannot be determined by looking at the facts of the case from all possible angles (let alone from just one angle), but only by making a further legal judgment, informed by an approach to characterisation, about whether the law fits within the legal category of laws about – or, as the Australian Constitution puts it, 'with respect to' – trade and commerce. The Australian approach conceals this reality.

The effect of the Australian doctrine on the federal distribution of powers should also be noted. The concentration on legal operation rather than purpose in characterisation means that, as a rule, federal powers are greatly enlarged; for the federation, in the complex chain of transactions which characterises any enterprise in the modern world, need find only one of them (such as exporting the sand) over which it has power in order to be able to exercise power over the whole enterprise. The ruling doctrine, in other words, splits up integrated activities with one purpose into as many possibilities for federal law-making as there are transactions within that activity.

The Australian approach accordingly results in statutes which promiscuously fasten on all available transactions that are within federal power in the interests of regulating as much as possible by catching various instances of legal operation. Here is one of many possible examples of this from s 6 of the *Trade Practices Act* 1974, in which sub-section (3) is drafted so as to pick up anything that can be got at under the federal power over 'postal, telegraphic, telephonic and other like services' (s 51 (v)):

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[31] Lederman Q.C., *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Butterworths, Toronto 1981), pp. 236f.

(3) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by subsection (2), the provisions of Part IVA, of Divisions 1, 1A and 1AA of Part V and of Divisions 2 and 3 of Part VC have, by force of this subsection, the effect they would have if:

(a) those provisions (other than sections 55 and 75AZH) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and

(b) a reference in those provisions to a corporation included a reference to a person not being a corporation.

And sometimes it would not be terribly hard to determine that the purpose of a law has in reality nothing to do with the power conferred. For example, there have been cases, such as *Murphyores*, in which the federal Parliament has authorised the selection of participants in activities over which it has power in accordance with criteria which are stated in legislation and have nothing whatsoever to do with the power allocated to the federation. As such legislation has a direct operation on the subject-matter of federal power, its selection of criteria which have nothing to do with the federal power is, under the ruling doctrine, irrelevant to its validity.

In one respect, however, the ruling doctrine does appear more worthy of assent and less formalistic – it recognises that a law may be about more than one thing, and that therefore, in characterising laws, it will not be right to assume that every law has one character and one character only. For example, a prohibition of sand mining for export on an island has a direct legal effect on sand mining, islands and exports. If it were necessary to ascribe only one character, or a dominant character, to every law, it would be necessary to decide which of those characters is its sole or dominant one, but the ruling doctrine obviates that by decreeing that one character only of a law need fall within the list of federal powers for the law to be valid.

This recognises that the search for the "true" character of a law may be a foolish enterprise having regard to the complexity of many laws, the fact that they can be looked at from a large number of angles together with the consideration that the importance of various aspects of them may well depend on the angle of observation. It also recognises the fact that the Australian Constitution contains no list of State powers and there is accordingly no list of non-federal powers (as there is in Canada) which might suggest alternative headings under which a law falling within the federal list might have to be considered.

One might however think that there must come a point at which a law's operation on something is so trivial or incidental in relation to its principal effect or effects that the law should not be considered a law 'with respect to' the thing trivially or incidentally affected by it. As Latham C.J. once stated:

> A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter: for example, income tax laws apply to clergymen and to hotel-keepers as members of the public; but no-one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or to banking.[32]

Given, however, the extremely formalistic nature of Australian characterisation doctrine as it has continued to develop, it is open to considerable doubt whether the same common-sense view could still be taken. The *reductio ad absurdum* of the current approach was reached in three decisions of the High Court of Australia in 1970[33] which indicated that State laws even of the most general character (such as regulations about health and safety at work under the *Scaffolding and Lifts Act* 1912 of the State of New South Wales) did not apply to areas subject to the Commonwealth's exclusive legislative power under s 52 (i). Such perfectly general laws also had, as one of the thousands of characters that might truly be assigned to them, that of being applicable in Commonwealth places, and, as the Commonwealth's power was exclusive, that character, exiguous though it was, was enough to invalidate them.[34]

The doctrine of dual (perhaps better: multiple possible)[35] characterisation, while certainly defensible as a view about the character of laws, has the unfortunate consequence of allowing the federation to expand its powers beyond the original plan. Rather than searching for the "true" nature of any law, the Courts will allow it if one of its characters falls within the list of federal powers. Given that the list now contains forty items, some of them very wide-ranging,[36] it is a rare law which is not at least a good candidate for consideration under one or more of the powers allocated to the centre. But again this might be seen, in part, as the result of the ab-

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32 *Bank of N.S.W.*, (1948) 76 CLR 1, 186.

33 *Worthing*, (1970) 123 CLR 89; *Attorney-General (New South Wales)* v. *Stocks & Holdings (Constructors)* (1970) 124 CLR 262; *R* v. *Phillips* (1970) 125 CLR 93. As the matter is now covered by Commonwealth legislation, the Court has recently refused to reopen the principal of these decisions: *Permanent Trustee Australia* v. *Commissioner of State Revenue (Victoria)* (2004) 211 ALR 18, 21. But see *Paliflex* v. *Chief Commissioner of State Revenue (New South Wales)* (2003) 202 ALR 376.

34 This is well explained in Goldsworthy, *The Language of Excluded Sub-Matters in Australian Constitutional Law* (LL.B. (Hons.) thesis, University of Adelaide, *s.d.* (1976?)), Ch. 4.

35 *Actors and Announcers Equity Association of Australia* v. *Fontana Films* (1982) 150 CLR 169, 190-194. For more recent authority, see *Grain Pool*, (2000) 202 CLR 479, 492.

36 The list is accordingly much longer and more generous than that in the United States: Mason C.J., (1986) 16 FLR 1, 13, 15.

sence of a list of State powers which might have compelled the Courts to ascribe one character only to a law in order to determine which list it appears in.

The concept of a law as about many things, as against a conception of laws as principally about one fixed thing, will recur throughout this book. A more complete discussion of it will have to await the contrast provided by Canada and the dilemmas thrown up by the emerging case law of the United States.

What can be said without the need for any comparator is that current Australian doctrine contains a number of inadequacies and inconsistencies. The flaw in the ruling doctrine's insistence that purpose is irrelevant and legal operation is all is exposed by the following example suggested by Menzies J. in *Fairfax* v. *Federal Commissioner of Taxation*.[37] His Honour said:

> Whether or not a law is one with respect to taxation cannot be determined by looking at its economic consequences, however apparent they must have been at the time of its enactment; nor is an enquiry into the motives of the legislature permissible. There may be laws ostensibly imposing tax which, nevertheless, are not laws with respect to taxation. For example, a special prohibitive tax upon income derived from the sale of heroin or from the growing or treatment of poppies for the production of heroin may not be a law with respect to taxation but rather a law made for the suppression of the trade in that drug by imposing penalties described as taxes for participation in it.

The subtle move to purposive characterisation – '*for* the suppression of the trade' – is worth noting. His Honour continues:

> The reason for denying to such a law the character of a law with respect to taxation would not be either its economic consequences or the motive behind its enactment. It would simply be that its true character is not a law with respect to taxation.[38]

With the exception of what now seems a somewhat naive reference to 'true character', this has considerable intuitive appeal. The difficulty is explaining it in accordance with current doctrine. How is the 'true character' of the anti-heroin law to be ascertained other than by looking beyond its legal operation – 'the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges';[39] here: a tax on the sale of heroin – and passing, *via* the history, tradition and purpose of the prohibition of hard drugs in the criminal law, on to the underlying (criminal-law) purpose of the legislature in enacting such a law?

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37 (1965) 114 CLR 1.

38 At 17f. See also *R* v. *Barger* (1908) 6 CLR 41, 97f; *Cunliffe* v. *Commonwealth* (1994) 182 CLR 272, 354.

39 See above, fn 24.

Indeed, current doctrine appears to require us to reject this common-sense analysis, as a majority of the Court pointed out in commenting on the passage just quoted in 1987:

> [I]t does not explain how the true character of the hypothetical law as a law for the suppression of the noxious trade, rather than a law with respect to taxation, is determined. [...T]he illustration scarcely stands well with the principle on which Kitto, Taylor and Windeyer JJ. decided the case. [...That principle] has been applied by the Court in later cases. In characterising a law the Court has regard to its operation, to what the law does in the way of creating rights and obligations, and how it operates within the permitted area of power. It matters not that the provisions which so operate may be intended to achieve some other purpose.[40]

It is easy to see that, without some such corrective as a consideration of purpose, the received doctrine would permit half a criminal code to be enacted under the guise of "taxation". The doctrine has broken down here because the interpretation of the word 'taxation' in s 51 (ii) is unrestrained by any purposive element, making its reach too broad by, on the face of things, permitting anything that calls itself and has the form of a tax to be accepted as a tax. But this ignores the purposive element in taxation. Without it, how could we know that income tax is not a penalty for earning income?

This is not the place to attempt the difficult task of developing criteria for distinguishing between a fine and a tax. We need merely note the purposive element in taxation which the ruling doctrine compels us to ignore. Of course taxes are often imposed in the hope that they will also encourage or discourage a particular activity. Sometimes this is even said to be the principal purpose of this or that tax, such as the tax on tobacco. A tax may have more than one purpose. But if there is no purpose at all of raising revenue for general governmental purposes, but rather the purpose of prohibiting conduct entirely and punishing those who engage in it in the manner of the criminal law, we are talking about a fine, not a tax. That is why the heroin "tax" would be a fine. It is not good enough to say, as a majority of the High Court of Australia did in 1993, that '[i]f a law, on its face, is one with respect to taxation, the law does not cease to have that character simply because Parliament seeks to achieve, by its enactment, a purpose not within Commonwealth power'.[41] If, as with the heroin tax, the *sole* purpose of the tax is to discourage a certain activity, and there is no real purpose of raising revenue, what purports to be a tax is in fact a fine.

A solution to the "heroin tax" problem is simple as soon as the outdated doctrine prohibiting reference to purpose is abandoned and the Courts are permitted to

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40 *State Chamber of Commerce and Industry (Queensland)* v. *Commonwealth ("Second Fringe Benefits Tax Case")* (1987) 163 CLR 329, 353f; see further Zines, *High Court and the Constitution*, p. 31.

41 *Northern Suburbs General Cemetery Reserve Trust* v. *Commonwealth* (1993) 176 CLR 555, 569.

refer to purpose, as they regularly and rightly – indeed unavoidably[42] – do in interpreting statutes,[43] or to substance as well as form, as the Courts do in applying the prohibitions contained in the federal Constitution. But the ruling doctrine, true to its 1920s origins, prohibits that.

Another example of the difficulties involved in the test of legal operation alone is provided by the marriage power (s 51 (xxi)). Marriage is an activity which results in a status with manifold legal consequences attached to the status. Clearly, the scope of the federal power goes beyond merely laying down the manner in which marriages may be celebrated, and also includes 'directly and squarely [...] a law joining with other laws to fix the bounds of the legal changes which marrying is to bring about'.[44] One of those consequences, for example, is that the parties to a valid undissolved marriage cannot re-marry. If that is so, why is it that a law which exempted married persons from taxation by the States would not be a law about marriage? The answer provided by Gibbs C.J. is that

> [s]uch a law would be concerned with the relationship which exists between citizens and the state, and would have no connexion with the marriage relationship except that it was rendered applicable to a married person – a connexion too slight and remote to give the law the character of a law with respect to marriage.[45]

Why, however, must this be so? It would surely depend on the purpose of the law. The federal legislature may wish to encourage marriage by exempting married persons from certain State taxes (for example, on transactions or documents connected with the purchase of a dwelling). On the other hand, it may have the purpose of harming the States by the mooted law by depriving them of taxes from married people for no good reason. 'The problem with a status word is that any consequence at all fits logically.'[46] Only a consideration of purpose will enable us to separate one sort of law from the other.

An even more extravagant example is a federal statute exempting married persons from speed limits on the roads (or, for that matter, the prohibition on possessing heroin). Mr Justice Murphy, certainly no enemy of federal power, says that the speed-limits law would 'have no real connexion with marriage'.[47] A connexion between speed limits and married persons could certainly be perceptible in some circumstances: speed limits might be lowered for married people with children to make them drive more slowly in the interests of the children's safety. On the other hand, a law about speed limits and married persons might raise speed limits for

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42 Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv LR 630, 665-667.

43 Mason C.J. appeared unaware of this tension in (1986) 16 FLR 1, 5.

44 *Attorney-General (Victoria)* v. *Commonwealth* (1962) 107 CLR 529, 554; *Fisher* v. *Fisher* (1986) 161 CLR 438, 452.

45 *Gazzo* v. *Comptroller of Stamps (Victoria)* (1981) 149 CLR 227, 235.

46 Detmold, *The Australian Commonwealth* (Law Book, Sydney 1985), pp. 167f.

47 At 256. *Cf.* Zines, "Characterisation", p. 55 (law prescribing maximum speed for married persons while driving cars not a law about marriage).

married people and be aimed at depriving the States of a large proportion of their revenue from speeding fines. But, as in the heroin tax example, how could we know this except by looking beyond the legal operation of the law to its purpose, and then taking into account what we know about the usual consequences of marriage although it is equally forbidden under *Engineers* doctrine to consider whether a particular area of law was intended by the Constitution to be reserved to the States? As far as legal operation is concerned, the law raising the speed limit for married persons attaches consequences to the status of marriage just as much as a law preventing them from marrying again.

Is it the fault of the text or of the doctrine that the Australian States are often thought to have been short-changed by the Constitution? As Professor George Winterton points out,[48] failing to include a list of State powers and departing in this respect from the Canadian model was a serious misjudgement on the part of the framers of the Australian Constitution.[49] They had intended the States to continue to exercise almost as much power as they had before Federation, but they failed to provide a list of what those powers were. This means that the Courts, in determining the scope of a federal power, have no measuring-stick of what it was that the States were meant to do. They were and are therefore rightly reluctant to read into the list of federal powers qualifications that are not expressed in the text. The consequent adoption of the principle that it is not legitimate, in reading the list of Commonwealth powers, to assume that any power at all is retained by the States has certainly contributed to the States becoming far less powerful than was intended. The defective design has allowed defective doctrine to emerge.

c. Criticism: ignoring context in scope doctrine

The *Engineers* principles have hardened into a 'general rejection of reference to any interpretive context',[50] both in scope doctrine as well as in characterisation in the narrow sense. In scope doctrine, this manifests itself in the refusal to read federal powers in the context of the overall federal nature of the Constitution. In interpreting federal power, each expression is to be given its fullest meaning without any presupposition that any area of power is to be reserved to the States. Contentions that a particular interpretation of a federal power would give the federation too much power – would upset the federal balance – are not permitted. The guiding principle is that the federal power must receive its natural meaning and be interpreted without regard to the effect of the width of any interpretation on State power.

It may perhaps have been possible when the *Engineers Case* was decided, in 1920, to believe that words used in a particular context can have a meaning independent of that context. But we are wiser now. It is absurd to interpret a federal

48 "The High Court and Federalism", p. 204.
49 See also Craig/Walters, [1999] PL 274, 295.
50 Blackshield/Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed., Federation Press, Sydney 2002), p. 309.

constitution as if it were not a federal constitution and to ignore the need to accommodate federal power to State power. A leading analyst writes:

> Pushed to an extreme, *Engineers* is a silly method to use in interpreting a federal constitution because it privileges Commonwealth powers without paying attention to the federal system of which they are but one part. [...] Moreover, *Engineers* was a radical departure from the method of the earlier Court that was made up of the leading Founders who had led the constitutional conventions that drafted the Constitution. There is nothing in the Constitution to require or suggest such a method, and it is incompatible with its deeper federal structure.[51]

We shall see that every English-speaking federation other than the Australian one permits the Courts, in interpreting federal powers, to take account of the effects that the interpretation will have on the powers of the States and to take a step back if there is too great an intrusion into traditional State areas.

In *Commonwealth* v. *Tasmania ("Tasmanian Dams Case")*,[52] the federation successfully argued that its power over external affairs (s 51 (xxix)) permitted it to make laws for implementing international obligations. The minority argued that, under the majority's interpretation,

> there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the Executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive. To say this is of course not to suggest that by the Constitution any powers are reserved to the States. It is to say that the federal nature of the Constitution requires that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament' [...].[53]

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[51] Galligan, "The High Court's Role in Government and Nation" in Cane (ed.), *Centenary Essays*, p. 39.

[52] (1983) 158 CLR 1.

[53] At 100 (quoting *Bank of New South Wales*, (1948) 76 CLR 1, 184f); see also at 197, 302.

But in vain.

Such arguments attempt to mobilise what one American commentator has called the "non-infinity principle"[54] – any interpretation of the Constitution that leads to potentially unlimited federal power must be wrong because it conflicts with the overall structure of the Constitution. In the Australian context, this argument attempts to overcome the refusal of the Courts to read *single powers* as subject to reservations for State power.

One can, however, see the difficulty. How can the Courts assume that *any* particular power is reserved to the States when the Constitution does not enumerate State powers? And even if we subscribe to the "non-infinity principle", which power apparently conferred upon the federation shall we exclude from its powers in the interests of that principle? We shall see below that the Canadian Courts are not faced with the same difficulty because their text is better. In the United States, more extreme claims than those ever made in Australia for federal power have recently resulted in the revival of the conception of a State "police power". In Australia, that option is foreclosed by the doctrine of 1920. But reasoning in favour of the preservation of State power might nevertheless have led, for example, to the interpretation of the federal power to make grants to the States (s 96 of the Constitution) in a manner that did not permit the federal Parliament to make its grants conditional on anything it chooses, including matters normally outside its powers.[55] That could have been done without postulating that powers were reserved to the States; it would merely have been necessary to restrict the federation to its express powers. But that road was not taken either.

Furthermore, the self-denying ordinance which bans considerations such as "the federal balance" from consideration in determining the scope of Commonwealth powers might have been abandoned. It is hard to see why that consideration should be entirely irrelevant in interpreting a federal constitution. It may not be the last word or controlling, but why must it be entirely disregarded so that powers might be interpreted so as to give the federation complete (if concurrent) power over effectively everything?

Another target of a more sophisticated scope doctrine might have been the settled doctrine in Australia that each federal power is interpreted separately from the others, so that the fact that a particular activity does not count as inter-State trade (s 51 (i)), for example, does not mean that the Commonwealth is powerless to regulate it if it falls within some other power, such as that over trading, financial and foreign corporations (s 51 (xx)).[56]

Each power is interpreted, in other words, as if it were the sole grant of power to the federation – and not to a federation, at that, but a unitary state whose powers

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54 Koppel/Reynolds, "Taking Federalism Seriously: *Lopez* and the *Partial Birth Abortion Ban Act*" (1997) 30 Conn LR 59, 69.

55 As was clearly favoured by Dixon C.J.: *Victoria* v. *Commonwealth ("Second Uniform Tax Case")* (1957) 99 CLR 575, 609.

56 *Strickland* v. *Rocla Concrete Pipes* (1971) 124 CLR 468, 510, 523; *Commonwealth* v. *Tasmania ("Tasmanian Dam Case")* (1983) 158 CLR 1, 268f. Another example may be found, and is concisely explained, in *R* v. *Lambert;* ex parte *Plummer* (1980) 146 CLR 447, 464f.

are for some reason limited. We saw an example of this above, when the Court refused to interpret the external affairs power so that it would not have the potential to obliterate large portions of the federal division of powers. This doctrine, of course, greatly increases the potential for the exercise of federal power.

Thus, federal labour law legislation is not confined to the power under s 51 (xxxv) of the Constitution over '[c]onciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. If other powers can be used to regulate industrial matters outside this power, Australian doctrine does not prevent this.

Under s 5AA (1) (a) of the federal *Workplace Relations Act* 1996, certain parts of that Act apply to industrial matters involving corporations over which the federation has power under s 51 (xx). Federal power may also be exercised to regulate labour law under the external affairs power if an international agreement on labour law exists which the federation can implement under that power.[57] A similar exploitation of all available heads of power could be seen in relation to s 6 of the *Trade Practices Act* 1974 quoted above, but here it is scope doctrine that is questionable: if the Constitution gives the federation power over labour relations within a defined area, and apparently leaves the rest of the labour law field to the States, other powers should be interpreted accordingly.

But the doctrine requires no such common-sense interpretation. To it there are however some exceptions of necessity which expose the flaw in the reasoning. For example, the express textual exclusion of State banking from the otherwise general federal power over banking (s 51 (xiii)) has resulted in a restrictive interpretation of other powers (such as the financial corporations power in s 51 (xx)) so that State banking is excluded from them as well.[58] Otherwise, the exclusion would, of course, be entirely nullified.

An even more thorough-going exception from the usual rules is made for the federal power over "taxation" (s 51 (ii)), which if read literally would include taxation by the States and thus give the federation power to regulate or prohibit taxation by them. In flat contradiction not only of the rule against considering purpose, but also of the *Engineers* rule of literalism and the principle that the effect of interpreting federal powers on the States is irrelevant,[59] this power is read as if it said what it should say, "taxation for the purpose of raising revenue for the federal government".[60]

57 *Victoria* v. *Commonwealth ("*Industrial Relations Act *Case")* (1996) 187 CLR 416.

58 *Bourke* v. *State Bank of New South Wales* (1990) 170 CLR 276. See further Aroney, "The Ghost in the Machine: Exorcising *Engineers*", available at: http://www.samuelgriffith.org.au/papers/html/volume14/v14chap2.html, Part IV.

59 Detmold, *The Australian Commonwealth*, pp. 165f.

60 *Allders International* v. *Commissioner of State Revenue (Victoria)* (1996) 186 CLR 630, 646f; Zines, "*Engineers* and the 'Federal Balance'", p. 86.

d. The exception that disproves the rule

It was said above that there is one exception to the general rule that the Courts will not consider the purpose of laws while characterising them. The exception is constituted by the powers which fall within the purposive/incidental group.[61] It is settled law that the chief example of a purposive power is the defence power (s 51 (vi)), as it names a purpose or goal – 'naval and military defence' – rather than a collection of objects or activities as the thing over which the federation has power.

Sir Owen Dixon justified the distinction between purposive and non-purposive powers thus in 1944:

> Some of the difficulties which have been felt in the application of th[e defence] power seem to me to be due to the circumstance that, unlike most other powers conferred by s 51 of the Constitution, it involves the notion of purpose or object. In most of the paragraphs of s 51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognised category of legislation (as taxation, bankruptcy).

It is worth interrupting this quotation to make a few points that it throws up.

First, as we shall see, the last species of legislative power identified by his Honour is very important in Germany and should be noted in advance of reaching the discussion of that country's doctrine.

Secondly, we might also wonder why, if "defence" is a purpose, "taxation", at least, cannot also be – a view which would solve some of the problems just sketched in respect to the taxation power at least.

Thirdly, his Honour does not mention powers over persons. Such powers, however, clearly exist. Examples include the federal powers over trading, financial and foreign corporations, aliens and 'the people of any race for whom it is deemed necessary to make special laws' (s 51 (xx), (xix) and (xxvi)).

Fourthly, some powers might also contain descriptors of more than one class, for example the federal power over 'naturalisation and aliens' in s 51 (xix). Aliens are persons; and whatever naturalisation is (a recognised category of legislation or an activity), it is not a person.

Dixon J. continues:

> [... I]t is usual, when the validity of legislation is in question, to consider whether the legislation operates upon or affects the subject matter, or in the last case answers the description, and to disregard purpose or object. [...]

61 *Cunliffe* v. *Commonwealth* (1994) 182 CLR 272, 356.

> But "a law with respect to the defence of the Commonwealth" is an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed. This peculiarity in the power has caused no departure from the practice that excludes from investigation the actual extrinsic motives and intentions of legislative authorities. But, however it may be expressed, whether by the words "scope", "object", "pith", "substance", "effect" or "operation", the connection of the regulation with defence can scarcely be other than purposive, if it is within the power.[62]

Later, in 1951, that distinguished Judge drew a distinction between the 'ostensible purpose' of legislation, to be considered in cases involving purposive power, and 'an external motive or purpose incapable of invalidating'[63] legislation.

In addition to the defence power, there is a further source of federal power with a purposive element to it. In the first place, there is an express incidental power (s 51 (xxxix)) dealing with matters incidental to the execution of federal powers. 'Examples of laws justified by this power are: laws about contempt of Parliament, the setting up of Courts, the running of the public service, Royal commissions to enquire into matters of policy.'[64]

Secondly, and more importantly for this analysis, each substantive federal power has in addition attached to it a penumbra of unwritten incidental power so that federal power can be exercised beyond the core area of direct legal effect – outside the area of direct legal effect on the subject-matter of the federal power. This permits legislation which does not operate directly on subjects of federal power, but on something else, but at the same time has a sufficient connexion with the subject of the power because of the effect that the legislation has on the subject of the power.

Thus, for example, under the federal inter-State and overseas trade and commerce power the incidental power may cover production for the purposes of and preparatory to inter-State or overseas trade and commerce[65] and indeed 'all matters which may beneficially or adversely affect the export trade of Australia; [...] anything at all that may be considered likely to affect an export market by developing it or impairing it'.[66] It is probably[67] also this aspect of the federal power over external affairs which permits federal legislation which does not directly operate on external affairs, but which carries out, within Australia, Australia's international obligations. This aspect of federal power is accordingly extremely important in practice, because on it is based one of the principal powers that the federation cur-

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62 *Stenhouse* v. *Coleman* (1944) 69 CLR 457, 471. See further *Grain Pool*, (2000) 202 CLR 479, 492.

63 *Moore* v. *Commonwealth* (1951) 82 CLR 547, 568.

64 Detmold, *The Australian Commonwealth*, p. 159.

65 The best treatment of this is in Zines, *High Court and the Constitution*, pp. 64-68.

66 *O'Sullivan* v. *Noarlunga Meat* (1954) 92 CLR 565, 598.

67 Brennan J. in *Cunliffe* v. *Commonwealth* (1994) 182 CLR 272, 322 and Blackshield/Williams, *Australian Constitutional Law*, p. 656, state that this 'aspect' of the external affairs power is purposive. It would be unusual for a power to be only partly purposive, however.

rently relies upon in the absence of any other power to pass legislation, for example, prohibiting racial discrimination.[68]

Another example is that trading corporations, a subject of federal power (s 51 (xx)), may be protected from others' attempts to injure them by legislation which operates directly on those others rather than on the corporations. It is true that some Judges appear to have treated this situation as one involving core rather than incidental power.[69] However, this is clearly wrong, in the author's view, as such statutes do not alter the rights of the trading corporations concerned or directly operate upon them in any other way; rather, they have direct legal operation only on those who would harm them and must therefore be valid, if at all, under the incidental power. Similarly, the Court has wrongly classified a law operating on those seeking to supply assistance to would-be migrants as a law within the core operation of the power over aliens (s 51 (xix)), when it has no direct operation on them but rather on those who would advise them.[70] This might conceivably be different if the subject-matter consists not of persons (corporations, aliens) but rather of an activity (trade and commerce), especially of course if the threat comes from someone else actually engaged in that activity.

The incidental power in particular involves a number of difficult judgments. That which is relevant for this essay is this: it must be decided whether a particular law has a sufficiently close connexion with – although it *ex hypothesi* does not operate upon – a subject-matter of federal power to justify characterising it as a law 'with respect to' that subject-matter. In Dixon C.J.'s words, 'everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the *reasonable fulfilment* of the legislative power over the subject matter' and in relation to which there is a '*reasonable connection* between the law which is challenged and the subject of the power under which the legislature purported to enact it'.[71] But when is there a reasonable connexion and when is a connexion apparent but still too minimal to justify characterising a law as one 'with respect to' the federal power?

In the end there is no sure guide to when this is so. It is a question of degree.[72] For example, in Re *Dingjan;* ex parte *Wagner*,[73] it was held that a statutory provi-

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68 *Racial Discrimination Act* 1975, upheld in *Koowarta* v. *Bjelke-Petersen* (1982) 153 CLR 168.

69 *Actors and Announcers Equity Association of Australia* v. *Fontana Films* (1982) 150 CLR 169; see the discussion of this case in Zines, *High Court and the Constitution*, pp. 48-50; Zines, "Characterisation", pp. 52f. *Cf. Gonzales* v. *Raich* (2005) 125 S Ct 2195, 2216.

70 *Cunliffe*, (1994) 182 CLR 272; Blackshield/Williams, *Australian Constitutional Law*, p. 695. This distinction may be relevant in the United States as well: see the discussion in Saylor, "Federalism and the Family after *Morrison*: An Examination of the *Child Support Recovery Act*, the *Freedom of Access to Clinic Entrances Act* and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers" (2002) 25 Harv Women's LJ 57, 111-123.

71 *Burton* v. *Honan* (1952) 86 CLR 169, 177, 179. Emphases added.

72 *Burton*, (1952) 86 CLR 169, 179; Zines, *High Court and the Constitution*, pp. 41f.

73 (1995) 183 CLR 323.

sion permitting the variation of contracts 'relating to the business of' a corporation subject to the Commonwealth's power exhibited a connexion with such corporations, but one that was 'so tenuous and fortuitous that it is wholly insufficient to impart to the [challenged] provisions the character of a law with respect to trading or financial corporations'.[74] Virtually anything could satisfy the "relating to" test. That was not enough, as the Court held. This is clearly right, but it is noticeable that one becomes rather lost for words in saying why this is so once asked to go beyond descriptions such as tenuous, insubstantial, fortuitous, exiguous and so on. This is really inherent in the nature of things: we have few precise ways of measuring the connexion between a law and a descriptive category. We simply splutter that "This will not do".

There is an analogy from a different area of law that springs to mind here: the question whether, in a case of criminal attempt, the accused's actions have gone beyond what is merely preparatory to the commission of the offence and he has commenced, although not completed, its commission. This is another issue in relation to which, as far as the author is aware, no-one has ever succeeded in providing what one recent author aptly calls 'a general test that, without being vacuous, will be appropriately applicable to the whole range of offences, and to all the diverse types of conduct they may involve'.[75] The same thing may be said (substituting "subject-matters and factual situations" for 'offences') of the area currently under discussion. The reason for this is, in short, that the law requires us to draw a sharp distinction along a continuum. (In constitutional law, moreover, we have no jury to which we can neatly refer the issue and receive a decision without reasons attached that we might be able to pick holes in.)

There is no escaping the need for value judgment in this area. As Professor Zines has said, 'the word "direct" is a label for a policy or value judgment'.[76] It certainly is true that, in determining whether something is close enough in its effect on a subject-matter to justify it under the incidental power, value judgments and decisions about legal policy cannot be avoided. Equally, if educated in the country concerned and familiar with its constitutional law and practice we come to the question with all sorts of preconceptions about the proper reach of federal power and what we should expect to find the federation and the States doing. Not all of these things can even be articulated.

Despite all these obstacles to greater precision, some further guidance can perhaps be given.

In Australian law, the precise role of the concept of proportionality in deciding these questions of degree remains unresolved.[77] However, it is clear that a marked

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74 At 338.

75 Duff, *Criminal Attempts* (Clarendon, Oxford 1996), p. 34.

76 Zines, "Characterisation", p. 46.

77 Blackshield/Williams, *Australian Constitutional Law*, pp. 696f. It may be that the position is different here depending on whether the incidental aspect of a non-purposive power or a purposive power is involved: *Leask* v. *Commonwealth* (1996) 187 CLR 579, 605f, 624. However, the author's view, for the reasons given in the text, is that proportionality can be an important factor in the area of incidental power as a guide to sufficiency of connexion: *Leask* at 593, 616, 617, 635.

disproportion between means and ends may well result in invalidity. An example of such a disproportion provided by Dixon C.J. in the *Second Uniform Tax Case* was a hypothetical federal statute requiring people to pay their 'phone bills (then in effect a debt to the federal government) before paying any other debts. Such a law would 'strike the mind as absurd'.[78] In other words, it would use a sledge-hammer to crack a nut; it would make absurdly stringent requirements when the nature of the obligation to be enforced is taken into account; it would, in a word, be disproportionate.

On the other hand, the Courts disown any intention to second-guess the wisdom of federal enactments,[79] so that there must be something more than mere disproportion: in the *Second Uniform Tax Case*, for example, the statutory requirement that taxpayers should pay federal before State taxes was an indication of an ulterior purpose on the part of the federal legislature – namely, the purpose of driving the States out of the field of income taxation – so that the invalidity of the federal statute could be identified.

In considering whether a federal law is supported by the incidental power, the Courts do indeed consider its purpose and practical effect as well as its legal operation. This seems to make something of a mockery of claims that such matters either cannot or should not be considered by the Courts in determining the character of legislation. It has, to take another example, been decided that the federal power over inter-State trade and commerce can be used to ensure the safety of intra-State flights, for otherwise an inter-State flight might collide with an intra-State one. Such legislation is valid although it does not directly operate on inter-State commerce, because it protects that commerce from a real and substantial threat which might otherwise injure it. Supporting this conclusion were such practical considerations as the

> speed at which modern aircraft move through the skies; their constant liability to sudden and wide deviation in flight by reason of mechanical or human deficiencies, the vagaries of the weather, the behaviour of other aircraft and other causes; the multiplicity of flights required to satisfy the demands of modern life;

– coupled, one might interject, with the fact that Judges will be on some of those flights – and

> the multiplicity and inter-relation of the routes to be served; all these matters and more combine to make air navigation in this country a complex of activities of such a kind that what happens at any given time and place in the course of an air operation may substantially, even dramatically, affect other air operations close or distant in time or space.[80]

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78 (1957) 99 CLR 575, 615. See further Zines, "Characterisation", p. 56.

79 *Burton*, (1952) 86 CLR 169; *Herald & Weekly Times* v. *Commonwealth* (1966) 115 CLR 418, 437; *Grain Pool*, (2000) 202 CLR 479, 492.

80 *Airlines of New South Wales* v. *New South Wales (No. 2)* (1965) 113 CLR 54, 116.

And when the incidental aspect of the external affairs power is mobilised in order to permit the federal Parliament to implement Australia's international obligations, one of the principal questions is whether what the federal law does is reasonably capable of being considered an appropriate means of carrying out those obligations.[81] This is the language of purpose.[82]

There is nothing wrong in principle with considering such matters.[83] Indeed, a similar conclusion was reached in 1911 in the Supreme Court of the United States – speaking through a newly appointed van Devanter J., later one of the "Four Horsemen" – in relation to railway travel.[84] But they should lead us to ask why, if such purposive considerations – the need to ensure safety – can be taken into account in dealing with the incidental aspect of power, they should suddenly become irrelevant when the core aspect of the power is considered. Looking to other federations prompts similar thoughts.

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[81] For references to the numerous statements to this effect, see Zines, *High Court and the Constitution*, pp. 286-292.

[82] Industrial Relations Act *Case*, (1996) 187 CLR 416, 487.

[83] However, the argument that further practical considerations such as economic efficiency could also be considered received a far less enthusiastic reception in *Attorney-General (Western Australia)* v. *Australian National Airlines Commission* (1976) 138 CLR 492. The author does not object to this as it was done in the interests of not permitting undue expansion of federal power – one of the few occasions on which this consideration has been mentioned by the Court.

[84] *Southern Railway Co.* v. *United States* (1911) 222 US 20, 26f.

3. Canada

a. Federalism as a core value

The great difference between Australian and Canadian characterisation doctrine can be explained only partially by differences in the text. It is also the case that the Supreme Court of Canada takes its role as the guardian of federalism, and the task of ensuring that federal powers are not over-stretched, much more seriously than does the High Court of Australia.

Thus, the Supreme Court of Canada refers to the need to maintain the federal balance unashamedly, and in terms which would be heretical in Australia. Reading statements like the following, especially from an Australian perspective, one might even be forgiven for thinking that federalism is a cardinal feature of Canadian constitutional arrangements which the Courts take seriously.

> [I]t is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government [...]. The Courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation which does not conform with the requirements [...].[85]

The peculiar features of the Canadian constitutional text do admittedly provide the Supreme Court of Canada with much greater opportunities to ensure that the federal division of powers is maintained. The consequences of the Canadian method of setting out the division of powers in the constitutional text provide, as we shall see, a case study in unplanned, but generally beneficial, consequences.

b. Text and doctrine

No attempt is made here to include every last detail of the Canadian text; after all, those who desire to acquaint themselves with the scheme in all its details can read the text for themselves. However, the essential features are unusual, and must be described briefly. Section 91 of the *Constitution Act* 1867 vests a list of powers

[85] Re Firearms Act [2000] 1 SCR 783, 812.

numbering just under thirty exclusively in the federal Parliament.[86] It also adds the residue of powers not vested in the provinces to those federal powers – in Canada, unlike in the United States and Australia, the residue falls within the powers of the federation.

Provincial powers are set out in ss 92, 92A and 93. Section 92 takes the traditional list approach, while ss 92A and 93 deal at greater length with natural resources and education respectively. There are fifteen items on the list in s 92, and they are also exclusive to the provinces. The list commences with a miscellaneous assortment of unimportant-looking topics. Reading the first three-quarters of the provincial list, one has the impression that the provinces are little more than glorified county councils. But the list ends not with a whimper but a bang. Section 92 (13) confers power over 'Property and Civil Rights in the Province', 'Civil Rights' meaning not what a modern American reader might think it means, but, essentially, the civil or private law. Section 92 (16) additionally confers power over 'Generally all Matters of a merely local or private Nature in the Province'. The most substantial grant of provincial power is in fact s 92 (13). Professor Hogg Q.C. comments that 's 92 (16) has in practice turned out to be quite unimportant, because its work has been done for it by s 92 (13)'.[87]

There are only four concurrent powers: 'the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy' (s 92A (2); concurrent by virtue of s 92A (3)), old age pensions and disability benefits (s 94A), and agriculture and immigration into a province (s 95). It is worth noting in passing, although it is strictly irrelevant to the topic considered here, that s 94A provides a very unusual rule of pre-emption: provincial statutes prevail over federal ones.

In essence however, and leaving aside these four exceptions, the Canadian scheme involves two lists of exclusive powers, and a residue vested in the centre rather than the provinces. As a matter of historical fact, this scheme was designed to produce a strong centre. To explain this, one need only recall that the Canadian Constitution was written in the mid-1860s, when there was an example to the south of a federation which was encountering difficulties which the Canadians certainly wished to avoid. One must also remember that the two major divisions of Canada, what are now Ontario and Quebec, were then united into a single Province of Canada – unlike the American and Australian States, they approached federalism from the reverse direction.

The chief architect of the Canadian Constitution, John (later Sir John) MacDonald A.-G., explained in early 1865 why this elaborate structure had been adopted:

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[86] This expression is pleonastic in Canadian constitutional usage, as only the federal and not the provincial legislatures are referred to as Parliament. However, for greater clarity this phrase will sometimes be employed here.

[87] Hogg Q.C., *Constitutional Law*, p. 17-2.

> Prior to the formation of the American Union, as we all know, the different States which entered into it were separate colonies. They had no connection with each other further than that of having a common sovereign, just as with us at present. Their constitutions and their laws were different. They might and did legislate against each other, and when they revolted against the Mother Country they acted as separate sovereignties, and carried on the war by a kind of treaty of alliance against the common enemy. Ever since the Union was formed, the difficulty of what is called "State rights" has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their Constitution that each State was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each State, except those powers which, by the Constitution, were conferred upon the General Government and Congress. Here we have adopted a different system. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have [also] expressly declared that all subjects of general interest, not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority [...].
>
> [A]ll the great questions which affect the general interests of the Confederacy as a whole are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact and entrusted to the care of the local bodies. [...]
>
> Besides all the powers that are specifically given, [...] the Constitution confers on the General Legislature the general mass of sovereign legislation, the power to legislate on 'all matters of a general character, not specially and exclusively reserved for the local governments and legislatures'. This is precisely the provision which is wanting in the Constitution of the United States. It is here that we find the weakness of the American system – the point where the American Constitution breaks down.[88]

As we shall see, virtually all the statements in this speech have turned out to be wide of the mark, at least as far as legal interpretation of the Constitution is concerned.

In particular, the claim made by MacDonald A.-G. to 'have avoided all conflict of jurisdiction and authority' proved false almost from the very start precisely because of the structure adopted. The fact that there are two lists of exclusive powers

[88] Speech of 6 February 1865, reproduced in Keith (ed.), *Selected Speeches and Documents on British Colonial Policy 1763-1917* (O.U.P., 1966), pp. 293f, 313, 318.

in Canada has produced highly complicated doctrine relating to scope and characterisation. It is a remarkable double paradox that the efforts of the Canadians to avoid creating a distribution of powers like that of the United States has resulted in the creation of a distribution which is very like that which the United States was meant to have but does not.

As far as scope is concerned, there is a need in Canada to reconcile two lists which claim to be exclusive, and thus mutually exclusive. Professor Lederman Q.C. calls the resulting balancing act between two exclusive lists the principle of mutual modification, and gives the following example:

> [C]onsider the relation of the federal class, "regulation of trade and commerce", with the provincial class, "property and civil rights". Trade and commerce is carried on in articles in which persons have property and in respect of which they have civil rights. Obviously, in the logical sense there is here a wide overlapping. However, speaking generally, the Courts have said that "regulation of trade and commerce" is to be reduced in generality and read as "regulation of inter-provincial and international trade and commerce". Likewise, "property and civil rights" is to be rendered "property and civil rights except those involved in inter-provincial and international trade and commerce". By these operations the overlapping of the literal words of the statute is reduced and some additional degree of exclusiveness is imparted to federal and provincial classes of laws.[89]

In the end, this amounts to nothing more complicated than reading the constitutional text as a whole. It does, however, produce a great deal of highly involved doctrine behind the words of the text, so to speak, as each item on each list interacts with the others.

It is accordingly only a slight exaggeration to say that, as a result, the meaning of the federal power under s 91 (2) over 'The Regulation of Trade and Commerce' bears 'little resemblance to its language'.[90] It is limited by judicial decisions, as Professor Lederman Q.C. says, in essence to inter-provincial and international trade and commerce, while the provinces retain power over intra-provincial trade and commerce, as that is considered to fall within property and civil rights within each province. (This is the sort of case law which might have developed in Australia had the High Court of Australia felt able to supply the missing list of State powers and continue with its pre-1920 attempts to read federal powers in the light of the powers assumed to be retained by the States.)

The law on the scope of this power dates from the decision in 1881 of the Judicial Committee of the Privy Council[91] – which, sitting in London and composed of

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[89] Lederman Q.C., *Continuing Canadian Constitutional Dilemmas*, pp. 243f.

[90] Gilbert, *Australian and Canadian Federalism*, p. 63.

[91] Hereinafter referred to, in accordance with common practice, simply as the "Privy Council". There is a separate Queen's Privy Council for Canada which is not connected with the Privy Council in London.

British Judges, was until 1949[92] the supreme Court of appeal for Canada even on constitutional issues – in *Citizens Insurance Co. of Canada* v. *Parsons*.[93] The case concerned the validity of a statute of the province of Ontario relating to the conditions attached to contracts of insurance against fire. It was argued unsuccessfully that this came within the federal trade and commerce power. In deciding the case, their Lordships of the Privy Council pointed out the falsity in Sir John MacDonald's claim to 'have avoided all conflict of jurisdiction and authority' by indicating that the existence of two lists with overlapping subject-matters required careful reconciliation of the granted powers when determining their scope:

> Take as one instance the subject 'marriage and divorce', contained in the enumeration of subjects in s 91; it is evident that solemnisation of marriage would come within this general description; yet 'solemnisation of marriage in the province' is enumerated among the classes of subjects in s 92, and no-one can doubt, notwithstanding the general language of s 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in s 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes', assigned to the provincial legislatures by s 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one.[94]

Without finally deciding whether insurance was a trade, their Lordships nevertheless were able to determine that the statute fell within provincial power and outside federal power. In words which have laid the foundation for more than a century's case law on the scope of the federal power, their Lordships attempted to (de)limit its scope as follows:

> The words 'regulation of trade and commerce' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the [Constitution] 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 shews that the words were not used in this unlimited sense. In the first place the collocation of No. 2 [the federal trade and commerce power] with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the [Imperial] legislature, when conferring this power on the [Canadian federal] Parliament. If the words had been intended to have the full scope of which in their literal meaning

92 13 Geo. VI c 37 (Can.) (1949) s 3.
93 (1881) 7 App Cas 96.
94 At 108.

> they are susceptible, the specific mention of several of the other classes of subjects enumerated in s 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.
>
> [...]
>
> 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 of trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.[95]

The law continues to follow the scheme of interpretation laid down in this case. The two principal divisions of federal power are therefore inter-provincial and international trade, and the "general" limb.

Thus, for example, the Supreme Court of Canada needed very little time to decide that a statute of the province of British Columbia effectively putting an end to the business of private car insurance in that province in favour of a compulsory government-run scheme was not part of trade and commerce – although of course insurance is commerce as a matter of ordinary language. That was because the insurance business concerned was not inter-provincial, and therefore did not satisfy one of the unwritten limitations on federal power which have sprung up in order to reconcile it with the provincial power over property and civil rights in the province. The Court held that, even though many if not all of the companies conducted their business from other provinces, the statute concerned was in truth about property and civil rights in the province.[96]

As can be seen from the quotation above, there is in addition a further category under the trade and commerce power, which covers matters of general concern. It is known as the "general" limb. Federal successes under it have been few and far between,[97] at least until the late 1970s when Laskin C.J., who 'had never really departed from the intellectual tradition of the progressives of the 1930s, who saw centralisation as necessary to effective government',[98] began a charge in favour of its revivification. That charge has however had very moderate success only.[99] The chief reason for this is that it has never been forgotten that the "general" limb must not be allowed to swallow up the reservation of internal trade in favour of the provinces. The price of this is, of course, a considerable degree of tension in the

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95 At 112f.

96 *Canadian Indemnity Co.* v. *Attorney-General (British Columbia)* [1977] 2 SCR 504.

97 An extensive treatment of this subject may be found in Hogg Q.C., *Constitutional Law*, Ch. 20.

98 Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Carswell, Toronto 1990), pp. 253f. See further pp. 223-235.

99 Swinton, *The Supreme Court*, p. 144.

task of balancing federal and provincial power, and the need for the Court to make 'difficult and controversial decisions about the importance of the national interest at stake and the impact of federal regulation on provincial autonomy in the economic sphere'.[100] However, principles guiding such decisions have begun to emerge.

Thus, for example, in *MacDonald* v. *Vapor Canada*[101] the Supreme Court of Canada struck down a federal statute which purported to prohibit acts and practices 'contrary to honest industrial or commercial usage in Canada'. The fact that it applied throughout Canada did not save it, as it was an attempt to create a general cause of action resembling actions in tort – 'Civil Rights' in the language of s 92 (13) – which only the provinces could do.

On the other hand, in *General Motors of Canada* v. *City National Leasing*,[102] a different federal statute was upheld although it looked very similar.[103] This is therefore an interesting pair of cases which deserve some analysis.

General Motors concerned the validity of s 31.1 of the *Combines Investigation Act*, which relevantly provided:

> 31.1 (1) Any person who has suffered loss or damage as a result of
>
> > (a) conduct that is contrary to any provision of Part V, or
> >
> > (b) the failure of any person to comply with an order of the Commission or a Court under this Act,
>
> may, in any Court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the Court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

As its name suggested, the aim of the Act in which this section appeared was not to regulate private rights, but to eliminate anti-competitive conduct reducing competition in the marketplace. It dealt with the regulation of trade in general, rather than specific industries, and the aim of the whole statutory scheme therefore was held by the Court to fall within the general limb. However, was the action for damages created by s 31.1 invalid as an intrusion into the provincial power over

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[100] Swinton, *The Supreme Court*, p. 144. See also at pp. 298f.

[101] [1977] 2 SCR 134.

[102] [1989] 1 SCR 641.

[103] On whether the form of reasoning adopted in this case amounted to an acceptance of incidental powers reasoning on the Australian model, see Hogg Q.C., *Constitutional Law*, p. 15-39. This author agrees with Professor Hogg Q.C.'s analysis to the effect that no such doctrine is needed to explain the reasoning in that case. More will be said about the redundancy of incidental powers reasoning in a "pith and substance" jurisdiction when we come to look at Indian doctrine.

property and civil rights? It might have been seen as equivalent to a private right of action in tort law, but the Court held that it was valid.

The two cases establish a number of criteria to be considered in deciding whether a federal statute creating a private right of action succeeds under the general limb of the trade and commerce power. These enable us to conclude why one was valid and the other not. The criteria include – importantly – the seriousness of the encroachment on provincial powers; whether the provinces could constitutionally enact a similar statute (how this might be possible will be explained shortly); and whether the failure of the provinces to act in concert might jeopardise the effectiveness of the scheme established by federal legislation.[104] The statute in *General Motors* passed these tests.

Another criterion – the one that in my view was decisive in saving the private right of action in issue in *General Motors* – is the existence of a general regulatory scheme overseen by a regulatory agency. This shows that the concern of the federal legislature is not really with civil rights between individual participants in trade and commerce, to be enforced at the instance of those affected like obligations in tort law, but rather with the governmental enforcement of standards in trade and commerce more generally to which the private right of action is merely an adjunct. Thus, any apparent encroachment on provincial powers over tort law is in reality merely a part of an overall general scheme within federal power. Accordingly, the general tort-like action dealt with in *Vapor Canada* was not within federal powers, but the remedy created by s 31.1 of the *Combines Investigation Act* was merely a way of implementing an entire scheme which was within federal powers, and did not, as the Court found, involve too great an appropriation of provincial powers.

Professor Hogg Q.C. asks, 'If a provision is a rational, functional part of a federal legislative scheme, why should it be regarded as "encroaching" or "intruding" on provincial powers?'.[105] There is certainly something in this. One might in fact take such words as a licence by the Court for the federation to intrude into provincial areas, as long as it does not do so too much – which was certainly not what was meant. In order to understand this, we must anticipate the discussion of characterisation (in the narrow sense) that follows: the Court in characterising the law is looking for the pith and substance of the law, to which its dominant purpose is at the very least an excellent guide. But pith and substance is not everything that could possibly be said about the law concerned, nor is dominant purpose. What the Court is asking us to direct our attention to, therefore, is whether the law in question intrudes so far into provincial areas that its pith and substance becomes a law about those areas.

As we have seen, it rightly held in *General Motors* that that was not the case. It held that the provision was indeed a rational, functional part of a federal legislative scheme, and thus did not become, in pith and substance, a law on a topic granted to the provinces, even if it might occasionally have done things very similar to what might be done by the provinces under their powers.

104 [1989] 1 SCR 641, 661f.

105 Hogg Q.C., *Constitutional Law*, p. 15-39.

In between the two cases just dealt with, further limits on federal power under the general limb were revealed when it was held in *Labatt Breweries of Canada* v. *Attorney-General (Canada)*,[106] Laskin C.J. dissenting, that the federal Parliament could not set standards for light beer under the general limb of the trade and commerce power. The majority[107] stated that even if such standards were enacted for

> a substantial portion of Canadian economic activity, one industry or trade at a time, by a varying array of regulations or trade codes applicable to each individual sector, there would not, in the result, be at law a regulation of trade and commerce in the sweeping general sense[108]

as is required by the general limb. Such statutes would merely be, to use the words of *Parsons* quoted above and quoted in *Labatt* itself as an important part of the Court's reasoning,[109] a collection or series of 'minute rules for regulating particular trades' and thus outside federal power. The 'sweeping general' nature of the statutory scheme as a whole in *General Motors* was, on the other hand, an obvious point in favour of its validity.

Such case law illustrates the effort and thought that goes into finding appropriate criteria for reconciling federal and provincial power, and preserving provincial power, in Canadian scope doctrine. There is no doubt that one reason for this is that the text is more favourable to provincial powers than the Australian one, simply because it lists and thus preserves them. It was indeed a mistake not to enumerate State powers in the Australian Constitution. A distinguished Australian Judge, Mr Justice Evatt, once commented:

> Section 91 of the *British North America Act* [as the Canadian Constitution was then called] vests exclusive power in the Dominion Parliament to make laws for 'the regulation of trade and commerce'. But s 92 of the same Constitution vests exclusively in the Legislatures of the provinces exclusive power to make laws in relation to 'property and civil rights in the province'. It was, therefore, not possible to ascertain and define the extent of the Dominion power over trade and commerce without maintaining the exclusive provincial power over local civil rights. Central and local claims to power had to be balanced. Neither power was greater or less than the other. It was necessary to visualize and recognize both powers at the same moment. Consequently the "aspect" of any questioned legislation often became of supreme importance. In such cases, the double enumeration of exclusive powers of Dominion and province respectively in ss 91 and 92 made the problem one of classifying disputed legislation under two already given heads of power. If the challenged Dominion law appeared to regulate

106 [1980] 1 SCR 914.

107 See at 952 per Ritchie J.

108 At 944.

109 At 935.

> civil rights in the province rather than to regulate the trade and commerce of Canada as a whole, the Dominion power was denied.
>
> The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine those duly granted to the Commonwealth. The legislative powers of the States are only exclusive in respect of matters not covered by the specific enumeration of Commonwealth powers. It is the grant to the Commonwealth which must first be ascertained. Whatever self-governing powers remain belong exclusively to the States.[110]

c. The residue

There is not normally very much to be said about residues – once the express powers have been characterised, they are what is left, and accordingly the main focus of most characterisation doctrine is on the interpretation of those powers.

However, Canadian scope doctrine has a number of interesting features even in the treatment of the residue, which accordingly deserves a section to itself. The Canadian residue is notable for being a relatively minor source of federal power over a few areas rather than the leviathan one might expect it to be on reading the text in the light of the statements made by (Sir) John MacDonald A.-G. about the intention behind the structure chosen by the drafters. This is because it is interpreted with the need to maintain the federal distribution of powers and provincial autonomy firmly in mind.

In Canada, as we have seen, the residue is vested in the centre. It is also referred to as the "peace, order and good government" power after the words introducing s 91's enumeration of federal powers, which make it clear that the residue is central power over everything that is not enumerated and can be described as being for the "peace, order and good government" of Canada. This is however a somewhat misleading phrase, a phrase with a history. In the nineteenth century, the phrase was used by the Imperial British Parliament as a conventional description of the sovereign plenitude of legislative power possessed by the Imperial Parliament and conferred by it, even if in relation to limited subjects, on the colonial legislatures.[111] Its function as conferring legislative power of this sovereign quality on the Canadian legislatures was confirmed by nineteenth-century authority in the Privy Council.[112] However, the question dealt with here is not about the quality of the power conferred, but about its quantity (or scope) – how far does the sovereign power extend, in relation to what subject-matters may it be exercised?

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110 *Huddart Parker* v. *Commonwealth* (1931) 44 CLR 492, 526f.
111 *Union Steamship of Australia* v. *King* (1988) 166 CLR 1, 10.
112 *Hodge* v. *R* (1883) 9 App Cas 117.

Just as the individual federal powers must not be allowed to crowd out the provincial powers, the residue has been restricted to a very few areas in Canada in the interests of preserving provincial power. At the same time, this is an illustration of the nebulous nature of residues – enumerated powers very often tend to have priority over "everything else".

The Canadian residue has been held to cover three areas. It covers, first, obvious and deliberate omissions from the text. Thus, the incorporation of companies with federal objects falls under the residue of federal power, as only the incorporation of companies with provincial objects is mentioned in the text (s 92 (11)) – this point was also settled in *Parsons*.[113] This example suggests that the primary focus here is not on omissions *from* the enumeration of powers as a global description of all possible areas of legislative activity, but rather on omissions *within* the enumeration of powers, that is to say, subject areas that are raised as possible subject areas of legislative power by the enumeration but conspicuously unallocated by it. That is almost certainly contrary to the intention behind the power, but nevertheless in the interests of maintaining a federal balance within Canada.

On this peg, incidentally, hangs the dispute about whether the Canadian centre has a treaty implementation power similar to that possessed by the Australian centre. This dispute exists because s 132 of the Constitution gives the centre power to implement treaties entered into by the British Empire, but is silent about treaties entered into by Canada in its own right (an impossibility in 1867 when Canada had no international personality, something which it developed only after the First World War).[114] There is a strong case for recognising the implementation of such treaties as part of the "peace, order and good government" power,[115] but in this author's view an even stronger case for not disturbing the existing case law except by amending s 132 to provide an express power for the implementation of all treaties. This is especially so given the sensitivities of the provinces, above all Quebec.

Secondly, there is the "national concern" branch of the residue, which consists of a few new areas of human life (such as aviation)[116] which can be confined to a relatively small domain[117] as well as obviously federal topics such as the national capital.[118] Newness, however, is neither a sufficient nor a necessary criterion for inclusion under this heading; the residue is certainly not a power over everything that had not been invented in 1867. After all, as Professor Hogg Q.C. points out, a

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113 (1881) 7 App Cas 96, 116; Hogg Q.C., *Constitutional Law*, pp. 17-5, 23-1f; Ziegel, "Constitutional Aspects of Canadian Companies" in Ziegel (ed.), Studies *in Canadian Company Law/Ètudes sur le Droit Canadien des Compagnies* (Butterworths, Toronto 1967) vol. 1 pp. 150-154.

114 Re *Regulation and Control of Radio Communication in Canada* [1932] AC 304, 312.

115 Hogg Q.C., *Constitutional Law*, pp. 11-12 – 11-16, 17-5f; Strom/Finkle, "Treaty Implementation: the Canadian Game Needs Australian Rules" (1993) 25 Ottawa LR 39; Struthers, "'Treaty Implementation ... Australian Rules': A Rejoinder" (1994) 26 Ottawa LR 305.

116 *Johannesson* v. *West St Paul Corp* [1952] 1 SCR 292.

117 Lederman Q.C., *Continuing Canadian Constitutional Dilemmas*, p. 296.

118 *Munro* v. *National Capital Commission* [1966] SCR 663.

number of new inventions have been held to come within the enumerated powers.[119] Rather, the test is said to be whether the subject-matter concerned 'goes beyond local or provincial concern or interests and must from its inherent nature be the concern of [Canada] as a whole'.[120]

Even this proposition, however, is quite misleading. Reading it, one might think that the Courts make an assessment of the significance of each area and decide who would be best at regulating it. That is not what occurs. The proposition states a necessary but not a sufficient condition for recognition of a power as falling under this branch of the residue.

What then are the other conditions? This is hard to say, partly because of the nebulousness of constitutional doctrine developed on a case-by-case basis, partly because of the small number of cases involved, and partly because each subject area recognised as falling under the residue is unique. However, it was held in 1988, while recognising marine pollution as an area of federal power under this heading, that an area of human life could be subjected to federal power in this way only if it possessed

> a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of power under the Constitution.[121]

As mentioned, it was held that the subject matter of marine pollution passed this test, and it accordingly joined the select list of federal subject-matters that have been recognised as falling within the residue. Marine pollution is after all a particularly good candidate for recognition under this heading given the nature of the sea.

It is interesting to notice that the need to ensure the preservation of provincial powers results in the residue being sub-divided into a number of distinct subject-matters, almost as if there is a second unwritten federal list, rather than being simply a power over everything that is not on the provincial list. The Courts furthermore insist that each area recognised under this heading as belonging to the federal domain should be easily confined, defined and restricted, as the quotation illustrates, in order to prevent a large-scale "break-out" of the residue into provincial powers.

The result of this doctrine is that this branch of the residue has had very limited application. The decisions relating to the national capital, aviation and marine pollution are in fact the only three in which a subject area has been held to come within federal power solely on the basis of this branch of the residue, unaided by any of the enumerated powers.[122]

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119 Hogg Q.C., *Constitutional Law*, pp. 17-17f, 22-25f (radio and television).

120 *Attorney-General (Ontario)* v. *Canada Temperance Federation* [1946] AC 193, 205; Hogg Q.C., *Constitutional Law*, p. 17-10.

121 *R* v. *Crown Zellerbach Canada* [1988] 1 SCR 401, 432.

122 Hogg Q.C., *Constitutional Law*, pp. 17-10f.

To this must be added, first, the subject of temperance legislation – a case on this provided the occasion for the enunciation of the test referred to above – although this is now a somewhat antiquated field of law and one with a very chequered history in Canadian constitutional law[123] which would take too much time to recount here but which results in its being a less than firm basis for the construction of constitutional doctrine. Secondly, a few decisions have upheld federal legislation as justifiable both under an enumerated power and the residue. The outstanding example is the subject area of atomic energy, recognised in this fashion in 1993.[124] As La Forest, L'Heureux-Dubé and Gonthier JJ. put it:

> This case can equally well be disposed of under Parliament's power to legislate over matters of national concern under the peace, order and good government clause in s 91 of the *Constitution Act* 1867 [as under the enumerated power over works for the general advantage of Canada (s 91 (29), 92 (10) (c))]. There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power. No one seriously disputed this assertion, and my colleagues both agree that this is so. [...] The strategic and security aspects of nuclear power in relation to national defence and the catastrophe and near-catastrophe associated with its peaceful use and development at Chernobyl and Three Mile Island bespeak its national character and uniqueness.[125]

(As this quotation suggests, the Court divided on the question whether labour relations within atomic energy plants came within federal power and held by the narrow margin of 4 – 3 that they did.)

Finally, the third branch of the residue is temporary emergencies. As well as obvious temporary emergencies such as war and insurrection (although surprisingly not the Great Depression), the very outer limit of this was reached under the centralist leadership of Laskin C.J., when it was held that the inflation of the mid-1970s constituted an emergency for these purposes.[126]

In this case the Court experimented with the idea (borrowed from American doctrine) of requiring the opponents of the validity of a federal law to show that federal Parliament had no rational basis for its assessment that there was an emergency, rather than requiring the supporters of the law's validity to show that there was in fact such an emergency[127] – something which would obviously greatly increase the opportunity for emergencies to be exploited in order to increase federal power and which might even mean that 'the federal Parliament can use its emer-

123 See Hogg Q.C., *Constitutional Law*, pp. 17-7 – 17-10.
124 *Ontario Hydro* v. *Ontario* [1993] 3 SCR 327.
125 At 379.
126 Re Anti-Inflation Act [1976] 2 SCR 373.
127 At 425.

gency power almost at will'.[128] It may be questioned whether this suggestion is the last word on the topic; Canadian law on the residue has always been in a state of evolution; and Laskin C.J. is no longer on the Bench. If however the "rational basis" suggestion is adopted by the Court, a small breach will have been opened in the otherwise strong wall of protection which the Court has always thrown around provincial powers.

d. Characterisation (in the narrow sense)

In the area of characterisation in the narrow sense, the text can explain the differences with Australian doctrine only partially. The first proposition on which Canadian characterisation doctrine rests, and which is connected with the existence of two lists, is that a law's predominant character – its "pith and substance" – is to be the basis of characterising it.

This is to some extent a product of the two-list system because, if laws were regularly said to have more than one character as in Australia, there will be cases in which the various characters of a law will fall under both the federal and provincial lists. This would mean that – as the listed powers are mostly exclusive – it would simultaneously be the case that both and neither jurisdiction could legislate on the topic in question. It is therefore necessary, as a rule (to which there are exceptions), for each law to have one predominant character only. Thus, the law about car insurance had to be about either trade and commerce or property and civil rights, not both, as each is on a different list.

A more recent example of this is *Kitkatla Band* v. *British Columbia*,[129] which concerned a provincial statute relating to the protection of heritage and cultural property. In its application to objects of significance to aborigines, a choice had to be made between provincial power under s 92 (13) and the federal power under s 91 (24) over 'Indians, and Lands reserved for the Indians'. In the event it was held that the statute fell under the former power and was therefore valid. Its predominant character was not about Indians as such; they were affected by the statute incidentally in the same way as other groups in society.

One is reminded of Latham C.J.'s statement that a law is not about clergymen simply because it taxes the incomes of all including clergymen. One might also wonder whether such jurisprudence might have become doctrine in Australia too and been applied to laws purportedly regulating trade and commerce in the interests of the environment. The case provides an example of a statute which does have a direct legal operation on a named class of people, but does not regulate them in their capacity as members of that class – as such – and is therefore not about them.

In the *Kitkatla Band* case, the Court considered a question which cannot go unnoticed when a Court states that it characterises according to the "pith and sub-

[128] Hogg Q.C., *Constitutional Law*, p. 17-26.
[129] [2002] 2 SCR 146.

stance" of legislation – is it the whole statute which is to be considered, or each separate provision? The Court opted for the latter view,[130] adding in 2004 that it would consider the 'provision in its overall legislative context';[131] and this is clearly correct. It is also in accordance with the procedure we have already observed in *General Motors.*

If it were otherwise, of course, a legislature could bury away in an otherwise valid statute a provision which is outside its powers and claim validity for the whole on the grounds that the valid parts outweigh the invalid parts. In the *Kitkatla Band* case, the Court quoted from the *Vapor Canada/General Motors of Canada* line of authority to summarise its approach:

> If [the impugned provision] can stand alone, it needs no other support; if not, it may take on a valid constitutional cast by the context and association in which it is fixed as [a] complementary provision serving to reinforce other admittedly valid provisions.[132]

A second proposition, also different from the Australian doctrine, does not appear to be connected with the structure or the text of the Canadian constitutional document in any obvious way. It is that, in characterising a law, its purpose is to be taken into account in addition to its effect. Canadian constitutionalists therefore need to know, when characterising a law, why it was enacted, not just what it does. The "why" question is one which Australians never ask[133] (except perhaps occasionally, and in a somewhat obscure way, in dealing with the purposive/incidental group of powers). It is clear that, in assessing the constitutionality of a law similar to that in *Murphyores*, prohibiting the export of sand for environmental reasons, Canadian doctrine would have permitted not only the legal effect of the law, but also its purpose to be taken into account – something which the High Court of Australia has closed its mind to.[134]

The "what" question is different in Canada too: the third proposition to which attention should be directed is that, in considering the effect of a law, Canadians regularly take into account not only its legal but also its practical effect.

This means that the "heroin tax" example mentioned earlier, which causes such trouble for Australian constitutional doctrine, can be solved effortlessly by Canadian constitutional doctrine – a state of affairs which gives the lie to the proposition that it is never possible for Courts to determine whether the stated reason for enacting a particular law (to raise revenue) is the real reason for doing so. There is admittedly no exact equivalent in Canadian law of the puzzle posed in Australia, as the Canadian centre has a criminal law power (s 91 (27)) under which it can of

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130 At [56].
131 *R* v. *Demers* [2004] 2 SCR 489, [15].
132 [2002] 2 SCR 146, [57], quoting *Vapor Canada,* [1977] 2 SCR 134, 159, which was also quoted by Dickson C.J. in *General Motors of Canada,* [1989] 1 SCR 641, 665.
133 Gilbert, *Australian and Canadian Federalism*, p. 27.
134 Gilbert, *Australian and Canadian Federalism*, p. 52.

course prohibit the possession of dangerous drugs.[135] An analogy is however provided by the provincial power over 'Property and Civil Rights in the Province' (s 92 (13)), because the attempt could be made, by the imposition of fines and disabilities affecting property and civil rights, to regulate the whole of society, or at least parts of it that are supposed to be beyond provincial power.

Something like that was in fact at issue in *Switzman* v. *Elbling*.[136] The case concerned a statute of Quebec known colloquially as the "Padlock Act" which prohibited the propagation of communism from any house, and permitted orders to be made closing the house on infringement. The direct legal effect (to use the Australian terminology) of such an order was, of course, on property and civil rights in the province of Quebec. But the Supreme Court of Canada came without difficulty to the conclusion that its real object was to 'prevent propagation of communism within the province and to punish anyone who does so'.[137] The law was therefore to be characterised as outside the powers of the provinces. This was not difficult given that its real purpose (as distinct from motive – the motives of the lawmakers might, for example, have been to exploit anti-communist feeling) was apparent to anyone with the ability to read the statute in the light of contemporary events and concerns. The same might, of course, have been said of the facts dealt with by the High Court of Australia in *Murphyores*, the sand-mining case. In *Switzman*, their Lordships differed among themselves about what federal power (criminal law or the residue) the Act would have fallen under had the federation enacted it, but, with the exception of Taschereau J., were unanimous in their decision that it did not fall within provincial power.

Examples like this show that common sense and a feel for what has traditionally fallen within a power which is allegedly being exercised are important in Canadian characterisation doctrine. This again came to the fore in Re Firearms Act,[138] in which federal legislation restricting access to firearms was upheld as coming within the federal power over criminal law. This would perhaps have seemed obvious were it not for the fact that the federal law included a substantial regulatory content, making it appear more like a matter within provincial power; but it was held valid partly on the grounds that such laws traditionally come within the accepted ambit of the criminal law.[139]

It is easy to see that a power over criminal law, like the "property and civil rights" power, might swallow up everything else if it were not limited in a practical, common-sense way. The Supreme Court of Canada accepts this challenge. And it is certainly a challenge: something beyond a prohibition and a penalty must be required, or else the federal criminal law power would indeed be just as much a blank cheque to regulate everything as a taxation power divorced from purpose. The necessary extra something has never been precisely identified. Question-

[135] For a surprising qualification to this, now it seems obsolete, see Hogg Q.C., *Constitutional Law*, pp. 17-16 – 17-18.

[136] [1957] SCR 285.

[137] At 288 per Kerwin C.J.

[138] [2000] 1 SCR 783.

[139] At 804.

begging formulae like 'valid criminal law purpose' or incomplete lists such as 'those laws that are designed to promote public peace, safety, order, health or other legitimate public purpose[s]'[140] are sometimes offered. Tradition is clearly important: as the Court pointed out in Re Firearms Act and again in 2004, 'In determining whether the purpose of a law constitutes a valid criminal law purpose, Courts also look at whether laws of this type have traditionally been held to be criminal law'.[141]

In the end the inconclusive nature of the available tests is however not surprising: the search for the magic third ingredient that makes a prohibition with a penalty attached part of the criminal law reminds one of Mr Justice Stewart's definition of "obscenity".[142] However, the difficulty of drawing lines is no excuse for not doing so when the Constitution requires them to be drawn in a particular place, and in the vast majority of cases there is no real difficulty in doing so.

Taxes on banks in Canada have raised the question of the true nature of taxation laws which Latham C.J. raised in Australia and which has also raised by the "heroin tax" puzzle. Under Canadian doctrine, a provincial tax on banks is valid under the provincial taxing power if its dominant purpose is to raise revenue – even despite the federal power over "banking" in s 91 (15)[143] – but a tax on banks was invalid when levied as part of an attempt by the government in Alberta, which adhered to the "social credit" theory of economics, to drive the banks out of business rather than as a true attempt to raise revenue.[144] This latter case is the same as the "heroin tax" example in all essentials, except that the statute concerned was provincial rather than federal. This difference, however, makes no difference to the broader question whether it is possible to determine the true object of what is said to be a measure of taxation but is suspected to be a means to another end.

Probably, however, the government of Alberta would not have refused the extra money it would have raised by the tax on banks before driving them out of business, so that the raising of revenue must have been at least an intended side-effect of it, and perhaps even a subsidiary purpose.[145] In the end this may depend on what we mean by "purpose" – a concept that, like "intention", is difficult to define with absolute accuracy. The Privy Council's decision must mean that the raising of revenue was at most a secondary purpose, as was indeed the reality. It was the dominant or real purpose of the law which lent it its character.

What happens if a law has two equally important purposes, one of which is within power and one outside it? Recently, in *R* v. *Demers*,[146] the Court held that a

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140 *R* v. *Malmo-Levine* [2003] 3 SCR 571, [74], citing earlier case law.

141 *R* v. *Demers* [2004] 2 SCR 489, [17].

142 *Jacobellis* v. *Ohio* (1964) 378 US 184, 197.

143 *Bank of Toronto* v. *Lambe* (1887) 12 App Cas 575.

144 *Attorney-General (Alberta)* v. *Attorney-General (Canada)* [1939] AC 117, 130, 133.

145 As this book went to press, the Supreme Court of the United States had just handed down its decision in *Gonzales*, (2005) 125 S Ct 2195. There is a reference in that case (at 2202) to a piece of legislation which had the practical effect, and perhaps also the purpose, of 'practically curtail[ing] the marijuana trade'. It would be interesting to know what the Canadian Courts would have made of that.

146 [2004] 2 SCR 489.

statute had 'twin goals of protecting the public and treating the mentally ill accused fairly and appropriately',[147] but that each of these fell within federal Parliament's power over criminal law.[148] What if this had not been so? This is a conundrum which the Court has, to my knowledge, never faced.

A similar example of the relevance of purpose in Canadian constitutional law is the interesting series of cases[149] on whether Sunday closing laws have a religious purpose (in which case they fall under the federal power over criminal law because they enforce what is said to be society's moral code) or the secular one of ensuring that workers have a day off (in which case they come under the provincial power under s 92 (13)).

Given the somewhat anachronistic nature of laws designed to promote the observance of the Sabbath,[150] the Court has also had occasion to point out that a law's '[p]urpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable'.[151] A legislature which found itself in the position of wishing to change the purpose of a law would probably, therefore, be compelled to re-enact it.

A further example of the importance of purpose in characterisation is provided by the trade and commerce power: whether a statute falls within the federal power over inter-provincial trade and commerce or not is determined by its purpose, not merely its direct legal effect, that is, what sort of goods it operates upon and where they are at the time. Two cases from in the early 1970s in addition to *Vapor Canada* and *General Motors* provide illustrations of this. In one, a provincial statute was struck down because, although it applied to trade within the province only, its aim was to regulate the trade in eggs produced outside the province as well;[152] in the other, federal restrictions on intra-provincial trade in oil were upheld because they were in truth part of a scheme dealing with imported oil.[153] It is thus not the legal effect of the laws that was crucial – in each case they were at first sight within provincial jurisdiction because they applied to objects to be traded within the province – but their purpose. The effect of this in preserving the Canadian economic union against possible attempts to undermine it by giving preference to producers in one's own province is not to be overlooked.[154]

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147 At [18].

148 At [25].

149 *R* v. *Big M Drug Mart* [1985] 1 SCR 295, 355 (federal legislation struck down on rights grounds); *R* v. *Videoflicks* [1986] 2 SCR 713 (upholding provincial legislation on both federalism and rights grounds).

150 See previous footnote.

151 *Big M*, [1985] 1 SCR 295, 355.

152 *Attorney-General (Manitoba)* v. *Manitoba Egg & Poultry Association* [1971] SCR 689, 703.

153 *Caloil* v. *Attorney-General (Canada)* [1971] SCR 543, 551.

154 Swinton, *The Supreme Court*, pp. 140f. In addition, s 121 of the Constitution provides: 'All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces'.

A slightly more recent and striking example of going behind the stated purpose of a law in order to uncover its true nature is *R* v. *Morgentaler*.[155] This concerned a statute of the province of Nova Scotia which prohibited a wide variety of medical or associated procedures outside hospitals in order, it expressly stated, to ensure the quality of medical services. One of those procedures was the abortion of a live foetus. The Court held that it should consider both the purpose and effect of this law, and that 'it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity'.[156] Looking at the effect of legislation involved considering both the legal effect of the legislation as such, but also the practical effect. In the case at hand – and despite what the law said – the Court concluded, correctly, that the purpose of the legislation was not ensuring the quality of medical services, but rather restricting access to abortion as a socially undesirable practice.[157] The other medical services were regulated merely to make it seem that abortion was not the legislature's principal concern.

The case is interesting not only because it deals with such a highly controversial topic, but also because it reveals the wide variety of materials that can be used to determine purpose. The enquiry is quite wide, and is not confined to direct evidence but may include circumstantial evidence of intention as well. '[T]he Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be',[158] as the Privy Council said as long ago as 1938 in dealing with the tax on banks emanating from Alberta.

This is still the law in Canada. Thus, the Court reached its conclusion in the abortion case on the basis of a very broad consideration of circumstantial evidence surrounding the enactment of the legislation. For example, conclusions were drawn from the haste with which the prohibition had been introduced after the constitutionality of an earlier attempt to prohibit abortion alone had been challenged, as well as from extracts from the official report of the debates of the legislature which showed that the legislature was concerned with abortion clinics, not health generally.[159] On these bases, the Court was able to conclude that the legislation was invalid and could have been enacted only by the federal Parliament under its criminal-law power to enforce basic minimum standards of conduct.

Furthermore, the Court, speaking through Sopinka J., used the *Morgentaler* case to expatiate on the relevance of practical and legal effect of legislation to characterisation in terms which are worth quoting at length.

> Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect". The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation"

[155] [1993] 3 SCR 463. See also Re Firearms Act [2000] 1 SCR 783, 797f.
[156] [1993] 3 SCR 463, 482.
[157] At 494, 501, 513.
[158] *Attorney-General (Alberta)*, [1939] AC 117, 130.
[159] [1993] 3 SCR 463, 500-505.

refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. [...] Legal effect is often a good indicator of the purpose of the legislation, but is relevant in constitutional characterisation even when it is not fully intended or appreciated by the enacting body. [...]

The analysis of pith and substance is not, however, restricted to the four corners of the legislation. Thus the Court 'will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve', its background and the circumstances surrounding its enactment and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation. The ultimate long-term, practical effect of the legislation will in some cases be irrelevant.

[...]

I have noted that the legal effect of the terms of legislation is always relevant. Barring material amendments, it does not change over time. The practical effect of legislation, on the other hand, has a less secure status in constitutional analysis. Practical effect consists of the actual or predicted results of the legislation's operation and administration. Courts are often asked to adjudicate the constitutionality of legislation which is not yet in force or which, as here, has only been in force a short time. In such cases any prediction of future practical effect is necessarily short-term, since the Court is not equipped to predict accurately the future consequential impact of legislation.

[...]

In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires*.

[...]

If, however, pith and substance can be determined without reference to evidence of practical effect, the absence of evidence that the legislation has a practical effect in line with this characterisation will not displace the conclusion as to the legislation's invalidity. In such a case, 'evidence as to the likely effect of legislation would not add anything useful to the task of characterisation, but would merely bear on the wisdom or efficacy of the statute. In those cases the evidence is not relevant.' Such evidence will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its object. The Court is not concerned with the wisdom of a

> statute, and the government surely cannot justify legislation already determined to be *ultra vires* by arguing that it will not realise its aim or objective. Moreover, as I have said, legislation is often considered before experience has shown its actual impact, and prediction of future impact is necessarily short-term.[160]

The reason for the caution about practical effect is only hinted at in this extract. The difficulty is that it is sometimes hard to consider practical effect without infringing the doctrine of separation of powers by considering the wisdom or efficacy of the statute concerned.

Questions relating to the wisdom and efficacy of a statute – whether it will actually have the effect that the legislature intended – are as a rule rightly reserved for the legislature. For example, the Courts will not receive evidence that gun-control legislation will not effectively keep guns out of the hands of criminals,[161] even, or perhaps especially, if that is what the legislature claims to wish to achieve by its legislation. Nor is even quite a significant practical effect necessarily even relevant: the valid provincial requirement that private motor insurance should cease had a significant effect on insurance companies, but that does not affect the validity of the purpose pursued by the legislature.

An allegation that a legislature is pursuing goals other than the stated ones, however, is a different matter, as the result in *Morgentaler* itself shows. In such cases, practical effect certainly is relevant.

In summary, the extract indicates the comparative richness of Canadian characterisation doctrine. It shows that the Canadian Courts do not reject the Australian criterion of legal operation, but rather subsume it under the general heading of "pith and substance". That phrase clearly includes legal effect, and also practical effect if it is alleged that the legislature has attempted to conceal its real purpose. As *Morgentaler* itself shows, however, purpose also means just that – what the legislature wanted to do, as shown by any reliable evidence of its intention that is available.

Perhaps the only thing missing here is a consideration of what is meant by purpose. The similar (but not identical) concept of intention raises difficult problems, and the Supreme Court of Canada might be thought to proceed in an untheorised and common-sense way in determining what the purpose of a statute is. Why, for example, was the purpose of the law in *Morgentaler* the prohibition of abortion rather than, say, the preservation of potential human life? Doubtless the Court wanted to avoid emotive descriptions of purpose in favour of neutral ones, and thus to concentrate on the proximate purpose of the statute rather than the broader motives and remoter purposes underlying it. But why select the proximate rather than the remoter purpose? As in the criminal law, the identification of purpose/intention does not often cause problems. But occasionally it does. Another possible situation raised in recent American authority which bears some similarity

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160 At 482f, 485-488. The two internal quotations to which no reference is given in this book are from an earlier edition of Hogg Q.C., *Constitutional Law*.

161 Re Firearms Act [2000] 1 SCR 783, 797; Hogg Q.C., *Constitutional Law*, pp. 15-16f.

to a situation much discussed in the criminal law[162] is knowledge by the legislature that its statute will achieve something which it does not actually desire to do – the reference is to an American statute[163] which had the effect of diminishing significantly the trade in marihuana although its purpose, at least as stated, was merely to regulate its use. If the Supreme Court of Canada ever faces such a case, it will have to look a bit more closely at what it means by purpose.

Despite this lack of a theoretical underpinning, the degree of sophistication in the scope-of-power doctrine, and characterisation reasoning more generally, to be found in Canadian constitutional cases far exceeds the vapid simplifications of Australian doctrine. It is again well illustrated by the very recent case of *Ward* v. *Canada*.[164] The case concerned federal legislation prohibiting the sale of a certain type of seal. The federal powers under which this legislation might be valid were the power over inland fisheries (s 91 (12)) and criminal law. For the defendant, the legislation was said to fall under the provincial power in relation to property and civil rights and thus to be invalid. The legislation did not, of course, fall under the federal trade and commerce power: there was nothing to show that the trade and commerce involved in selling the seals fell within the limits on federal power established by the case law. It was not, for example, inter-provincial.

That being so, the next most obvious suspect for a correct characterisation of the law was the provincial power over property and civil rights, which is held to include most forms of trade and commerce which do not fall within the federal power. However, such an easy answer would overlook the question of purpose. The Court, looking at the report of a Royal Commission which preceded the statute's enactment, discovered that its purpose was not to regulate trade and commerce at all, but rather to conserve inland fisheries as an economic resource having regard to boycotts of Canadian fish products that had been threatened owing to the killing of seals. The most sensible way of achieving the conservation of fisheries, given the nature of the seals and the method used to make commercial use of them, was not to prohibit the taking of the relevant seals from the water at all, but rather to prohibit their sale (thus making killing them pointless). The Court accordingly rejected the argument 'that because the legislative measure is a prohibition on sale, it must be in pith or substance concerned with the regulation of sale. This confuses the purpose of the legislation with the means used to carry out that purpose.'[165] The Court has gone a long way into the background behind the law in order to determine what it really is about.

That having been established, the Court had also to consider whether the law, thus characterised, fell within the scope of the fisheries power. This was resolved in favour of validity partly on the basis of the prior case law which established that economic goals associated with fisheries were included within the power; partly as a result of the observation that the power was not just over fish, but over fisheries

[162] For references, see the author's "Concepts of Intention in German Criminal Law" (2004) 24 OJLS 99, 107.
[163] See above, fn 145.
[164] [2002] 1 SCR 569.
[165] At [25].

as a whole; and partly by contrasting the fisheries power with the provincial power under s 92 (13). Given that the fisheries power is hardly likely to swallow entire the provincial power over property and civil rights, and also given the state of the case law, this was a sensible decision to reach.

The case was therefore decided in favour of federal power, which leads me to the point that should be made in closing this section. It would of course be possible to exaggerate the extent to which Canadian federalism doctrine results in the protection of the federal idea in that country. Indeed, the history of other federal countries indicates that financial arrangements, for example, may well be just as important as anything the Courts do. And many – but by no means all – of the cases cited above have gone the way of the federation; one commentator points out that, since the Second World War, few Canadian federal statutes have been held unconstitutional by the Courts.[166] There has indeed been a moderate but noticeable increase in federal power since the Second World War. This trend sped up under Laskin C.J., but has since become less noticeable again. One thing that Canadian constitutional history does teach us, however, is that change and development in the case law is a constant factor.

However, the sheer number of victories for the centre is not a reliable indicator of the strength of federalism in Canada, or of the effect of the doctrine. That is because the Canadian centre, knowing that the Supreme Court of Canada tolerates much less than the High Court of Australia, has tried to get away with much less.

Most importantly, however, Canadian characterisation doctrine is much more profound, intellectually defensible and the product of concern to remain loyal to the federal design of the Constitution than is Australian doctrine. Whatever trends the future holds, Canadian case law will at least continue to be based on well thought-out characterisation doctrine. The challenge for the Supreme Court of Canada, as it struggles with the manifold difficulties of its constitutional text and with the needs of Canada as a whole and of each of its very different parts, is to continue to preserve federalism by, for example, elaborating limits to federal powers, such as the trade and commerce power and national concern and emergency branches of the residue, which might over time be used to reduce provincial autonomy.[167]

e. The double aspect doctrine

As with the Australian doctrine, there is one exception to the general rules which must be dealt with briefly here for the sake of completeness. It is the "double aspect doctrine". In a system of mutually exclusive lists of powers, a decision that one level of government can enact legislation logically entails that the other cannot. If this principle were applied rigorously across all areas, difficulties would

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166 Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26 Can Jo Political Science 3, 13, 20.

167 Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992) 55 Law & Contemp Probs 121, 128.

arise. Accordingly, various examples exist of surprisingly similar statutes that have been validly enacted by both levels of government pursuant to allegedly exclusive powers.

For example, both the centre and the regions can create offences relating to conduct on the roads such as failing to stop after an accident or driving without due care and attention.[168] When enacted by the centre, these statutes deal with the criminal law. When enacted by the provinces, they are about property and civil rights, or merely local matters in the province. An interesting recent example along similar lines involved a prohibition of unprofessional conduct by prosecutors under provincial legislation. While criminal law and procedure fall within federal power under s 91 (27), the provincial prohibition in its context, and having regard to the fact that it dealt with dishonest conduct only, was held to be concerned with upholding the standards of the legal profession. This purpose fell outside the federal exclusive power and within provincial power under either s 92 (13) or the "administration of justice" power (s 92 (14)).[169]

The fact that virtually the same statutory rule can be supported under two separate heads of power granted to two separate levels of government which are said to be exclusive of each other might be thought to show the impracticality of dividing powers according to mutually exclusive lists. There is certainly something in that. Phenomena in the world do not lend themselves to such cut-and-dried classification.

The doctrine which has grown up, however, goes a long way towards explaining the apparent inconsistency with the constitutional scheme. If one of the principal criteria in characterising laws is their purpose, then laws with the same content, but enacted for a different purpose, might well be able to be characterised differently. There is no reason not to see the purpose of a federal statute requiring people to stop after an accident as designed to enforce minimum acceptable standards of conduct as the criminal law usually does, while seeing a provincial statute to the same effect as having the purpose of ensuring that people's property and civil rights under the law of torts are adequately protected by giving the people involved in the accident the opportunity to exchange names and addresses.

168 *O'Grady* v. *Sparling* [1960] SCR 804; *Stephens* v. *R* [1960] SCR 823; *Mann* v. *R* [1966] SCR 238. Further examples may be found in Hogg Q.C., *Constitutional Law*, pp. 15-11f.

169 *Law Society of Alberta* v. *Krieger* [2002] 3 SCR 372.

4. The United States of America

a. Introduction

Paradoxically, the oldest modern federation has the least well-developed characterisation doctrine. That is because the Supreme Court of the United States in effect abandoned judicial review of legislation on federalism grounds after the New Deal crisis of 1937.[170] The recent revival in the United States of America of the practice of striking down federal laws because they are outside Congress's enumerated powers – a power that the Supreme Court of the United States, following its spectacular backdown in 1937, did not exercise from 1936 to 1995 – has been the subject of an enormous amount of analysis,[171] not all of which can be reviewed here. In the two cases in which it has struck down laws under the commerce clause[172] – *United States* v. *Lopez*[173] and *United States* v. *Morrison*[174] – the Court did not consider in any detail the technical issues surrounding methods of characterisation which are the subject of this essay.

This is not necessarily the Court's fault. The title of the laws presented to it in *Lopez* and *Morrison* to be regarded as laws 'regulat[ing] Commerce with foreign Nations, and among the several States, and with the Indian Tribes' (the "commerce clause", as it is universally known),[175] and thus within federal power, was so meagre that the principal challenge for the Court in characterising the laws must have been to avoid bursting into laughter[176] rather than to conduct a learned

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170 Leuchtenberg, "The Origins of F. Roosevelt's 'Court-Packing' Plan" [1966] Sup Ct Rev 347.

171 See above, fn 18.

172 The Court has also shown more rigour in considering the constitutionality of laws said to be supported under the Fourteenth Amendment, for example: an instance of this is *City of Boerne* v. *Flores* (1997) 521 US 507. However, that and other illustrations of the Court's revival of interest in federalism are not dealt with here, as they do not raise issues of characterisation.

173 (1995) 514 US 549.

174 (2000) 529 US 598.

175 United States Constitution, Article I, s 8.

176 *Cf.* Nelson/Pushaw, "Re-Thinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues" (1999) 85 Iowa LR 1, 102. I am of course aware that in each case four dissenting Judges held that the law was valid under the commerce clause, but their Honours' judgment cannot be regarded as a serious attempt at judicial enforcement of limits on federal power; rather, it not only has the effect, but also amounts to an argument, that

review of what precisely is involved in characterising a law which has a serious claim to validity under the enumerated powers of Congress.

Nevertheless, aspects of the Court's approach can, on analysis, be discerned from the judgments. Moreover, it may well be of assistance in future cases, in which the arguments for and against validity are more finely balanced than they were in *Lopez* and *Morrison*, to know what the Court thought it was doing in those cases. It will certainly be of assistance to have some realisation of the options involved in the process of characterisation and the consequences of adopting them if – to take a much-debated example – a challenge to the federal statute dealing with the enforcement of child support payments across State boundaries comes before the Supreme Court.[177]

Before commencing the analysis of the recent case law, a word should be said about the structure of the distribution of powers in the United States Constitution. It is both well known and simple, as befits the world's oldest modern federation, so that this question need not detain us for long. As usual, the concentration will be on the main features of the structure; there is no attempt to be comprehensive.

Under Article I, s 8 of the Constitution of 1787, enumerated powers are conferred on the federation.[178] The text, with one exception relating to the power over what is now the District of Columbia and other federal properties, does not state whether the powers are exclusive or concurrent; in practice they have been largely treated as concurrent[179] unless there is some prohibition on action by the States elsewhere in the Constitution. This view is supported by the Tenth Amendment, which states that '[t]he 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 enumeration of powers concludes with an incidental power '[t]o 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' (the "necessary and proper" clause).

When the Constitution is amended, the practice is not to touch the sacred text of 1787 itself, but rather to append the amendments to the text; they prevail over inconsistent portions of the original text. A number of such amendments confer additional power on the federation. Each of the Thirteenth, Fourteenth and Fifteenth Amendments, passed in the 1860s after the Civil War, ends with some statement

judicial review on federalism grounds should be entirely abandoned – an argument with which of course some people, although not this author, would agree.

[177] So far the statute concerned has had a good record at intermediate appellate level: *cf.* *U.S.* v. *Monts* (2002) 311 F (3^{rd}) 993, 996f; *U.S.* v. *Klinzing* (2003) 315 F (3^{rd}) 803, 806-808; Kemper, "Validity, Construction and Application of *Child Support Recovery Act of* 1992 (18 USCA § 228)" (1998) 147 ALR Fed 1; Merritt, "Commerce!" (1995) 94 Michigan LR 674, 722; Taylor, [2001] PL 281, 291f.

[178] There are of course other sources of congressional power as well; they are handily listed in Tribe, *American Constitutional Law*, vol. I pp. 789-798.

[179] There is an exception here relating to the commerce clause itself, namely the "dormant commerce clause", but a treatment of this would be outside the scope of this book. See Tribe, *American Constitutional Law*, vol. I pp. 1024ff.

to the effect that 'Congress shall have power to enforce this article by appropriate legislation', a formula which is repeated at the conclusion of the Nineteenth (1920), Twenty-Third (1961), Twenty-Fourth (1964) and Twenty-Sixth (1971) Amendments. The Sixteenth Amendment of 1913 on the other hand just gives Congress power to levy an income tax.

It has already been mentioned that in the United States federal powers are often conferred, as indeed the commerce clause shows, by reference to an introductory purposive verb of greater or lesser specificity, such as *regulating* commerce, *promoting* the progress of science and useful arts, *providing* and *maintaining* a navy, and so on. They are not merely expressed as powers 'with respect to' defined areas as are the Australian powers; they do not simply name a topic without an introductory verb or prepositional phrase as do the Canadian ones.

Of the powers conferred in 1787, by far the most significant is the commerce clause. It is 'the chief source of congressional regulatory power'[180] and the power on which the recent case law has also concentrated.

b. Categories of commerce

Lopez involved a federal statute which created an offence of possessing a firearm in a school zone. In order to decide whether this came within congressional authority over inter-State commerce under the commerce clause, the scope of that power and the character of the law had to be determined. Drawing on precedent mostly from the nineteenth and early twentieth centuries, the Court held that federal power extended to three areas: the use of the channels of inter-State commerce; the instrumentalities of inter-State commerce, and persons and things in inter-State commerce; and activities that have a 'substantial relation to inter-State commerce, *i.e.*, those activities that substantially affect inter-State commerce'.[181]

The Court has here created sub-categories of trade and commerce in an effort to determine the scope of the power. This approach (although not of course the categories themselves) is at first sight somewhat reminiscent of the Canadian approach of dividing federal power over trade and commerce into inter-provincial, international and "general" trade and commerce. However, this initial impression is a misleading one. The Court is engaged here on a different enterprise from that in which the Supreme Court of Canada is engaged when determining the scope of the Canadian trade and commerce power. The difference lies in the fact that the Canadians must attempt to confine what is, according to the text, an immensely wide power in order to make room for the exclusive provincial power over property and civil rights, and so the sub-categories which describe the scope of the power there are a real limitation. The Supreme Court of the United States, on the other hand, aims at merely analysing the power into its component parts without attempting to impose limitations on the power that are not present in the text.

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[180] Tribe, *American Constitutional Law*, vol. I pp. 807f.

[181] (1995) 514 US 549, 559.

A more helpful analysis of what the Court is doing here is an analysis along Australian lines contrasting direct legal effect (the core of the power) and the penumbral incidental power.[182] In stating that the commerce power applies to the channels and instrumentalities of, and persons and things in, inter-State commerce, the Court is setting out a list of what appear to be all the cases in which a statute might have a direct legal effect on – operate directly on – the activity of inter-State commerce.

This is supplemented by the third category, which is 'different in kind'.[183] By this category, provision is made for cases in which the legal effect of the law is not on any activity in inter-State commerce – the rights, duties and obligations affected by the law lie elsewhere – but the law in some way 'substantially affect[s]' inter-State commerce. An example of this from the Australian case law which was mentioned earlier, and would fit squarely within the American doctrine, was the safety of aeroplanes: regulation of those engaged only in inter-State or international commercial transport will still leave the possibility that those 'planes might fly into some other 'plane. This would be very likely to affect substantially the operations of the 'plane in inter-State or overseas commerce. It is therefore necessary in the interests of the safety of flights unequivocally within federal power also to regulate flights which otherwise would not fall within federal power.

We need not pause to consider here whether a doctrine similar to the Australian one distinguishing between two types of incidental power might be applicable in the United States as well, as some appear to have thought.[184] If this is so, there would be a distinction between matters incidental to the *execution* of a power – in essence machinery provisions – which would be covered by the express incidental power in the "necessary and proper" clause (which does refer to the 'Execution' of the granted powers), while those that extend substantive legislative norms into new fields (aeroplanes in intra-State commerce, for example) would be said to be inherent in the grant of each power itself. In the end this does not make much difference. However the analysis adopted by the Supreme Court of the United States may be justified on the words of the text, it can be analysed along "classical" Australian lines as a division between core and incidental power reasoning.

The Court's analysis can also be seen to use the concept of direct legal operation in determining whether core power is mobilised by a statute. This is further confirmed by a case from the post-*Lopez* jurisprudence of the Supreme Court of the United States, *United States* v. *Robertson*.[185] The case involved convictions under the *Racketeer Influenced and Corrupt Organizations Act* relating to investments in a gold mine in Alaska. The conviction was set aside on appeal to the Circuit Court of Appeals on the grounds that the *Lopez* "substantial effect" condition

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[182] The quotation from the judgment of Kennedy and O'Connor JJ. to which Professor Tribe calls attention (*American Constitutional Law*, vol. I p. 821 at fn 53) further supports this division of the Court's reasoning.

[183] *Gonzales*, (2005) 125 S Ct 2195, 2215.

[184] *Contra* Scalia J. in *Gonzales*, (2005) 125 S Ct 2195, 2216; but see Tribe, *American Constitutional Law*, vol. I p. 798.

[185] (1995) 514 US 669.

was not satisfied, that is that there was no proof that the gold mine had substantially affected inter-State commerce. On further appeal to the Supreme Court of the United States, the conviction was restored. The gold mine had used inter-State labour and supplies, and above all had exported 15% of its product out of Alaska. In a very brief unanimous opinion, the Court held that there was no need to prove that the gold mine had substantially affected commerce, because it *was* commerce. In other words, there was no need to analyse the statute in its application to the gold mine under the incidental aspect of the power, as it came within the core area of the power and had a direct legal operation on an activity that was inter-State commerce. That was all that had to be shown.

Thus, the core/incidental framework for analysis, as used in a country with greater experience in characterisation despite its being a much younger federation, assists in the task of characterisation and in resolving issues left open by the Court's decisions so far. And although the Australian doctrine was criticised strongly above, this is not necessarily a criticism of what the Supreme Court of the United States was doing here. This is because, first, the division between core and incidental power is an unobjectionable feature of Australian doctrine. And secondly, the Supreme Court of the United States was faced here with prior case law that was by any standards extraordinarily generous to the federation. Any attempt at all to limit it is better than nothing, and takes some courage given the historical background.

As stated, federal power over the channels, instrumentalities, and things and people in inter-State commerce appears, with one clear exception, to be non-incidental or core. The clear exception, recently mentioned by Scalia J.,[186] is the power to keep the channels of inter-State commerce free from deleterious influences and obstructions, even influences that involve no discernible use of commerce. One example is statutes preventing the contamination of the channels of inter-State commerce, which include persons crossing State borders on foot or in private cars (*i.e.* without using commercial transport), for what are described as immoral purposes.[187] This does not involve any direct regulation or prohibition of – that is, any direct operation on – commerce, because commerce is an activity in which such people are not engaged.

Such cases should therefore be re-conceptualised as an (attempted) use of the incidental power; but in the broad scheme of things this is a minor *caveat.* It may however make a difference to the permitted extent of such statutes given that such behaviour does not, as a rule, substantially affect commerce and is therefore unlikely to come within the incidental power: the effect on commerce constituted by the gradual wearing-down of the inter-State pedestrian's shoes and the need for them to be replaced eventually by new shoes is clearly too minuscule to count as a real connexion.

[186] *Gonzales*, (2005) 125 S Ct 2195, 2216.

[187] *Cf.* the facts of *Caminetti* v. *United States* (1917) 242 US 470; Nelson/Pushaw, (1999) 85 Iowa LR 1, 77, 109. Note, however, that the usual case will involve the use of commercial means of transport, and this accordingly can be regulated within the core area of the commerce power.

What about laws that do not operate upon, but protect, commerce against those who would harm it? A standard example from the United States is the federal statute prohibiting the obstruction of the work of abortion clinics.[188] As abortion clinics are commerce, but those who attempt to obstruct them are not acting in commerce, a statute criminalising their behaviour seems to have a direct operation outside the field of commerce, on those who are not engaged in it. This is just like the Australian statutes protecting trading corporations from something else that threatens them from outside, which have been seen to involve incidental power despite views to the contrary.[189]

In terms of the system of classification adopted for the commerce clause, this raises again the question of keeping the channels of commerce free from deleterious influences and obstructions, and therefore the incidental power. In the end, though, nothing much turns on this question of doctrinal classification in this context, for if statutes protecting abortion clinics are analysed under the incidental aspect of power – in *Lopez* terms, by asking whether they substantially affect inter-State commerce – they are very likely to succeed, always assuming of course that we are able to discern an inter-State market for the provision of abortion.[190]

At this stage, it is worth making here make the broader point – based on Sir Owen Dixon's analysis of powers by the type of human endeavour they embrace that was quoted earlier – that commerce is indeed an activity. As such it has a beginning and an end. It is not a sacrament – unlike baptism or holy orders, the status of "being in commerce" does not confer an indelible character on the object to which it is applied that can never be erased. Thus, the use of shoes containing imported leather by the pedestrian crossing State boundaries does not make that activity inter-State commerce – even though the importation of the leather originally was.

Whatever difficulties may arise in determining the boundary between commerce and everything else – and they are not to be underestimated – such activities are clearly on the other side. Working out where inter-State or overseas commerce ends and intra-State commerce resumes, and deciding whether manufacturing and production for commerce counts as commerce or is something preparatory to it, are indeed difficult questions of the scope of power – the meaning of inter-State and overseas commerce – that proved troubling in both Australian and pre-1937 American case law.[191] In the end answering these questions involves drawing a line which may appear arbitrary near the border, for example when a case concerning the first sale after crossing State or international boundaries must be dealt with. However, *Robertson* gives us some assistance in determining one half of the question. The Supreme Court of the United States held there without hesitation

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[188] Nelson/Pushaw, (1999) 85 Iowa LR 1, 148-150.

[189] See above, fn 69.

[190] Nelson/Pushaw, (1999) 85 Iowa LR 1, 110-113, 150 fn 684 deals with the question of inter-State-ness, which is perhaps the only serious question arising here. Their conclusion is in accordance with the idea that very few things in the modern-day United States are merely *intra-State* commerce, given the existence of a unified national market.

[191] On pre-1937 American case law, see further Tribe, *American Constitutional Law*, vol. I p. 810. For Australian law, see above, fn 65.

that commerce 'generally' included a person who is 'directly engaged in the production, distribution or acquisition of goods or services in inter-State commerce'.[192] The reference to 'production' indicates that this activity (and presumably manufacturing as well) will 'generally' be commerce, not something merely preparatory to it. The status of the more difficult question of sales after importation remains to be resolved in the light of *Lopez* and *Morrison*.

It can be seen that the concept of core power involving the direct operation of the statute on the subject-matter of the power, together with the recognition that commerce is an activity with a beginning and an end, easily disposes of some of the more extravagant claims that are sometimes made for the commerce clause based on the use of something that once was, or might again be, part of commerce.[193] It explains, for example, why the use of a gun or a car does not necessarily make everything done with the gun or car commerce. This is so even though guns and cars are of course the product of, and are sold and re-sold in, commerce, and cars at least can be used in commerce or in the channels of commerce. But a statute which operates on them after they have been made and sold, are in private hands and not for sale does not directly operate on the activity "commerce". It can therefore be valid, if at all, only under the incidental aspect of the power.

This implies a number of things about the nature and degree of the connexion which must exist between a purported exercise of federal power and the granted power which will be dealt with below. A recent example of a law that was however clearly valid under this aspect of the power occurred in *Pierce County* v. *Guillen*,[194] in which the Supreme Court of the United States was faced with a federal statute prohibiting disclosure of certain information which had been collected about road safety. The purpose behind the collection of the information was to improve safety on inter-State roads – that is, in the channels of inter-State commerce – but it did not operate directly on any form of commerce. The statute was held valid because it encouraged State authorities to provide more comprehensive information free from the fear that it might be disclosed and used to found negligence actions. A unanimous Court held that it was to be seen as legislation 'aimed at'[195] improving safety in inter-State commerce. This emphasis on purpose is, as we have seen, classic incidental language in Australia as well.

c. The reasoning in *Lopez*

The question in *Lopez*, it will be recalled, was whether a statute prohibiting the possession of a gun in a school zone was valid under the commerce clause. It is first of all of interest to note that the Court dealt with this issue under the third heading, that is, as an incidental power case. It asked, in other words, whether the

192 (1995) 514 US 669, 672, quoting *United States* v. *American Building Maintenance Industries* (1975) 422 US 271, 283.
193 Nelson/Pushaw, (1999) 85 Iowa LR 1, 157.
194 (2003) 537 US 129.
195 At 147.

statute substantially affected inter-State commerce. This implies, correctly,[196] that the gun brought into the school zone by Mr Lopez was no longer, if it ever had been, a thing in inter-State commerce.

As we saw above, defining the boundaries of commerce is not always easy, especially when the sequel to importation is involved and a point has to be determined at which a thing ceases to be in inter-State or overseas commerce. The Supreme Court of the United States, however, appears to know the answer intuitively here, for it states peremptorily that the *Lopez* statute could not be justified as regulating a thing in inter-State commerce.[197] This marks something of a change from earlier case law in the 1960s upholding civil-rights statutes in which the Court was prepared to assume, if it was desperate enough to uphold a federal law, the presence of inter-State commerce.[198] But it is clearly correct, as a statute does not have a direct operation on commerce merely because it deals with something that was once in inter-State commerce. It is not necessary to try to define where commerce ends in this case, for it had clearly ended by this time.

Another possibility is that education itself might be commerce. There is of course no reason why education in the United States, or elsewhere, must always be seen to be non-commercial. But this was a state high school, not a fee-paying institution.

In coming to these conclusions in *Lopez*, the Court was clearly concerned with the maintenance of the federal division of powers (and indeed, as Professor Charles Fried has recently pointed out, with the maintenance of the rule of law and respect for the Constitution's provisions more generally).[199] The Court states that, if the statute were valid, this would 'bid fair to convert congressional authority under the commerce clause to a general police power of the sort retained by the States'.[200] Here, the Court has moved into Canadian territory and left Australian doctrine, in which such a proposition of scope doctrine would be heresy because it involves assuming that there are certain areas which are left to the States in determining the grant of power to the federation. It is interesting to an Australian reader in particular to note that Kennedy and O'Connor JJ., in their concurring judgment, actually use the language that in Australia has been heretical since the *Engineers Case*, referring to the 'reserved powers of the States'.[201] The Court itself joined the ranks of the heretics in *Morrison*, in which it referred to the need to keep Congress out of 'areas of traditional State regulation'.[202]

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196 The facts of the case that are relevant in this respect emerge from (1993) 2 F (3rd) 1342, 1345. It may be possible to say that Lopez was acting in commerce, but not in inter-State commerce.

197 (1995) 514 US 549, 559.

198 Most notably in *Daniel* v. *Paul* (1969) 395 US 298, in which there was no actual evidence on the point at all.

199 Fried, *Saying What the Law Is: the Constitution in the Supreme Court* (Harvard University Press, Cambridge Massachusetts 2004), pp. 28, 46f.

200 *Lopez*, (1995) 514 US 549, 567. See also at 577 per Kennedy and O'Connor JJ.

201 At 581.

202 (2000) 529 US 598, 616. See also *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (2001) 531 US 159, 174.

Any reader who has persevered this far in following the argument presented here will be unsurprised to read that this must be a legitimate thing for the Courts to consider. Not doing so results in interpreting the Constitution divorced from its context, as if it were the constitution of a unitary state, albeit one in which the legislature is, for some reason, restricted in the ambit of the powers it can exercise to certain nominated topics. As the Court put it in *Lopez*, it would equate to assuming 'that the Constitution's enumeration of powers' – and its maintenance of a second tier of government – 'does not presuppose something not enumerated'.[203]

Having rejected the possibility that the law might be valid under the core power, the Court was required to deal with incidental power. Here it was required to characterise the law (not Lopez' behaviour, and so the fact that he claimed to have been promised a small sum in return for trafficking in the gun[204] has no effect on the questions that follow). The Court makes a further and most interesting distinction under this heading: the law, to be valid, must not merely substantially affect inter-State commerce, but also regulate 'economic activity'.[205] If some such principle were not adopted, the Court continued, activities that related only 'tenuously' to inter-State commerce could be regulated under the commerce power, and it would be 'difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign'.[206] In this way characterisation (in the narrow sense) was held to be also affected by the federal principle: any approach to characterisation that would result in an undue diminution of State power must be rejected.

The Court broadly confirmed this approach in *Morrison*, in which it expressly explained its holding in *Lopez* by saying that 'a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case'.[207] As we shall see, however, it made one qualification of significance.

The fact that, in this incidental area, we speak not of "commerce" but of "economic effect" is noticeable, but easily explained in terms of the doctrine outlined so far. In the incidental area of power, we are, by definition, not regulating the thing itself, but something related to it in some way.

That will not however suffice. In the area of incidental power, it is simply not possible to avoid some such phrase as "tenuous": there must be a point at which the connexion between the power and the subject of the law is discernible, but so remote that the law cannot be characterised as one about the power concerned. Thus merely being economic cannot suffice for validity. This is in the end a question involving impression and sound judgment, but one which the Courts are tolerably well equipped to answer.

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203 (1995) 514 US 549, 567, adapting a dictum of Marshall C.J. in *Gibbons* v. *Ogden* (1824) 22 US 1, 194f.

204 See above, fn 196.

205 (1995) 514 US 549, 560.

206 At 564.

207 (2000) 529 US 598, 611. See also *Sabri* v. *United States* (2004) 124 S Ct 1941, 1946.

It is an altogether different question whether it is legitimate to make "economic effect" a *necessary* criterion for the exercise of such power. The intention behind this doctrine is certainly a praiseworthy one: the Court is concerned here to rein in the incredibly expansive claims that had been made for this aspect of the commerce power – as may be seen, for example, in the arguments for the validity of the statutes in question in *Lopez* and *Morrison*, which amount to little more than Lenin's reported observation that 'everything is connected to everything else', and thus to commerce. A resort to a black-letter rule, as distinct from a test as vague as "tenuous connexion" or some such, is very understandable[208] in these circumstances. The same might be said of *Morrison*, in which the argument was that violence against women – rape, in fact – came within the commerce clause because of the effect that that activity has on commerce.

Nevertheless, we might wonder whether such a rule could be supported in all possible circumstances.[209] We need only adapt an example with which we are already familiar from the Australian case law: let us imagine that a glider flown by its owner solely for the purposes of his own pleasure, and within the one State, is endangering the safety of inter-State commercial aeroplane flights. (A glider is chosen rather than an aeroplane as the latter would require imported fuel, although that – like the shoes with imported leather worn by the pedestrian – should really be disregarded, as the fuel has ceased to be in inter-State commerce by the time it is used by its end user. The example could however be further perfected by making the glider a home-made one constructed using only timber personally harvested by its owner, and other materials entirely made, in the owner's home State. These are the mental contortions which pre-*Lopez* law promotes.)

Even if we accept the reasoning in the famous case of *Wickard* v. *Filburn*,[210] could the activities of the owner of the glider sensibly be described as "economic"? Unlike the farmer's activity in *Wickard*, the flying of the glider here does not even fill any obvious need that would otherwise be supplied in the market. But do we not also have a strong intuition that this apparently non-commercial activity should be susceptible of regulation by the federation in the interests of the safety of commercial inter-State flights? Is this not so even if the threat comes from a non-economic source? The incidental area of power can involve too many factual situations of such varied characteristics to be the subject of strict rules as distinct from a judgment, informed by principle, precedent and intuition, about whether a connexion is too tenuous or not.

Unease about possibilities such as this may explain the following sentence from the Court's judgment in *Morrison*:

> While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our

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208 After writing this sentence, I found Professor Tribe (*American Constitutional Law*, vol. I p. 823) using exactly the same term.

209 Pollak, "Foreword" (1995) 94 Michigan LR 533, 547.

210 (1942) 317 US 111. This case appears to be still good law: *Gonzales*, (2005) 125 S Ct 2195.

> nation's history our cases have upheld commerce clause regulation only where that activity is economic in nature.[211]

This leaves the door open for a statute that is tightly directed towards non-economic activities each individual one of which immediately affects inter-State commerce – by harming it, for example, or creating such potential for harm that it has to cease while the potential exists – and there is thus no need to add up the effects of a large number of these individual actions in order to be able to discern a substantial effect on commerce. Threats to abortion clinics may be an example of this.

d. Unresolved issues

It would be beyond the province of this book to provide a list, let alone an analysis, of all the cases decided by the lower Courts and of scholarly analyses since *Lopez* which comment on or attempt to apply the law as laid down by the Supreme Court of the United States.[212] Indeed, the point has been reached at which it would almost be beyond human capacity to do so. Here, I propose to concentrate on discussing the validity of two statutes dealing with the protection of the environment and the non-payment of child support, and preface the discussion with my apologies for adding to the already huge range of discussions available on the topic as a whole.

The recent cases in the Supreme Court of the United States have indicated that the Court has adopted, for the present at least, a rough dividing line between the economic and non-economic in order to determine whether a law, which does not directly operate on the channels, instrumentalities, persons or things in inter-State commerce, nevertheless regulates an activity that substantially affects it. If this is the criterion, some familiar questions will have to be faced.

In *G.D.F. Realty Investments* v. *Norton*,[213] a case in which the Supreme Court of the United States[214] refused a petition for a writ of *certiorari*[215] as this book went to press, the question of the permissible scope of aggregation was raised. If aggregation of the effects of activities in order to reach the level of "substantial effect" can occur only if the activities are economic in nature, or it is only economic activities that can come under the incidental power attached to the commerce clause – they are not the same thing, and the Court has not been quite clear about this so far – there is no escaping the question of how widely to define the circle of

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211 (2000) 529 US 598, 613. See also *Gonzales*, (2005) 125 S Ct 2195, 2215-2218.

212 The author did, however, attempt such a task in 2001: see Taylor, [2001] PL 281, 291 fn 70.

213 (2004) 362 F (3rd) 286.

214 No. 03-1619.

215 Such a petition is equivalent to what in other jurisdictions would be called an application for leave to appeal. The refusal of the petition occurred on 13 June 2005 according to the Court's web site, and this is noted at (2005) 72 USLW 3742.

activities to be aggregated or investigated for an economic effect. In other words, if, as a dissenting minority claimed in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*,[216] 'it is not necessary that each individual instance of the activity substantially affect commerce, but it is enough that, taken in the aggregate, the *class of activities* in question has such an effect',[217] the question is, of course, what the class of activities is. This is a question of the level of abstraction with which the class is determined.

G.D.F. Realty Investments concerns the federal *Endangered Species Act* 1973, which has been modestly described by the Supreme Court of the United States in another case as 'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation',[218] and in the case at hand was applied to stop development of land in Texas in the interest of not harming some rare beetles which live in some limestone caves on the property in question.

There are a number of reasons for looking at this decision of the Fifth Circuit Court of Appeals. The first is the obvious analogy with *Murphyores*, the Australian case about mining on an island which was banned pursuant to a federal power over external trade. The second is the possibility that the Supreme Court of the United States refused *certiorari* because it was satisfied with the result and/or the reasoning of the Fifth Circuit Court of Appeals. The third is the confusion exhibited by the Fifth Circuit Court of Appeals in deciding the case. The fourth is the question whether the activity concerned was economic or not, which raises the issue of the level of abstraction to be adopted.

Taking the third point first, it might have been thought that, as the land proposed for development was to be used for commercial purposes, the direct legal operation of the statute was on commerce, and that a demonstration that it was inter-State was all that would be required to show the statute's validity under the core of the commerce power. This also might not be unduly onerous given that the proposed use of the land concerned was for a shopping centre including a "Wal-Mart" shop. This, it might be thought, was part of the channels of inter-State commerce, given that such a shop would certainly sell goods made inter-State; and, subject to a consideration of the status of first sales after the importation of goods from inter-State or overseas, it might be thought that it would also involve things in inter-State commerce.

However, the case was dealt with on the basis that the statute was to be characterised on the assumption that it regulated the beetles. I find this difficult to understand; the effort devoted to trying to fine-tune incidental power doctrine should not blind us to the possibilities inherent in the core power. A different Court had got the same issue right in the previous year, pointing out that the 'regulated activity is [the real estate developer's] planned commercial development, not the arroyo toad that it threatens. The [*Endangered Species Act*] does not purport to tell toads what they may or may not do.'[219] *Robertson* would also support this analy-

[216] (2001) 531 US 159.
[217] At 193. Emphasis in original.
[218] *Tennessee Valley Authority* v. *Hill* (1978) 437 US 153, 180.
[219] *Rancho Viejo* v. *Norton* (2003) 323 F (3rd) 1062, 1072.

sis, as we have seen, with the qualification (essentially irrelevant on this point although not of course for the final disposition of the case) that that case dealt with production rather than sale of produced goods.

At one point, however, the majority in *G.D.F. Realty Investments* also referred to the fact that the damage to the beetles 'would occur as a result of plaintiffs' planned commercial development'[220] suggesting that they did in fact see the point that the regulation was of commercial development. Certainly the majority's judgment exemplifies the confusion that results from scope doctrine that is neither clear or well thought through conceptually, nor applied in a disciplined and rigorous way. The analysis here would have benefited greatly from a distinction between core and incidental power, and a concept of the former as requiring only direct legal operation, along Australian lines.

The Court in *G.D.F. Realty Investments*, however, analysed the issues in the case principally under the incidental aspect of the commerce power. On a petition for re-hearing *en banc*, the Court split on the issue of the application of the incidental portion of the commerce power to the Act and the beetles. The majority adopted a high level of abstraction in defining the class of activity involved here, and decided to draw the circle so that the beetles were included with all other endangered species to which the Act applied. This provided the necessary economic activity and of course also a substantial economic effect: if the whole environment were destroyed, this of course would have a substantial economic effect.

The minority, on the other hand, would have held that this aggregation of effects could happen only with respect to threats to endangered species if 'they involve commercial or commercially-related activities like hunting, tourism and scientific research'.[221] Although this is of little comfort to endangered beetles or environmental activists, on balance the minority seems to be correct on this point, as any non-economic beetles could be added to any economic activity much larger than they in order to produce an aggregate which is mostly economic. Hence the general prohibition on aggregating non-economic activities with economic ones.

One hopes that the Supreme Court of the United States refused the petition for *certiorari* on the grounds that the result in the case was correct rather than the reasoning.

The case has obvious analogies with the Australian case of *Murphyores*, as was pointed out earlier. In both cases, a power over inter-State or overseas commerce has been used in order to deal with environmental concerns. I subjected *Murphyores* to sustained criticism above on the grounds that it ignores the purposive element in characterising legislation. The same criticism can of course be applied to *G.D.F. Realty Investments*, especially if it were concluded, as I have suggested it should be, that the statute had a direct legal operation on an activity in inter-State commerce and was justified under the core power rather than being an invalid attempt to aggregate the beetles with other instances of environmental damage and thus to exploit the incidental aspect of the commerce power.

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220 (2003) 326 F (3rd) 622, 639.

221 (2004) 362 F (3rd) 286, 291.

I do not of course resile from the criticism of the *Murphyores* approach above. The concentration of Australian doctrine on legal effect rather than purpose is, as we have seen, one of its weakest points. It means that Australian characterisation doctrine cannot deal with simple problems such as the heroin "tax". This issue in characterisation doctrine, with which the Supreme Court of the United States has hardly had occasion to deal recently, is accordingly quite a central one. Moreover, the American text, with its purposive-looking verbs introducing most powers, might have been considered a particularly promising foundation for a textually-based doctrine emphasising purpose in characterization, in relation to many powers at least.

But there is in *G.D.F. Realty Investments* no indication that the Circuit Court of Appeals considered adopting the doctrine that characterisation should take place according to purpose, in whole or in part. It is of course not surprising that the Court should not have considered this issue in relation to the core of the power, given that it considered the validity of the statute under the incidental power, but on the other hand the incidental aspect of the power is an even stronger case for purposive characterisation. Reading the case, one also does not have the impression that the Court's or the dissenters' real but unexpressed concern is about use of the commerce power for environmental purposes.

An indication that purpose is relevant in the core area of the power must come, if at all, from the Supreme Court of the United States. However, recent case law including, but not limited to, *Lopez* also suggests that the Court is not about to provide any such doctrine. One commentator sees the case law as showing that the Court's view is 'that Congress is not limited in its *goals* by the Constitution's enumeration of its *powers*' and that 'nothing in his opinion in *Lopez* suggests that Chief Justice Rehnquist has any qualms about Congress's use of any of its powers as instruments to achieve ends that are not themselves encompassed within those powers'.[222]

That is true, at least of the commerce clause. However, the question hardly arose in *Lopez* and silence may therefore have little significance.

It is interesting, with the discussion of Australian doctrine still in mind, to note in passing Professor Tribe's view that

> it is by no means clear that congressional motive ["purpose" in the terminology adopted in this book] is irrelevant when Congress is acting under the necessary and proper clause or any other source of authority that contains its own statement of the purposes for which it may be invoked – as, for example, the clause empowering Congress to provide for patents and copyrights '[t]o promote the progress of Science and useful Arts'.[223]

The textual base for such a doctrine in relation to the commerce clause is however less promising than for many other powers; its introductory purposive verb says

222 Powell, "Enumerated Means and Unlimited Ends" (1995) 94 Michigan LR 651, 658; emphases in original. See also Nelson/Pushaw, (1999) 85 Iowa LR 1, 125.

223 Tribe, *American Constitutional Law*, vol. I p. 803 fn 12.

that it is a power merely to 'regulate', which is a very general expression containing little purposive element.

It was observed above that *Lopez* and *Morrison* appear to proceed by asking first whether a statute has a direct legal operation on commerce. That is in essence the same doctrine as in Australia, and it is moreover one that is intimately although not inevitably connected with the Australian refusal to consider purpose (in addition to the decisive test of formal legal operation). The view 'that Congress is not limited in its *goals* by the Constitution's enumeration of its *powers*' therefore seems correct. It would be a bit late in the day now for the American Court to adopt a purpose-based approach to characterisation along the lines of that followed in Canada. Furthermore, it would extend the project of ensuring that Congress does not exceed its enumerated powers to a considerable degree. The project so far has been controversial enough without the importation of a foreign test which might cut a swathe through statutes that have been applied unquestioningly for decades to the use of the channels of inter-State commerce, the instrumentalities of inter-State commerce, and persons and things in inter-State commerce.

My second example of a statute that raises a series of familiar issues relating to characterisation doctrine is provided by the federal statute which (in summary) makes it an offence persistently to fail to pay child support to an inter-State recipient.

The statute concerned provides (omitting as much as possible) as follows:

> 228. Failure to pay legal child support obligations
>
> (a) Offense. — Any person who –
>
>> (1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
>>
>> (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or
>>
>> (3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000;
>
> shall be punished as provided in subsection (c).
>
> (b) Presumption. — The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.
>
> (c) Punishment. — The punishment for an offense under this section is –

(1) in the case of a first offense under subsection (a) (1), a fine under this title, imprisonment for not more than 6 months, or both; and

(2) in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a) (1), a fine under this title, imprisonment for not more than 2 years, or both.

(d) Mandatory Restitution. — Upon a conviction under this section, the Court shall order restitution under section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.[224]

This law is interesting because arguments can be presented that it can be justified under both the core and incidental aspects of the commerce power. It makes a good case study for another reason: because it requires the employment of virtually all the tools of analysis presented here for the purpose of deciding whether it is valid. It is suggested that using those tools of analysis assists in the task of thinking clearly about this issue.

It is somewhat worrying that even an intermediate appeals Court can argue, as it did in *United States* v. *Monts*,[225] that the child support statute is valid because it 'directly involves an activity that is both economic and inter-State in nature, specifically, the regulation of a Court-ordered obligation to pay money in inter-State commerce'.[226] This mixes up a number of questions which should be kept separate.

Again, it is necessary to think about these things in a disciplined fashion having regard to the three categories the Supreme Court of the United States has developed and their place in characterisation doctrine. The child support laws might, first, be valid because they deal with the core aspect of the power – things in inter-State commerce, namely the payments themselves (or, more precisely, the unsatisfied obligation to make them). Or they might be valid under the incidental power – because failing to make required payments substantially affects inter-State commerce. (Case law supporting both possibilities can indeed be found.)[227]

Let us consider the possibility of validity under the core aspect of the power. It should first be noted that (*pace* the Court in *Monts*)[228] the question here is not whether the obligation to pay child support is economic. It is whether it is commerce. It is very important not to conflate these two questions by asking whether something has 'a substantial effect on commerce – in other words, a substantial "economic" effect'.[229] There are several errors here. First, commerce and economic effect are mentioned together. But the dichotomy economic/non-economic was developed in relation to the incidental aspect of the commerce power – when

224 18 USC § 228.
225 (2002) 311 F (3rd) 993.
226 At 997.
227 Kemper, (1998) 147 ALR Fed 1.
228 And Saylor, (2002) 25 Harv Women's LJ 57, 111.
229 Pollak, (1995) 94 Michigan LR 533, 547.

it needs to be determined whether an non-commercial (or intra-State) activity nevertheless substantially affects inter-State commerce.[230] In the core area of the power we are entitled to expect that the law will be *about* commerce, not merely have a substantial effect on it.

In addition, there is a difference between commerce and the economy. Almost everything has a substantial economic effect. Not everything has a substantial effect on commerce, which is what should be required in the incidental aspect of the power. If we forget this, we shall run the risk of yet again over-extending the commerce power by making it a power to deal with everything that has a substantial economic effect.[231]

Child support payments seem, at first sight, to be quite foreign to the text we are meant to be applying, which grants power to Congress to 'regulate Commerce [...]'. If we adopt a recent proposal for a definition of commerce in this context – 'the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships and interests'[232] – or something along those lines, child-support laws appear to fail dismally. The payment of child support is a transaction, but it is not a voluntary, arm's-length transaction as commercial transactions are.[233] Nor does it involve the exchange of property or services for payment. As the state's power is required to enforce the obligation to pay child support, it might be thought that the payment is no more "commerce" than paying taxes or a parking fine. Furthermore, commercial transactions, one might think, would generally take place with a view to profit by at least one party to the transaction, further reducing the similarity of child support payments to commerce.

Thus, child support payments appear to lack a number of features that regularly occur as part of commerce. One American commentator perspicaciously likens the process of dealing with phenomena at the edge of the meaning of a word to the intuitive judgment involved in deciding what the proximate cause of an event is, as might be asked in tort law,[234] and to exercises in "fuzzy logic" such as deciding whether a chicken, an ostrich or a bat are birds, or a sink as well as a lounge suite falls under the description "furniture".[235] Each of these examples requires us to decide how much like the core meaning of a word a concept at its edges is. Yet another way of expressing the process involved in dealing with this question is the drawing of analogies, which can be strong or weak as the facts dictate.

Whether child support payments can, despite the obvious difficulties, still be described as "commerce" is in part a problem of determining the scope of the power. To solve it, we must elucidate the meaning of "commerce" in the text we are interpreting. Characterisation doctrine (in the narrow sense of the word "char-

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230 *United States* v. *Robertson* (1995) 514 US 669, 671.

231 Nelson/Pushaw, (1999) 85 Iowa LR 1, 109.

232 Nelson/Pushaw, (1999) 85 Iowa LR 1, 9; see also at 107.

233 *United States* v. *Parker* (1995) 911 F Supp 830, 835; reversed on appeal: (1997) 108 F (3rd) 28.

234 Merritt, (1995) 94 Michigan LR 674, 679.

235 At 745; Merritt, "The Fuzzy Logic of Federalism" (1996) 46 Case Western Reserve LR 685, 688.

acterisation") will not assist us here, as the question at this stage of the enquiry relates to the meaning of the word in the text. As is well known, there are numerous schools of thought about the correct approach to interpreting constitutional texts. But characterisation doctrine (in the broad sense) can at least make sure that we ask the right question, and realise what we are doing in answering it.

To this author, it seems very odd to extend the scope of "commerce" so far that payments of child support count as "commerce". However, others have put forward the view that this relies on a discredited line between the private and the public, the market and the family.[236] In the end, our definition of "commerce" will be informed by factors outside characterisation doctrine. It should not, however, be informed by the mere fact that we may happen to think the law a desirable one, for the judicial enforcement of federalism is not about whether we happen to approve of particular legislative measures,[237] but about which level of government can enact them.

If we do come to the conclusion that payments made to one's (ex-)relatives under compulsion by statute can nevertheless fall within the scope of commerce, we shall however merely face further questions when characterising the law. We may come to the conclusion that the law is about commerce and something else as well, family law for example. If so, we need to decide the issue that the Court has successfully managed to avoid deciding from *Lopez* until now. We saw above that the Canadian approach requiring the dominant nature of a law to be identified was one which – while it had certain benefits – was in the end a product of the peculiarities of the Canadian constitutional text. Do we have to determine the dominant nature of this law – deciding, say, whether it falls under family law or commercial law, and rejecting it as invalid if its true nature is the former?

If we were using a library catalogue to find the correct classification for a newly published book on the subject of child support payments, it would belong under the classification "family law", not under "business law", "trade and commerce" or anything similar. But a constitution is not an instruction manual for librarians. Nor does the United States Constitution contain two lists which might compel us to decide between two possible descriptions of the law which determine its allocation to one level of government or the other. Therefore, as long as the child support laws can be said, in at least one aspect which is not *de minimis*, to deal with persons or things in, or the instrumentalities and channels of, inter-State commerce, they are valid. It is not necessary to consider whether they also might come under some other head of power which does not actually exist!

Next, we shall have to ask ourselves whether it is the legal effect or the purpose of the law which will decide whether it is a law about the persons, instrumentalities *etc.* of inter-State intercourse.

If it is the legal effect of the law, then the answer appears to be tolerably clear: it enforces what we have determined to be an obligation of commerce and is thus valid. If the question is one of purpose, the issue is more complicated. In the end, however, we are again led to the conclusion that the statute is valid. There is no

[236] Saylor, (2002) 25 Harv Women's LJ 57, 100, 111.
[237] Fried, *Saying What the Law Is*, p. 28.

question of any form of ulterior motive in this law – it is not like the medical services law of Nova Scotia, which was a disguised attempt to prohibit abortion clinics. The purpose of the Act is to enforce what, on our working assumption, is a commercial obligation. No doubt a motivating factor of some importance was the distress that is caused when the obligation is not complied with, but that might be said of any statute which requires commerce to be conducted in a fair, honest and solvent fashion. If the conclusion that the purpose of this statute is a commercial one seems odd, that is not because of any defects in our analysis in this field of characterisation doctrine: rather, we have, *ex hypothesi*, reconciled ourselves to describing this activity as "commercial" in determining the scope of this power. For the characterisation of this statute, therefore, it does not matter whether purpose is a relevant criterion in the core area of the power or not.

Nevertheless, the question whether the legal effect of the statute and/or its purpose is to guide us in determining its character is a very important one indeed. It is worth returning to it before leaving the topic, for it is on this issue that the validity of the civil-rights laws upheld in the 1960s[238] may depend. The issue is therefore worthy of closer and renewed attention.

These civil-rights laws mostly attacked racial discrimination occurring in commerce,[239] so that if the cases arose in Australian law *Murphyores* reasoning would apply to them, the real purpose or reason for their enactment would be irrelevant and they would be valid because they have a direct legal operation on the subject-matter of the power.[240] It was suggested above that current American case law is to the same effect and indicates that purpose continues not to be a relevant criterion in characterising laws in the core area of power at least.

But if this is wrong, and the Court were to apply the characterisation doctrine of the Supreme Court of Canada, is it possible that the Court's conclusion would have to be that the true purpose of such laws, their pith and substance, is to ensure equality among the races, rather than to regulate trade and commerce among the States? The real evil, it might be argued, at which such federal statutes are aimed is the social and moral evil of racial discrimination which manifests itself in many areas of life, one of which is commerce. One need only think of the manner in which the Supreme Court of Canada looked behind a law ostensibly designed to ensure quality medical services to its real purpose of preventing the establishment of abortion clinics. Why should not the Supreme Court of the United States adopt similar "realistic" methods of reasoning?

In the discussion of *G.D.F. Realty Investments* above, some reasons for not adopting the Canadian approach were suggested. There are additional reasons for treating the civil-rights statutes as valid. One good reason outside characterisation

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238 In cases such as *Heart of Atlanta Motel* v. *United States* (1964) 379 US 241; *Katzenbach* v. *McClung* (1964) 379 US 294.

239 For example, 42 USC § 2000a; see Regan, "How to Think about the Federal Commerce Power and Incidentally Re-Write *United States* v. *Lopez*" (1995) 94 Michigan LR 554, 563f.

240 In fact the issue has been dealt with in Australian law under a different federal power, as was mentioned above; see above, fn 68.

doctrine why the civil-rights statutes should not be invalidated now is that they have been upheld and have operated now for forty years or so. As always, that reason will not convince everyone, although the general approval that civil-rights statutes rightly enjoy means that it is likely to convince a lot more people than it normally does.

But what about the issue of principle? There is one important difference between the Canadian and American constitutions: the latter contains no list of enumerated powers of the States. This does not affect the question whether we should look at the legal effect or purpose of the law, except that there is no list of alternative purposes with which a law under review could be compared. Who says that the ending of racial discrimination in – *within* – commerce is not a valid purpose for the federal legislature to pursue? Where is the line that divides racial discrimination in commerce from commerce *per se*?

Why should we interpret the United States Constitution as if it contained a clause allocating jurisdiction over racial discrimination to the States? The law in *Murphyores* stopped commerce because it was bad for something else – because of its by-product – but this law declares a particular type of commerce to be harmful as such. That must be within a power which, under the express terms of the Constitution, is a power 'To regulate Commerce'. The (irrelevant) *motivation* of the legislature might have been to end the evil of racial discrimination, but the *purpose* of the legislation can truly be said to "clean up" commerce by regulating it.

In *Murphyores* and *G.D.F. Realty Investments*, on the other hand, the purpose of the statute had nothing to do with commerce; commerce is merely a convenient peg on which to hang a regulation about something else outside commerce. It is true that this conclusion relies in the end on some measure of intuitive judgment. One may also be accused of drawing an arbitrary line between commerce "as" commerce and the mere by-products of commerce. It is submitted however that the distinction is a real one. It is the distinction between carrying on *commerce itself* in an objectionable manner, on the one hand, and, on the other, a *by-product* of commerce (or preparatory steps leading to commerce) which is undesirable, between actually conducting commerce and what mining for commerce leaves behind in its wake. We shall in fact see an example of an approach separating trade and commerce and their environmental consequences in looking at Austrian law. To put the same point in another way: we do not want anyone to carry on commerce in a racially discriminatory way, as that is an objectionable form of commerce, but we should be quite happy to see the activities under consideration in *Murphyores* and *G.D.F. Realty Investments* carried on if only we could eliminate their long-term negative effects on something outside commerce, namely the environment.

Admittedly, too, racial discrimination will also occur outside the setting of commerce and entirely outside federal power, but there will inevitably be some arbitrary lines of responsibility involved in dividing authority between the centre and the regions by subject-matter. If we point out that racial discrimination is not on the list of powers that the federation possesses, the response might be made: why is racial discrimination in the course of commerce not part and parcel of commerce? Is it not a bad type of commerce, rather than a bad by-product of commerce? Why then should it be conceptualised as something separate from the setting in which it occurs?

If the commerce power were read in that way, accusations might well be made that the Court had read the commerce power as if it contained an exception for statutes dealing with racial discrimination even when it occurs in the course of an activity which comes within the meaning of "commerce" on any sensible view. This is unlikely to be a position which the Court will be willing to adopt, nor is it a particularly sensible one given the nature of the American text.

The conclusion, then, is that the issue of purpose is not relevant here either.

The broader point to which all this leads me is that this example shows us that the Canadian approach is bound up, to some extent only, with the existence of two lists. In any case, the "other" list provides a list of alternative real purposes of laws, and without this aid we shall sometimes be faced with extremely difficult and potentially controversial decisions. This will admittedly not always be so. Even without two lists, any fool can see that the purpose of a law imposing a huge "tax" on the possession of heroin has nothing at all to do with taxation; but it is not at all obvious that ending racial discrimination that happens to occur in commerce and commerce itself are separate purposes in the absence of some list of what is separate from commerce. Indeed, a list of State powers would have to include racial discrimination expressly for that to be a purpose separate from, but opposed to, commerce. Nor can the ending of racial discrimination be said by any stretch of the imagination to be part of the police power or otherwise traditionally reserved to the States.

Returning to the child support laws: if we conclude that child support payments are not included within the scope of commerce, what of the possibility that the statute might be valid because of the substantial effect it may have on inter-State commerce? Here we do not have to describe not paying child support as part of commerce; we need merely conclude that it substantially affects commerce, and, using *Lopez* as our authority, that it is economic in nature. *Morrison* refines this with the indication that the Court will not usually aggregate the effect of individual acts of non-payment to find a substantial effect on commerce unless the act is economic in nature.

Child support payments in cold hard cash certainly do seem to meet the "economic" test, but they also have a substantial component related to family law. However, the Court is very likely to adopt the view that the non-economic aspects do not matter, as long as there is an economic aspect as well – the Australian approach of multiple possible characterisations – rather than the Canadian approach requiring the activity to be discounted if its predominant character is not economic. There is no indication in *Lopez* or *Morrison* that the activities in question there failed to meet the grade because they were not *exclusively* economic, but rather because they had *no* economic aspect at all.

On the other hand, the Court in *Lopez* did not say that everything economic in nature comes within the commerce clause. We also need to establish that there is a sufficient connexion with commerce to justify the application of the incidental branch of the commerce power – in other words, child support payments must *substantially* affect commerce and not have merely what the minority in *G.D.F. Realty* (the beetles case) referred to rather memorably as 'a remote, speculative, attenuated, indeed more than improbable connection to inter-State commerce'.[241]

In relation to the child support statutes, this is an issue which the Courts have, rightly in this author's view, been accused of deciding without sufficiently close analysis.[242] We can see that this is an issue of the reach of the incidental aspect of a power and thus a question of sufficiency of connexion – not merely the existence of some sort of connexion, no matter how 'remote, speculative, attenuated, indeed more than improbable'. The Supreme Court of the United States has attempted to provide more guidance in this area, as we have seen, by superadding the test of "economic in nature", which in this case is satisfied. But is the connexion otherwise sufficient?

There must of course eventually come a point at which the judgment must be made that the connexion between the statute and the granted power is too remote to sustain a conclusion that the statute falls under the grant. In such cases, the conclusion that there is a real connexion between the law and the power would 'strike the mind as absurd'.[243] The idea that statutes making it an offence to refuse to pay child support substantially affect commerce simply because the spending of child support money has an effect on commerce does set alarm bells ringing. Such an argument is far too reminiscent of the extreme liberality in the interpretation of the commerce power which *Lopez* and *Morrison* rightly reject: after all, everything has some effect on the economy. The question is whether the effect is substantial and not merely speculative, tenuous *etc.*

As we saw above, using the incidental power, and words such as "substantial", inevitably requires the drawing of lines somewhere, and where the line is drawn will in the end involve intuition and sound judgment. As we saw in relation to the comparable Australian test, this is really a value judgment informed by our intuition and conceptions of where lines should be drawn; we may be stuck for words when trying to justify our intuition, and reduced (as was the minority in *G.D.F. Realty Investments*) to hurling adjectives like "tenuous" and "speculative" at the law indicating our intuition that it will not do; but we can also refer to more easily articulated considerations such as proportionality and purpose.

But in any case involving incidental power the answer cannot be provided by value-free mechanical reasoning. By now it should be clear that everything can be linked by a more or less extended chain of reasoning to the concept of commerce; we must concentrate our efforts on deciding how closely connected something has to be in order to be accepted as part of the incidental area of power attached to the commerce clause.[244] Questions that will be relevant here include the directness of the effect of the activity in question on commerce, how similar it is to commerce

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241 (2004) 362 F (3rd) 286, 287.

242 Fischer, "Deadbeat Dads as Champions of Federalism? *Lopez*'s Dramatic (Unintended?) Effect on Commerce Clause Jurisprudence, as Illustrated by the *Child Support Recovery Act*" (2002) 86 Marquette LR 107, 146.

243 See above, fn 78.

244 Merritt, (1996) 46 Case Western Reserve LR 685, 688.

(is it a "near miss"?) and the number and breadth of the steps required to link it with commerce.[245]

Since *Lopez* and *Morrison*, there has been little case law to assist us in determining how generous the Court will be. The *Pierce County* case referred to above was a clear one and thus not very useful. Recently, however, in *Sabri* v. *United States*[246] the Court upheld a federal statute criminalising the bribery of State and local officials receiving at least $10 000 on federal funds on the grounds that all the money received by such bodies went into a common pot, from which money could be wasted by corrupt officials.

This suggests quite a generous standard, especially as the bribe was (according to the allegations in the case) to be received by the corrupt official, rather than involving the expenditure of federal money; but on the whole my intuition is that the Court's decision seems to be right because of the risk of loss of federal funds to inappropriately selected providers of services. If the federal government can make provision for the audit of the use of the money provided by it, which it could unquestioningly do, it seems to me that it can also make misuse of a fund partly provided by it an offence.

Returning to the child-support laws: American constitutional doctrine is also well acquainted with the question of proportionality, or 'means-end rationality',[247] which asks whether there is a reasonable relationship between the permitted end and the means (outside the core area of the power) adopted to achieve that end, such as the safety of inter-State commercial flights. This goes back to the famous case of *McCulloch* v. *Maryland*[248] ('Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the Constitution, are constitutional').[249]

The language from *McCulloch* v. *Maryland* just quoted is normally encountered in relation to the "necessary and proper" clause rather than the incidental aspect of granted powers. It was suggested above, however, that it does not really matter whether one sees the two sorts of incidental power – one covering machinery provisions, and the other substantive rules of law – as proceeding from different textual sources. Thus, there is no reason why the rationality of the means adopted to achieve the desired end should not also be considered in what has here been called the incidental aspect of the commerce power. (The same would apply to other federal powers, such as the power to 'constitute Tribunals inferior to the supreme Court'[250] and the enforcement power in the Fourteenth Amendment.)[251] Whatever the precise textual source of the incidental power authorising the enactment of substantive legislative norms as distinct from machinery provisions, it is

245 Merritt, (1995) 94 Michigan LR 674, 681-687.

246 (2004) 124 S Ct 1941.

247 At 1946.

248 (1819) 4 Wheat 316; 4 L Ed 579.

249 At 421; 605.

250 A very recent example of this is *Jinks* v. *Richland County South Carolina* (2003) 538 US 456.

251 *City of Boerne*, (1997) 521 US 507.

true to say that, as we saw in the discussion of Australian case law, a noticeably disproportionate means may indicate that an end other than the proffered one is being pursued.

Here, there is no reason to suspect that the federal law for the enforcement of child-support obligations is a disproportionate measure. Non-payment of child support can cause substantial suffering, which amply justifies threatening persistent non-payers with relatively short periods of imprisonment. There is no indication whatsoever of an aim other than the officially indicated one of ensuring that obligations to pay child support are met.

Even so, that is not enough. We must also make an assessment – in part on the basis of intuition, in part a value judgment, in part by analogy and using common sense – of the degree of connexion between this law and commerce. There is little to link child support to commerce other than the effect that non-payment of it will have on the volume of commerce in those places in which it should have been paid and received. People still in possession of money that they should have paid to someone else will be able to buy things that they otherwise could not afford, while those without money they should have received will be able to buy less. No doubt the effect of this on individuals is considerable, but it is also random and shared by absolutely everything else that happens (or should happen). Also, some of the money will not be spent by those who retain it, or would not have been spent by those who should have received it. Rather, it will or would have been saved and thus lost to commerce. There is just nothing else about this activity that marks it out as having a particularly significant impact on inter-State trade and commerce. The practical effect of non-payment on inter-State and overseas trade and commerce is also reduced in the aggregate because, across State boundaries, there will be a considerable amount of cancelling-out of the effects on commerce of non-payment and non-receipt of child support payments given that each State will contain some non-payers and some non-receivers.

There is also no direct threat to the integrity of commerce: we are dealing neither with aeroplanes that might fly into each other nor with the picketing of abortion clinics. On the whole, and taking all these things into consideration, this author's non-value-free, partly intuitive judgment is that the link between non-payment of child support and commerce should therefore be considered too tenuous to justify application of the incidental power.

5. Germany

a. Introduction

It was said earlier that German law has not dealt with, and German academic lawyers have not debated, issues relating to characterisation in any detail. There is, for example, only one academic article (by Professor Christian Count von Pestalozza)[252] which deals with general issues relating to characterisation such as those dealt with here, and even a lengthy second doctorate entitled *Basic Issues of Doctrine in Legislative Competence*[253] deals with them only very briefly. The Courts, too, have not attempted to develop a comprehensive account of what they are doing.[254] This is at first sight an extraordinary situation in a country in which questions of theory and doctrine are usually debated exhaustively.

In his article, Count von Pestalozza sees the lack of discussion on this topic as a product of Anglo-American influence:

> [T]he pragmatic jurisprudence of the Anglo-American tradition has doubtless found the correct degree of self-limitation here and has not detained itself for very long with theoretical definitions having regard to the natural opaqueness of the lists of powers; rather, it has turned immediately to looking at the necessary relationship between the law and the subject-matter.[255]

However, it may not be necessary to look quite that far to find the reason for the absence of doctrinal debate in Germany. (In fact, the explanation just quoted is wide of the mark, as there is a good deal more doctrinal discussion in Canada and Australia than in Germany.) Articles 74 (1) and 74a of the Basic Law set out a list of twenty-nine concurrent federal powers. One of them, Article 74 (1) (1), provides that the federation is to have power over 'the civil law, criminal law and its execution, the constitution of Courts, curial procedure, the legal profession, nota-

252 "Thesen zur kompetenzrechtlichen Qualifikation von Gesetzen im Bundesstaat" DöV 1972, 181.

253 Stettner, *Grundfragen einer Kompetenzlehre* (Duncker & Humblot, Berlin 1983).

254 Scholz, "Ausschließliche und konkurrierende Gesetzgebungskompetenz von Bund und Ländern in der Rechtsprechung des Bundesverfassungsgerichts" in Starck (ed.), *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlaß des 25jährigen Bestehens des Bundesverfassungsgerichts* (J.C.B. Mohr, Tübingen 1976), vol. 2 pp. 252f; Stettner, *Grundfragen*, pp. 410, 414.

255 DöV 1972, 181, 182.

ries and the provision of legal advice'; Article 74 (1) (11) goes on to add to this already vast field 'the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance)'.[256]

When to these fields are added the twelve items of exclusive federal power (which include moderately significant areas such as citizenship, currency, aviation, post and telecommunications, foreign affairs and immigration and emigration), it might be thought that these sweeping conferrals of power on the federation would leave little room for the States to do much at all (beyond administering federal laws, as they frequently do);[257] and indeed one sometimes hears commentators and informed citizens asking whether the States do still have any useful role at all given their lack of power.

Certainly, if Australian methods of characterisation were followed in Germany there would be very few things indeed that would not come within federal power. However, approaches to characterisation make a significant difference. Thus, one American commentator, writing just before *Lopez*, has rightly stated that the German Federal Constitutional Court had shown 'a sensitivity toward reserved State authority that has been conspicuously missing from decisions of our Supreme Court for the past fifty-five years'.[258] Unlike in the United States, the German Court had at least occasionally invalidated federal laws on federalism grounds. This means that it must have developed some characterisation doctrine, even if, like Monsieur Jourdain, it did not know what it was doing while it was talking.

b. Text

As may already be clear, the basic structure of the division of powers between the federation and the States in Germany (sometimes referred to by their German name of *Länder*) is similar to that in Australia and the United States, and dissimilar to that in Canada: the Basic Law confers on the federation exclusive (Article 73) and concurrent (Articles 74 and 74a) powers and leaves the residue to the States. As well as various minor differences of structural detail, and of course the differences among countries in the content of the lists, there is one major difference of structure which should be noted: Article 75 confers a third species of competence on the federation, namely the ability to make framework laws laying down general principles which the States are then required to fill in on their own account. There are seven items on this list. As this interesting phenomenon is not comparable to anything in the law of the other three countries considered so far,

[256] The words in brackets are examples only and not conclusive: Degenhart in Sachs (ed.), *Grundgesetz: Kommentar* (3rd ed., C.H. Beck, Munich 2003), p. 1574 (with further references).

[257] Article 83 of the Basic Law provides that the general rule is that federal laws are to be administered by the States unless it provides otherwise.

[258] Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago 1994), p. 37.

and has been noticed and explained elsewhere,[259] it will not be the subject of further explanation here, except as regards its interaction with general characterisation doctrine: at least one of the recent cases decided by the Federal Constitutional Court involves such a federal power and will be the subject of some discussion below.

c. Scope

German writers make the familiar distinction between defining the scope of a power (*Auslegung des Kompetenztitels*) and determining whether a law falls under the scope as defined (*Zuordnung des Gesetzes*);[260] to that extent the structure of the process of analysis is already very familiar. Somewhat less familiar is, however, the great role which traditional conceptions of the area encompassed by phrases such as 'the civil law' and 'the criminal law' play in scope doctrine (although in Canada the federal power over criminal law is, as we saw earlier, also interpreted partly having regard to what one would traditionally expect to find in that field). The Federal Constitutional Court, adopting a scheme suggested by an academic commentator,[261] pointed out in 2003 that many (but not all) powers conferred on the federal legislature assume the pre-existence of an elaborate scheme of legal norms such as those found in the Civil Code and confer power over that pre-existing complex:

> Subject-matters are classified as either factual-descriptive (proceeding to name the areas they encompass) or normative-receptive (adopting a pre-existing area of law as the area encompassed). If the constitutional legislator mentions a pre-existing developed complex of norms, and refers back to it as such, then it can be assumed that the ordinary laws defining that area of law also as a rule define the content of the constitutional power.[262]

In the case from which this quotation is taken, the Court held that "criminal law" was a normative-receptive power, that the Basic Law intended, by conferring power over it on the federation, to refer to the pre-existing complex of norms as

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259 For example, Currie, *Constitution*, pp. 50-52; Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed., Durham U.P., Durham 1997), pp. 92f.

260 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1511; Heintzen, in Dolzer/Vogel/Graßhof (eds.), *Bonner Kommentar zum Grundgesetz* (loose-leaf, C.F. Müller, Heidelberg, 112th update 2004), Art. 70 pp. 71, 73; Rengeling, "Gesetzgebungszuständigkeit" in Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (2nd ed., C.F. Müller, Heidelberg 1999), vol. IV p. 735; Stettner in Dreier (ed.), *Grundgesetz: Kommentar* (Mohr Siebeck, Tübingen 1998), vol. II pp. 1316, 1318; von Pestalozza (Count), DöV 1972, 181, 181.

261 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1511.

262 BVerfGE 109, 190, 218.

encompassed by the Criminal Code of 1871, and that the power was thus largely to be interpreted on historical lines. This led to the conclusion that preventative detention laws applying only to convicted criminals fell within that power (and thus could not effectively be enacted by the States given the exhaustive coverage of the criminal law to be found in the Criminal Code, which left no room for additional State legislation).[263]

The federal constitution, in other words, has received the pre-existing content of various fields of law and the pre-existing demarcations of the proper extent of those fields as its basis for distributing legislative power.[264] In addition to those mentioned above, further significant examples of this phenomenon[265] include federal powers over intellectual property, road traffic, the railways and postal systems and even the economic affairs power (which is very similar, except in the detailed wording chosen, to a traditional "trade and commerce" power). On the other hand, many federal powers, such as those over waste removal, war damage, air transport and nuclear energy, refer to facts in the world ("factual-descriptive" powers in terms of the analysis just set out) rather than to pre-existing codifications or predefined areas of law.[266]

Does the existence of powers defined by the pre-existing categories and codes of the sub-constitutional law mean, as one or two authors have feared, that amendments to the Criminal Code or the Civil Code, for example, are – whatever their content may be – automatically valid?[267] This is of course not so, as a number of cases have illustrated. Whether or not it is added to a code or enacted separately, a law breaking new ground must be analysed to see whether it is sufficiently similar to the existing content of the code concerned. For example, the Federal Constitutional Court held in 1982[268] that the newly enacted federal *State Liability Act* – "State" here in the sense of the whole state, not just the States of the federation, but including them as well – was invalid. This was because it conferred a right in the citizen to proceed against the state directly rather than merely indirectly against the civil servant responsible for the loss suffered, and, historically, only the personal liability of the civil servant had been considered part of the civil law; the liability of the state itself was, rather, part of public law and thus not within federal power.

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263 See also BVerfGE 11, 234, 237; BVerfGE 23, 113, 124. The federation has recently responded to this decision by enacting legislation for preventative detention: BGBl I 2004, 1838; Poseck, "Das Gesetz zur Einführung der nachträglichen Sicherungsverwahrung" NJW 2004, 2559.

264 Stettner in Dreier (ed.), *Grundgesetz*, p. 1317.

265 BVerfGE 26, 281, 298-300; BVerfGE 67, 299, 314-323; BVerfGE 68, 319, 327f; Degenhart in Sachs (ed.), *Grundgesetz*, p. 1511.

266 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1511.

267 Leisner, "Die Gesetzmäßigkeit der Verfassung" JZ 1964, 201, 204; Maunz in Maunz (ed.), *Grundgesetz: Kommentar* (loose-leaf, C.H. Beck, Munich, 43rd update 2004), Art. 73 pp. 11f.

268 BVerfGE 61, 149. This decision was eventually overridden by an amendment to the Basic Law: Article 74 (1) (25).

The Court stated, echoing past cases in which the same point had been made:

> The boundaries of the legislative subject-matter "civil law" as used in Article 74 (1) of the Basic Law have not been defined by the Basic Law itself. The allocation of power in Article 74 (1) of the Basic Law was formulated with an eye to the concurrent legislative competence of the federation for "the civil law" under Article 7 (1) of the Weimar Constitution, which itself, without providing any greater detail about the extent and boundaries of this subject-matter, followed the example of federal competence over "the whole civil law" in the Constitution of the German *Reich* of 1871.
>
> The constant use and virtually word-for-word adoption of the concept "civil law" in the division of powers in modern German constitutional history gives an indication that this concept is supposed to be understood in the same sense as previously. In determining the content and extent of the subject-matter in Article 74 (1), [...] what is "traditional" and "conventional" has significant weight. Regard is to be had to the historical context in the development of German constitutionalism and statute law; the history of the enactment of the law and state practice have particular weight in interpretation.
>
> [...] The division of responsibilities between the federation and the States is the formal framework for legislative power in a federal state and thus demands a high degree of certainty and predictability. That is why conventional state practice is important: it not only provides in general the greatest possible degree of certainty for the boundaries of the area as laid down, but also shows whether and why the legislature has historically used its power and to what extent there has grown up a legitimate expectation having regard to the overriding consideration of the continuity of the division of power.[269]

There followed pages of examination of the historical treatment of the issue in the law of the German states and in federal law from the nineteenth century onwards.

Along similar lines, it has been held that laws permitting the state to recover for damage caused to public property by the citizen are not within the civil law.[270] This decision too had the effect of validating a State law and enlarging the powers of the States: they cannot legislate in the field of the civil law because it (like the criminal law) has been completely codified by the federation, thus engaging what Americans would call the pre-emption doctrine and Australians would call "covering the field".[271] But they can legislate on fields outside it such as damage to public property by the citizen.

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269 At 174-176.

270 BVerfGE 42, 20, 28-32.

271 Sawer, *Modern Federalism*, p. 139. In Germany this is dealt with under Article 31 of the Basic Law, which reads in full: 'Bundesrecht bricht Landesrecht'. It is not possible

Having read the quotation just reproduced, with its strong emphasis on the lack of change over decades if not centuries, we might rather suspect that the danger would lie in the concession of too little, not too much freedom to the federation to depart from the traditional content of the code – that the traditional content of phrases such as "the civil law" and "criminal law" might be held to be frozen in the state in which the sub-constitutional law existed when the constitution was being drafted (1948-1949).

However, this obvious danger has not escaped the notice of commentators[272] or the Courts. The law is not frozen. For example, new laws for the protection of tenants and against unfair contractual terms have been validly passed under the "civil law" banner since 1949.[273] Equally, it has been held that a law on the use of dangerous explosives, although not contained in the Criminal Code, was part of the federal power over criminal law.[274] This was decided more or less on the same lines as similar questions are in Canada – because the law in question looked like a traditional criminal law. It is a matter of drawing a line between the extension of an existing field into new areas and the abandonment of the field entirely for other pastures[275] – in relation to which, of course, there is much room for disagreement. In the case involving the *State Liability Act*, the Court decided as it did because it drew the line between the liability of citizens (including civil servants) *inter se*, on the one hand, and, on the other, obligations owed by the state itself to the citizen. This is at least a defensible and easily understood criterion, but it is not beyond criticism.

Although this essay does not contain a detailed treatment of Swiss law, chiefly because it prohibits judicial review of federal legislation,[276] it is worth mentioning that the Swiss Federal Court has also taken the view (in a case not involving questions of judicial review on federalism grounds) that state liability is not part of the civil law. However, this view was reached on a different and somewhat more sophisticated basis from that in Germany.

Article 122 (1) of the new Swiss Constitution of 1998-1999 (reflecting the previous Constitution of 1874)[277] allocates the civil law to the federation, and a number of theories have grown up about the proper sphere of federal activity in this area which appear to be based principally on the doctrines of the sub-constitutional law about what constitutes civil law for procedural purposes, for example. The doctrines include:[278]

to do justice to the admirable brevity of this provision in English, but it can be translated using six words: federal law prevails over State law.

272 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1512; Scholz, "Ausschließliche und konkurrierende Gesetzgebungskompetenz", p. 265.

273 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1563.

274 BVerfGE 13, 367.

275 Rengeling, "Gesetzgebungszuständigkeit", p. 738.

276 Article 191/Article 189 (4) of the Constitution.

277 Article 64 (1), (2).

278 The number varies among sources. The sources used here are Bucher, *Schweizerisches Obligationenrecht: Allgemeiner Teil* (2nd ed., Schultheß, Zürich 1988), p. 80;

- the subordination theory (civil law ends when the state confronts the citizen in its sovereign capacity);
- the interests theory (civil law includes rules protecting private rather than public interests: *publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*);[279]
- the functional theory (whether the legal relationship concerned involves the maintenance of public as distinct from private rights);
- the modal theory (remedies of a civil-law nature indicate civil law, those of a public-law nature public law);
- the subject theory (civil law ends as soon as a public-law actor becomes involved);
- the fiscal theory (claims against the consolidated revenue are not made pursuant to the civil law).

None of these alone is decisive; each must be considered when the question arises whether something comes under civil law.[280]

In a recent case,[281] the Federal Court decided that the plaintiff's claim for damages against a Canton under the state-liability statute did not come within the civil law. The Court noted that the subject and the subordination theories suggested that this was not so, while the position under the interests theory was uncertain. It placed most emphasis however on the functional theory and the fact that, in the case at hand, the state had acted in its sovereign capacity against the plaintiff by ordering the compulsory administration of her real property in the interests of a creditor, so that the matter had started off with, and the damage for which she claimed had been caused by, a remedy which was clearly one belonging to the public law in which the state adjudicates on the claims of private people rather than stepping in to enforce its own. Swiss law certainly suggests a variety of criteria for recognising the civil law that are not as intimately bound up with history and precedent and which might be of some use to the German Court in its task of reviewing federal legislation allegedly enacted under the federal power over civil law.

As far as I am aware, however, the German Court does not consider using the insights from just across the border to any significant extent. One must always be wary of drawing conclusions from the weight attached to various lines of argu-

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Ehrenzeller *et al.*, *Die schweizerische Bundesverfassung: Kommentar* (Schultheß, Zürich 2002), p. 1263.

279 Dig. 1, 1, 1, 2; Inst. 1, 1, 4.

280 Despite the prohibition of judicial review of federal legislation, the question can still arise whether cantonal legislation falls within the area of the civil law and is invalid for conflict with the federal legislation on that area. An example of such a case is (1982) BGE 108 Ib 392 (Cantons do not have the power to regulate the consequences of marriage for cantonal citizenship).

281 (2000) BGE 126 III 431, 436f.

ment in any one case, as they may reflect the Judges' personal views, the way in which the advocates chose to conduct the case or the individual circumstances of the case. Nevertheless, it is worth noting that, in the *State Liability Case*, the Court devoted pages and pages to historical analysis and very few words indeed to anything else. It held that it was not necessary to consider in the case at hand whether the conventional understanding of what is covered by the civil law could be wrong, as there was no indication that it was, and justified this by stating that the historical material supported the view that 'the civil law [...] is oriented towards having effects on one's fellow citizens, while on the other hand excluding in principle the relationship of the individual to public institutions'.[282] That is just about all the conceptual analysis on the Swiss model that one finds.

Returning then to further case law from Germany: it shows that the impression we might have from the *State Liability Case* alone would not be a complete one, and that the Federal Constitutional Court has in fact recognised the need not to bind itself too closely to historical precedent and trodden a moderate path.[283] In 1958 it held[284] that labour law had detached itself from the field to which it previously belonged – civil law – and become a separate field of its own. To justify this conclusion it referred to developments such as the establishment of a separate Court for labour law; the numerous laws passed on the topic outside the Civil Code even before the fall of the Monarchy in 1918, but more particularly thereafter; and the creation of specialist labour law chairs at the Universities. As with the decision on damage to public property by the citizen, this decision had the effect of enlarging the powers of the State: no pre-emption doctrine prevents them from legislating on the separate field of labour law.[285] The decision of the Court was therefore that the annual leave legislation of various States was valid.

However, it is also possible for existing areas of federal law to extend themselves, as the Court held in 1987[286] in deciding that a federal law on social security insurance for freelance artists and writers was sufficiently similar to the existing laws on social security insurance to justify its inclusion within that area of federal power. Adopting a process familiar in a first-year philosophy class,[287] it considered whether the relationship of employment was an essential element of the definition of social security insurance and held that it was not. The Court recently conducted a similar exercise in concluding that federal power over "matters relating to private insurance" was not exceeded by a legislative requirement to insure against particular risks if a particular form of private insurance was taken out.[288]

[282] BVerfGE 61, 149, 190.

[283] Bothe in Denninger et al. (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Luchterhand, Neuwied 1989), p. 424.

[284] BVerfGE 7, 342, 348-351; see also BVerfGE 77, 308, 329.

[285] This is still the case: BVerfG, DVBl 2000, 1119, 1119f.

[286] BVerfGE 75, 108; similar BVerfG, NVwZ 2004, 463, 464; *aliter* BVerfGE 62, 354, 366.

[287] *E.g.* Hospers, *An Introduction to Philosophical Analysis* (2nd ed., Routledge & Kegan Paul, London 1985), pp. 23f.

[288] BVerfGE 103, 197, 217.

Even more recently, it held[289] that the federal power over the admission to the healing professions (Article 74 (1) (19)) is not restricted to the healing professions as they existed in 1949; rather the federation may create new healing professions – the vocation of aged carer in the case at hand – and legislate about them, provided that it can still be said that it remains within the bounds of that concept.

This review of some of the cases produces a mixed picture: sometimes the Court rules narrowly, sometimes it is more generous. It is not always easy to predict the level of abstraction or the principles which the Court will adopt in determining the boundaries of the existing areas of law picked up by the federal division of powers. Certainly references to history and tradition might sometimes mask judicial choice and intuition. But it can be said that the importance attached to historical considerations in scope doctrine is far greater than we are used to in English-speaking countries. The German doctrine does reflect the text of the constitution, which certainly does refer to many fields of law which already had a long-established tradition when the constitution was enacted; partly it reflects the rather stronger tradition in German law of dividing the law into various subbranches which are independent empires of their own with separate Court systems and academics who deal with nothing else. There is a sense that the divisions between fields of law in Germany are much stronger than in the more practical, untheoretical, disorganised world of the common law. (German colleagues often express surprise that I have taught in what they see as all three major sub-divisions of the law – public, criminal and civil law – and I am sure that some of them wonder why my teaching is so poorly focused.)

A further point is made by one astute commentator:[290] namely, that the Civil Code performs in German law the function of providing a unified national body of basic private-law concepts which is performed in English-speaking countries by the common law.[291] While this is primarily an explanation of why the federation, rather than the States, has power over the civil law, no doubt it also informs decisions about what is and is not included within that concept. Removing labour law from it, for example, may well mean that conditions of employment vary across the country. This could hardly be said to disturb the basic nation-wide foundation of civil-law doctrine to be found in the Civil Code (and indeed is not necessarily an evil at all).

The Court also refers occasionally to another form of historical interpretation, which in the English-speaking world is the subject of much debate – the meaning of federal powers in the eyes of those who drafted them. A recent example is provided by the case on the validity of the law opening the professoriate to candidates

289 BVerfGE 106, 62, 105.

290 Bothe, *Die Kompetenzstruktur des modernen Bundesstaates in rechtsvergleichender Sicht* (Springer, Berlin 1977), p. 223.

291 A *caveat* is necessary in relation to the United States here, not because of any doubts about whether it is an English-speaking country but because it has, as is well known, no unified national common law. But the common English-law inheritance of forty-nine of the States means that the broad concepts are mostly similar enough from State to State, even if the law differs in detail; and in some areas (defamation, for example) a federal constitutional-law rule applies across the country as well.

without a second doctorate. The question arose whether this fell within the federal framework power over 'general principles respecting higher education' (Article 75 (1) (1a)). This is, so to speak, a double framework power, as it is a power to lay down the framework for general principles. This does not really make much sense, except as a political compromise, but it does suggest that a very small amount of very general power was intended to be conferred by this provision. In order to test this supposition, the Court looked in great detail at the debates leading up to the enactment of this federal power, and found that the statements of those who participated in them confirmed what the highly cautious language in which the power is phrased suggested, namely that the federal power was meant to be of the most general character.[292] The Court held the law invalid on the basis that it did not confine itself to very general provisions but went into too much detail to be a "framework law".

This case also supports a rule which common sense suggests is correct, namely that if a law might be said to come under both a general and a more specific subject-matter it should be seen as falling within the latter.[293] Thus, for example, the Court (as just mentioned) very recently held[294] a federal statute invalid which simplified the requirements for becoming a University professor partly because it saw it as coming under the more specific (and more limited) federal framework competence over higher education rather than the more general power over government employees (including State government employees). Unlike the High Court of Australia, the Federal Constitutional Court will not allow the federal legislature to hunt around for a head of power which supports a law which it wishes to enact; its laws are classified as one thing or another according to what they are really about.

The importance placed on historical considerations is the most distinctive feature of German scope doctrine, but history is of course not the only thing to which the Courts pay regard. The Courts also use what in Germany is a familiar trio of interpretative aids: the teleological, systematic and grammatical (ordinary-language) approaches to interpretation.[295] Thus, for example, in interpreting a federal power – especially one which does not refer to a pre-existing area of law – the ordinary use of language can play a role.

It has accordingly been held that medical fees fall within the ordinary meaning of the power translated above as the power over "economic affairs", but which might more freely, and perhaps more accurately, be described as a power over trade and commerce. This is because medical fees are payment for an economic service.[296] An amnesty law can be validly enacted by the federation because stop-

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[292] BVerfG, NJW 2004, 2803, 2806.

[293] BVerfGE 7, 29, 44; Heintzen in Dolzer/Vogel/Graßhof (eds.), *Bonner Kommentar*, Art. 70 p. 71; Maunz in Maunz (ed.), *Grundgesetz*, Art. 74 p. 14.

[294] BVerfG, NJW 2004, 2803, 2807.

[295] See further on these Kommers, "Constitutional Interpretation in Germany: Balancing Rights and Duties" in Goldsworthy (ed.), *Constitutional Interpretation: A Comparative Study* (O.U.P., forthcoming 2006). (Other essays from this collection were not available to me at the time of writing.)

[296] BVerfGE 68, 319, 330.

ping existing prosecutions, and cancelling prison sentences, fall within the natural meaning of the phrases "curial procedure" and the "execution" of the criminal law respectively. Cancelling prison sentences comes within the natural meaning of those words, the Court held, because it equates to the 'removal of liability to criminal punishment, as it prohibits the execution of the sentence. Such a legislative measure belongs to the realm of the execution of the criminal law.'[297]

While that statement certainly makes sense, sometimes one is rather struck by the abruptness and lack of explanation offered by the Court: for example, it is easy to agree with it that laws relating to trade in and manufacture of weapons and ammunition do, while those relating to the possession and ownership of weapons do not, fall within "economic affairs"; but why does this phrase (which, as mentioned, might be translated, with some loss of word-for-word fidelity to the text, but perhaps greater accuracy, as "trade and commerce") not cover the acquisition of such weapons – which, the Court held, came within the States' powers over public order and safety?[298] However, this is not an area in which agreement will always be reached easily. In invalidating the *State Liability Act*, the Court also held that the words "civil law" can cover, as a matter of ordinary language (as well as historical classification of the law), only relations between citizens, not those between citizens and the state.[299] As a general rule, this seems more or less correct to this author, but probably not everyone will agree. As we have seen, the Swiss have developed a slightly more refined set of instruments for measuring whether a law falls under the civil law or not.

An example of the teleological approach may be found in the Court's decision[300] that federal power over sea shipping lanes and internal waterways used for general shipping (Article 74 (1) (21)) did not include general regulation of the waterways concerned, but related to their use for shipping traffic only, as to hold otherwise would not be in accordance with the aim of the conferral of the power on the federation – to allow it to regulate external trade more effectively. Systematic interpretation compelled this conclusion as well, as Article 75 (4), which conferred a framework power on the federation over what might be compendiously described as water resources, would be superfluous if Article 74 (1) (21) extended beyond the regulation of the waterways it mentions as channels for shipping traffic.

A point worth noting is that the Court attaches some[301] importance to ensuring that the federation's powers are not extended to a point where they threaten the States' residue of power. (In terms of the approaches to interpretation just mentioned, this falls most obviously within the systematic, as it pays regard to the Basic Law's federal nature; but there is also a substantial element of *telos* to it, the aim being, of course, the preservation of the federal structure.) Federal powers

297 BVerfGE 2, 213, 222.

298 BVerfGE 33, 206, 217. This decision was speedily overcome by the insertion of Article 74 (1) (4a) ("weapons and explosives law").

299 BVerfGE 61, 149, 201.

300 BVerfGE 15, 1, 17f.

301 Scholz, "Ausschließliche und konkurrierende Gesetzgebungskompetenz", p. 270.

over the criminal law[302] and taxation,[303] which are the most obvious powers which the federation could misuse to go beyond its recognised spheres, are interpreted fairly strictly. In the federal area of criminal law the historical, systematic and teleological approaches neatly coincide, as restricting criminal law to what has historically been seen as its province will also prevent misuse of the power.

The federal power over taxation is even more easily confined having regard to the detailed provisions which the drafters of the Basic Law – very wisely – added about financial arrangements within the federation.[304] Any charges on the people which are not provided for in those provisions will be subjected to especial scrutiny to ensure that they are not disguised attempts to undermine the division of fiscal responsibility and impose taxes, but are rather part of a broader regulatory scheme which only incidentally is financed by the charge.[305] As the constitution's financial provisions also limit the States' taxing powers, the same principle is applied to them – they must not misuse their residue of power to do things which the fiscal provisions do not allow them to do.[306] Equally, however, if the States are permitted to raise a particular tax by the fiscal provisions, and enact what is in truth a tax rather than a regulatory scheme, their taxation powers supply any deficiency in legislative competence resulting from the general catalogues of power.[307]

The Court dealt with a problem along these lines in 1998. The case concerned a local tax (levied under State legislation) on certain packaging and throw-away plastic utensils. The Court held that, despite the fact that the disposal of waste was a concurrent federal power (Article 74 (1) (24)), the tax concerned was one that generally fell under State powers, and that taxes might be used as a means of influencing behaviour as well as raising money. However, 'if the tax's effect on behaviour approaches a binding rule of conduct having regard to its degree and effect', the measure 'would not have the nature of a tax'.[308] On the facts, this tax was well within the permissible area (although it turned out to be invalid for another reason – namely, that it contradicted the broader federal scheme for dealing with waste under its waste disposal power). Using this principle, however, German law too can easily solve the "heroin tax" puzzle.

Any intrusion by the federation into the spheres of education and culture, traditionally reserved for the States, is also looked at closely.[309] The exclusive federal power over broadcasting (Article 73 (7)) is accordingly read down to include only the technical side of broadcasting, not cultural questions (in the broad sense of the word) associated with it.[310] On the other hand, the Court has recognised that too

302 BVerfGE 26, 246, 258; Degenhart in Sachs (ed.), *Grundgesetz*, pp. 1564f; Maunz in Maunz (ed.), *Grundgesetz*, Art. 74 p. 16; Rengeling, "Gesetzgebungszuständigkeit", p. 779.

303 BVerfGE 75, 108, 147.

304 Chapter X of the Basic Law.

305 BVerfGE 67, 256, 275-279; BVerfGE 75, 108, 147.

306 BVerfGE 4, 60, 73; Rengeling, "Gesetzgebungszuständigkeiten", p. 728.

307 BVerfGE 14, 76, 99; BVerfGE 98, 106, 118.

308 BVerfGE 98, 106, 118.

309 BVerfGE 106, 62, 132.

310 BVerfGE 12, 205, 229-249.

much cannot be assigned to what Americans would call the police power of the States ('public safety and order', as the Court has referred to it),[311] because many laws have some connexion with that concept; and, unlike in the United States, the German federation has a general criminal-law power; thus, only laws 'which have the sole and immediate aim of maintaining public safety and order can be assigned to a category of their own which is referred to as the police power and falls within the competence of the State legislatures'.[312]

Finally on questions of scope of power, it should be mentioned that German law also is familiar with the concept of incidental powers, which one author has with charming naivety christened 'in truth tacitly included'[313] powers rather than that impossible thing in a land of codifications, unwritten powers. The German incidental power has been compared with that available to the United States Congress under the heading of implied powers, and has been influenced somewhat by American doctrine; however, the German Court is noticeably much less generous than the American one, no doubt partly because the perceived need for federal power to be extended beyond the core is less in Germany than it is in the United States given that the list of federal powers in Germany is more generous.[314]

A few years ago now Professor Geoffrey Sawer commented waspishly but correctly that

> in Germany the trend of professional comment is against any extensive implied or incidental power to the centre, and although this is argued mainly on pseudo-logical grounds, its real foundation is the width of centre power without such a prop.[315]

German incidental powers doctrine is moreover not very satisfactory analytically, as it has been traditionally split up into two – *Annexkompetenz* ("associated competence") and *Kompetenz kraft Sachzusammenhangs* (which might be rendered "competence by reason of inter-connectedness of subjects"). There is much debate about whether there is any difference between them at all – on this topic, the best that can apparently be said is that the former variant of incidental power operates

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311 BVerfGE 8, 143, 150.

312 BVerfGE 8, 143, 150; accord BVerfGE 13, 367, 371f; recently reiterated in very similar language: BVerfGE 109, 190, 215.

313 'In Wahrheit stillschweigend mitgeschrieben[]': Ehlers, "Ungeschriebene Kompetenzen" Jura 2000, 323, 323; see further Starck, "Neues zur Gesetzgebungskompetenz des Bundes kraft Sachzusammenhangs" in Geis/Lorenz, *Staat — Kirche — Verwaltung: Festschrift für Hartmut Maurer zum 70. Geburtstag* (C.H. Beck, Munich 2001), p. 288.

314 Bullinger, "Ungeschriebene Kompetenzen im Bundesstaat" AöR 96 (1971), 237, 239; Ehlers, Jura 2000, 323, 323f.

315 *Modern Federalism*, p. 136. An informative and more detailed treatment of case law to 1980 may be found in Blair, *Federalism and Judicial Review in West Germany* (Clarendon, Oxford 1981), pp. 125-137. Professor Sawer refers to implied as well as incidental power; the former expression refers to unwritten powers of the federation owing to its status as the nation-state over matters such as the federal capital, the national anthem and so on, which are not dealt with in this book.

to deepen federal power, while the latter widens it – and about whether one category is merely an instance of the other.[316] Leading commentators admit that the distinction between the two is most unclear.[317] Perhaps it is a mistake to attempt to split up such an elusive concept as incidental power in this way, although those familiar with the exquisite refinements of Australian incidental powers doctrine may recognise some echoes of the distinction between the incidental power expressly conferred on the federation under s 51 (xxxix) of the Constitution and extending to machinery provisions, and the more significant incidental federal power attaching to each of the other express federal powers.

Given the unsatisfactory state of German incidental powers doctrine, it is more revealing to present examples of the operation of such powers.[318] This is also of interest because it provides a useful insight into questions of characterisation in the narrow sense to which we are about to turn. Typical examples of associated competence – extending more deeply into what is really the same subject-matter – are the regulation of administrative procedures and generally the execution of federal law, as well as the police power in places subject to federal jurisdiction such as railway stations.[319] The "inter-connectedness of subjects" incidental power, on the other hand, operates to extend federal powers into other fields entirely which are normally reserved to the States, and is thus of more interest to us. It is said to exist when the federation cannot sensibly regulate a subject-matter assigned to it without also regulating another subject-matter. The standard example of this is the need for the federation to be able to pass laws about broadcasting, normally a State matter, if it is to regulate political parties.[320] This is an unsurprising decision given that political parties are the subject of a special conferral of power on the federation in Article 21 (3) to which full effect should be given. The Court has also shown some sensitivity to State interests here in refusing to permit federal law to exempt what were federal agencies – the Railways and Post Office – from State administrative charges.[321]

However, there has been the occasional generous decision. In 2002, the Federal Constitutional Court held[322] that the federation could lawfully regulate the vocation of aged carer entirely, even though doing so involved regulating both the admission to a quasi-medical profession (as well as mobilising one or two other express federal powers) and dealing with the social welfare aspects of that vocation (normally a State responsibility). As a matter of policy this was certainly much more sensible than splitting the vocation into two halves, one subject to State and the other to federal jurisdiction, but it involved a significant extension of federal power beyond its defined powers.

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316 *E.g.* Ehlers, Jura 2000, 323, 325.
317 *E.g.* Degenhart in Sachs (ed.), *Grundgesetz*, p. 1509.
318 A full list may be found in Starck, "Neues", pp. 284-287.
319 Degenhart in Sachs (ed.), *Grundgesetz*, pp. 1507f.
320 Degenhart in Sachs (ed.), *Grundgesetz*, p. 1509.
321 BVerfGE 26, 281, 300.
322 BVerfGE 106, 62, 117.

Perhaps the most contentious[323] recent decision[324] involved the ever-controversial topic of abortion, which is 'traditionally'[325] part of the criminal law and thus a federal responsibility. After a great deal of discussion and a number of curial decisions, the federal legislature decided to regulate abortion by means of a federal law which placed the emphasis mostly on counselling the pregnant woman rather than on criminal punishment in an attempt (so the law in essence said) to dissuade her from proceeding with the abortion. The Bavarian legislature, clearly of a more conservative mind, enacted laws requiring institutions performing abortions to have State government approval, limiting to one-quarter the permissible abortion-related turnover of such institutions, and requiring doctors to refuse to carry out abortions if the pregnant woman had not made her reasons for doing so clear to the doctor. The Court held that these laws were invalid,[326] the last-mentioned in particular on the grounds that they disturbed the scheme of the federal legislation. It held that the federal law defined in the cases to which it applied the limits of medical professional duties beyond which the States could not go and to which they could not add. To the extent that the federal laws were criminal laws, they were covered by express federal legislative power. But as medical professional law generally is not on the federal lists but is a matter for the States[327] and could be regulated by the federation only under its incidental power, and as the conclusion that the States were prohibited from legislating in an area which was their own was drawn from federal silence, this decision attracted some attention. However, pursuing this would lead us too far into questions of inconsistency between federal and State laws which are outside the scope of this essay.

d. Characterisation (in the narrow sense)

What has just been written about the incidental power(s) under the Basic Law – an area which by definition involves characterising a law as one outside core federal power – might be thought to suggest, at first glance, that German characterisation doctrine involves a similar approach in one respect to that found in Australia – namely, that any law may have more than one possible character, and that it suffices that one of those should be within federal power. However, if the Court had reasoned in that way there would have been no need for it to resort to incidental-power reasoning at all. Rather, the Court proceeded on the basis that the aged carers' law, for example, could conceptually be divided into two, each part having a separate and single character, because the vocation it regulated had two distinct aspects to it. The character of any provision of the law thus depended on whether the quasi-medical or social welfare aspect of the vocation it recognised and regulated was uppermost; thus, the federation could, within the core aspect of the

323 *E.g.* Starck, "Neues", pp. 289-296.
324 BVerfGE 98, 265.
325 At 312.
326 At 312-328.
327 BVerfG (Kammer), NJW 2004, 2660.

power, regulate (for example) admission to the vocation having regard only to quasi-medical competence and not to the social welfare side. No doubt the inconvenience that this would have produced was a major factor in the Court's decision to uphold the whole law, partly, as we have seen, under the incidental power.

This analysis suggests, however, that – rather than the law as a whole having multiple characters – each part of the law had a dominant character (admission to the healing professions and social welfare respectively) which the Court was able to identify. This means, in other words, that German characterisation doctrine on this point is Canadian rather than Australian in flavour, a point which the case law considered below confirms.

One of the most perceptive German commentators on this topic does indeed draw an express comparison with the Canadian "pith and substance" doctrine. (If this essay reaches Canadian readers, they may be interested to know that the same author comments favourably on the effort that has gone into developing the "pith and substance" doctrine, contrasts that situation unfavourably with the lack of thought given to the question in Germany and adds that the "pith and substance" doctrine, 'although [...] it sometimes is not very helpful, is however at least a useful starting-point for a line of argument'.)[328]

The German Federal Constitutional Court tends to say less, however, about the need to maintain an appropriate federal balance, the importance of the federal system, the need for the Courts to take the balance into account and so on than does the Supreme Court of Canada. Partly this is because of the more rigid and much less discursive formula in which German judgments are written, and partly because it now has an express clause on which to rely in order to be able to import such considerations: Article 72 (2), which requires attention to be paid to the principle of subsidiarity. This provision has been the subject of an analysis by the present author elsewhere.[329] The German Federal Constitutional Court has admittedly been known to say that 'in cases of doubt, there is no presumption in favour of federal power. The system of the Basic Law demands rather a strict interpretation of [the provisions conferring power on the federation]',[330] but this can hardly be compared with the lengthy arias in praise of the federal balance which are sometimes sung in Ottawa.

An early example of what might be called the German version of the "pith and substance" doctrine may be found in a decision of the Federal Constitutional Court in 1958[331] on State laws relating to time limitations on the prosecution of criminal offences committed by the press (in the case at hand, the offence was incitement to treacherous sabotage). The Court was required to classify these either as laws relating to criminal procedure or the criminal law, or as laws about the press. This was necessary because criminal law and criminal procedure – while in form concurrent powers – are the subject of codifications that are far older than the federa-

[328] Bothe in Denninger (ed.), *Kommentar*, p. 423.

[329] "The Subsidiarity Principle in German Constitutional Law" (2006) 4 Int Jo Const Law (forthcoming).

[330] For example, BVerfGE 12, 205, 208.

[331] BVerfGE 7, 29.

tion itself, and accordingly, as we have seen in other cases already, the pre-emption doctrine again had the effect of closing these topics to the States. They might indeed be called *de facto* exclusive federal powers. If on the other hand the laws were to be classified as relating to the press, no such barrier existed. (In this way, we can see that the existence of the sub-constitutional codifications exerts pressure on constitutional characterisation doctrine as well as on scope doctrine.)

Now it might be thought that laws about time limitations on offences committed by the press could be said to be about both criminal law and procedure and the press. But if the law were classified as having any connexion with the criminal law, it would not be valid; and it is easy to see how much power could be taken from the States in this way. The Court accordingly held that the law was in truth about the press rather than about criminal law and procedure. It referred principally to the fact that for a century or more, both before and after the current codifications were enacted and before federal complications existed, such laws had appeared not in criminal codes, but in separate statutes dealing with the press.[332] This is accordingly another example of the historical approach. The Court did not reflect on its tacit assumption that each law would have one character only.

It is easy to imagine that an unstated reason for the Court's decision was the need to preserve State power by not coming too readily to the conclusion that a statute which has for decades been within State jurisdiction was actually about criminal law. In this way, the historical approach can operate as a doctrine of reserved powers preventing the removal from State jurisdiction of topics long understood to be theirs despite the lack of any such statement in the Basic Law itself.

Later, in 1973, the Court, using a similar "either-or" line of reasoning, came to the contrary conclusion about the privilege against giving evidence which German law extends in some circumstances to members of the press.[333] Here, the Court saw that the law in question had a 'recognisable connexion'[334] with both press law and the law of criminal procedure. However, the 'nature and historical classification'[335] of such laws in German law indicated that this law was predominantly about criminal procedure and thus could not be enacted by the States. I shall return to this case once some further points have been made.

Two more recent examples, both from 1998, include a decision that kindergartens both were educational and served the general public welfare, but that the latter characteristic outweighed the former (for constitutional purposes anyway – the kindergarten teachers' union would probably disagree) so that kindergartens fell within the federal public welfare power rather than the States' educational responsibility;[336] and a decision that a State law decreeing that members of corporations with majority State ownership could not remain in that capacity if elected to the State legislature was about both State public law and corporations (a federal area),

[332] At 39f, 44.
[333] BVerfGE 36, 193.
[334] At 202.
[335] At 203.
[336] BVerfGE 97, 332.

but should be classified as having the nature of a law about State constitutional law.[337]

These decisions show that the Court has begun to show awareness of its decision to classify laws under one heading only (rather than accepting the concept of multiple possible characterisations) by indicating that it sees various options for characterising laws from which it must select one.[338] Two phrases occur in its recent decisions with some regularity: it states that it looks to the '*Schwerpunkt*'[339] – which might be translated as "pith"[340] – of laws, or that it makes characterisation decisions based on the subject or matter (*Gegenstand*) of the law rather than on what the law happens to fix upon as the topic outwardly dealt with.[341] This, too, has been rightly compared by a German author to the Canadian approach.[342]

What criteria are used to determine the "pith"? Partly this question has been answered already, as the rule that historical factors are to be taken into account in determining the scope of a power applies also, as we have seen, in characterising laws in the narrow sense, so that we can look to see what sort of laws have in the past been characterised as laws about (say) civil law. German law also unconsciously mirrors Canadian case law in looking also at the principal[343] purpose of a law rather than just its outward form as occurs in Australia.[344] In March 2004, for example,[345] the Court had to deal in the *Dangerous Dogs Case*[346] with a new federal law prohibiting the import and breeding of dangerous breeds of dogs. It held that the principal purpose of the prohibition on breeding was the protection of people rather than other animals (as indeed was quite clear from the lead-up to the enactment of the law) and that it therefore did not come within the federal power

[337] BVerfGE 98, 145.

[338] Lerche, "Die Gesetzgebungskompetenz von Bund und Ländern auf dem Gebiete des Presserechts" JZ 1972, 468, 469; Rengeling, "Gesetzgebungszuständigkeit", p. 738; Stettner, *Grundfragen*, p. 421; Stettner in Dreier (ed.), *Grundgesetz*, p. 1319; von Pestalozza (Count), DöV 1972, 181, 183.

[339] BVerfGE 80, 124, 132 ('Schwergewicht'); BVerfGE 97, 228, 252; BVerfGE 98, 145, 158; BVerfG, EuGRZ 2004, 216, 224 ('Schwergewicht'). Academic commentary agrees: *e.g.* Maunz in Maunz (ed.), *Grundgesetz*, Art. 74 p. 14.

[340] *Schwerpunkt* – literally "heavy point" – has no exact equivalent in English. German-English dictionaries suggest translations along the lines of "main focus" or "centre of gravity", but in this context "pith" is better. "Pith" would be an ideal translation of the word in everyday English, too, if it were not for its somewhat out-of-the-way character. (Similar difficulties are experienced in translating the German word *Verkehr*, which occurs in some legal contexts, as the best translation of that would really be "intercourse", a word which now has one too many other associations.)

[341] BVerfGE 68, 319; BVerfGE 70, 251, 264; BVerfGE 77, 308, 329; BVerfGE 103, 21, 30. Count von Pestalozza said as much in 1972: DöV 1972, 181, 182f.

[342] Bothe in Denninger (ed.), *Kommentar*, p. 425.

[343] Stettner, *Grundfragen einer Kompetenzlehre*, p. 421.

[344] Degenhart in Sachs (ed.), *Grundgesetz*, p. 1513; Rengeling, "Gesetzgebungszuständigkeit", p. 739; Stettner in Dreier (ed.), *Grundgesetz*, pp. 1318f; von Pestalozza (Count), DöV 1972, 181.

[345] An earlier example is BVerfGE 28, 119, 147-149.

[346] BVerfG, EuGRZ 2004, 216.

over the protection of animals.[347] No doubt the law would also have protected animals, but that was not its purpose. It was therefore invalid.

On the other hand, a different conclusion was reached about the prohibition on the importation of dangerous dogs. The Court had previously held that historical considerations justify the rule that the exclusive federal power over the importation of goods (Article 73 (5)) is, exceptionally, able to be exercised regardless of the goal which the federation may be pursuing by regulating such trade. The historical background to the drafting of the equivalent power in the Weimar Constitution showed that, owing to various events in the First World War, the purpose of the conferral of power was to give the federation complete control over external trade regardless of why it wanted to control it. In the case in which this principle was laid down,[348] the Court upheld a federal law restricting the importation of films with content hostile to the free democratic order – always a peculiarly German concern having regard to the fate of the first German democracy – but no doubt it would also uphold laws similar to that considered by the High Court of Australia in *Murphyores*. The principle was confirmed in the *Dangerous Dogs Case* of 2004, allowing the federation to prohibit the import of dangerous dogs regardless of the reason why it desired to do so (which, of course, was the protection of the public from the dogs).[349]

Nor is purpose everything even in respect of the other powers. In the case involving the law granting an evidentiary privilege to the press mentioned earlier, the Court was confronted with the argument that the purpose of the law was to benefit the press rather than to deal with evidentiary issues; but it responded by saying that if the true nature of the law was procedural, as indeed it was held to be, its purpose could not save it.[350] (In terms of the categories of analysis discussed in the previous section, this is a combination between the systematic and historical approaches: it amounts to determining the place of the law in the system having regard largely to historical considerations.) A power over procedure might be said to be the mirror image of a power over public order in this respect: public order is such a vague concept that it could crowd out everything else if not interpreted fairly narrowly with an eye to ensuring that there is some room left for the criminal-law and other powers; on the other hand, procedure might be crowded out by everything else if regard were paid only to the purposes of laws. Not having regard solely to purpose certainly makes sense in relation to a power over adjectival law, which is rarely going to be an end in itself. Looking only to the purpose of a law about evidence might result in a considerable attenuation of a federal power over procedure.

The broader point, however, is that, as in Canada and unlike in Australia, it is the case that the German Court does not generally refuse to look at the purpose of a law in characterising it; purpose is an important criterion, but not the only one.

347 At 224.
348 BVerfGE 33, 52, 62-64.
349 BVerfG, EuGRZ 2004, 216, 220.
350 BVerfGE 36, 193, 205.

As in Canada, other indicators of the field in which the law operates are of course also important.[351]

[351] Degenhart in Sachs (ed.), *Grundgesetz*, p. 1513; Heintzen in Dolzer/Vogel/Graßhof (eds.), *Bonner Kommentar*, Art. 70 p. 73; Rengeling, "Gesetzgebungszuständigkeit", p. 739; Scholz, "Ausschließliche und konkurrierende Gesetzgebung", p. 268; Stettner in Dreier (ed.), *Grundgesetz*, pp. 1318f; von Pestalozza (Count), DöV 1972, 181, 183.

6. Austria

a. Introduction

The current Austrian Constitution came into force in 1920, although the entry into force of the federal division of powers for which it provides was suspended until 1 October 1925; in the interval, some re-drafting of the federal powers took place, and the way was prepared for the transition to federalism. These two dates are not merely of historical interest, as we shall see.

The Constitution of 1920 was re-enacted after the resurrection of Austria in 1945 and is thus still in force, but the events of 1945, unlike the date 1 October 1925, are of merely historical interest and have no other effect on the questions discussed here.[352]

The Constitution divides powers between the federation and the nine States (also known as *Länder* in German) in Articles 10 to 15 inclusive. By far the most important provision is Article 10 (1), which contains an extraordinarily lengthy and detailed catalogue of matters within the competence of the federation. It is divided into eighteen paragraphs, but that statistic does not give an accurate idea of the number of subjects assigned to the federation, as many of the individual paragraphs contain very numerous subjects. Thus, for example, item 6 on the federal list covers such diverse topics as the civil law; private charitable foundations; criminal law and what are somewhat clumsily referred to as 'establishments for the protection of society against criminal or otherwise dangerous elements'; copyright law; press affairs; and compulsory acquisition of property (except in State matters). These subjects are assigned to the federation – exclusively, as there is no concurrent list in Austria – by only one of the eighteen paragraphs in Article 10 (1).

Sometimes Article 10 descends to a level of detail which seems somewhat *infra dignitatem*. Thus Article 10 (1) (12), to take one of several possible examples, contains a diverse list ranging from health law (with the exception of the dead and the burial of the dead), clean air (without derogating from State responsibility for heating installations), and the regulation of commercial trade in seeds, plants, and substances for protecting feed, dung and plants. A glance at the Appendix certainly will confirm that the Austrian Constitution is a very detailed document indeed.

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352 Schäffer, *Verfassungsinterpretation in Österreich: eine kritische Bestandsaufnahme* (Springer, Vienna 1971), pp. 103f.

On the other hand, more significant powers that we might expect to find in a federal Constitution are also included. As well as the federal powers over civil and criminal law mentioned above, there are exclusive federal powers over foreign affairs,[353] 'matters pertaining to trade and industry', labour law[354] and defence (Article 10 (1) – entries (2), (8), (11) and (15) respectively). Further examples will be encountered as we proceed.

Also like the German Basic Law, the Austrian Constitution divides powers between the centre and the States on two separate levels: as in Germany, it is possible for the centre to have legislative power and the States to have the administrative responsibility for carrying out the legislation in question. In the Austrian Constitution, Article 10 deals with powers that belong to the federation both legislatively and administratively. Cases in which the federation makes the rules but the States administer them are the subject of Article 11, which includes important powers such as those over citizenship, housing policy, road traffic law, internal shipping (although surprisingly not ocean shipping) and the protection of animals.

The Austrian Constitution does not use the terminology of exclusive and concurrent powers which we find in many other federal constitutions, so that Articles 10 and 11 both set out exclusive federal powers. The only difference between them is that the topics in Article 10 are the subject of federal administration as well as federal legislation, while those in Article 11 are administered by the States in accordance with federal legislation. Article 12 does however mention a limited number of areas – perhaps the most important is 'public institutions for the non-curial resolution of disputes'[355] – in relation to which the federation has only "framework" legislative powers and the States the power to enact more detailed legal rules. This phenomenon was also encountered in German federal constitutional law. Even more familiar is the rule to be found in Article 15 (1) of the Austrian Constitution, which vests the residue of unallotted powers with the States.

It is convenient to mention at this stage one further consequence of the lack of a concurrent list in Austria. Given that civil and criminal law are exclusive federal powers, Article 15 (9) avoids a large number of problems by arming the States with a capacity which appears to partake of the nature of incidental power over civil and criminal law:

> (9) The States are also empowered, within their areas of legislative power, to enact provisions necessary for the regulation of those areas in the fields of criminal and civil law.

The Austrian Constitutional Court however takes a fairly strict view of the meaning of the word "necessary" in this provision, and interprets it to mean "necessary"

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[353] The States are however permitted under Article 16 of the Constitution to conclude treaties with other countries within their areas of responsibility.

[354] Except in relation to labour law applying to agricultural and forestry workers, which is a federal "framework" power under Article 12 (1) (6).

[355] Article 12 (1) (2).

rather than "desirable" or "appropriate", as it is wary of introducing concurrent legislative power in the area of civil law by the back door.

A fairly recent example of this is a case dealing with a proposed State law providing the State of Salzburg with a right of first option in the interests of protecting the historic parts of cities. It was held that this was in reality a substantive rule of the civil law rather than a mere adjunct to a law which would be within the State's power. The Court said that it would require an 'imperative connexion with other norms' and that there must be 'an internal, "technical legal" connexion of the civil-law rule with concrete norms of the public law in the statute, so that the rule of civil law is a necessary supplement to'[356] the public-law rule.

This power is thus not a means by which significant State responsibility for the civil and criminal law can be re-introduced; in fact, it is hardly an incidental power at all in the manner in which the concept is used in the United States or Australia, where the concept receives a fairly broad interpretation. One might also compare the Austrian approach here with the Supreme Court of Canada's more generous decision in *General Motors*, which dealt with a situation which was in some respects the converse of what we encounter here (in Canada, private law is allocated to the provinces, and the federal statute in *General Motors* was enacted as an adjunct to a general federal scheme). The Austrian power is more like a power to "clean up the mess" created by a rule within the State's powers which has unavoidable effects on rights and duties under the civil law.

For the sake of completeness, it should also be mentioned that Articles 14, 14a and 14b contain detailed divisions of power in the areas of education and public procurement law, and Article 13 refers the reader to the special law of constitutional status dealing with the division of powers and revenue in the area of taxation.

As with the German Basic Law, reading the catalogue of federal powers makes one wonder whether there could be anything left for the States at all. Like the German Federal Constitutional Court, the Austrian Constitutional Court occasionally proclaims that its general approach is that federal powers should be interpreted strictly in the interests of maintaining the federal balance,[357] but as one commentary bluntly assesses the position:

> It is no coincidence if the federal principle – even if the 'cornerstone' of our federal Constitution – is mentioned and considered here only in last place as a maxim of interpretation of the federal division of powers. This systematic position indicates the comparatively minor role in the jurisprudence of the Constitutional Court for the federalist point of view and an approach to problem-solving based on it. The Court does recognise in the abstract the validity of the federal principle as a principle of interpretation in interpreting the Constitution and in particular in interpreting the division

[356] öVerfGH, Erk Slg 13 322/1992, para. IV.3.2, with references to earlier case law.

[357] For a collection of these statements, see Funk, *Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung* (Wilhelm Braumüller, Vienna 1980), p. 89.

> of powers, but without also being able to make this principle effective in concrete application. We may thus speak of a contradiction between the postulates and the actual practice of the jurisprudence.[358]

If this is so, the position of the States might be thought to be bleak indeed having regard to the fact that all federal powers are exclusive (at least as regards legislation as distinct from administration) and to the width of the granted federal powers. In particular, the casual mention of the civil and criminal law in Article 10 (1) (6) appears to confer a vast quantity of power on the federation. The impression that there are few matters of great importance left for the States after subtracting the fields mentioned in Article 10 from their powers would be generally a correct one, but there is still a great deal of interest in looking at the Austrian approach to determining the scope of the powers conferred on the federation and to characterising laws. This is because Austria is the most strongly originalist of all federal jurisdictions in its approach to interpreting the federal division of powers. Its originalist doctrine greatly restricts federal power and restores the balance to a certain extent.

b. The petrification theory: basic principles

We saw that the German Federal Constitutional Court takes an approach to questions of scope which strongly emphasises the traditional historical classifications of laws. In relation to determining the scope of federal legislative powers, an even more strongly historical approach is followed in Austria, and has been christened the "petrification theory" (*Versteinerungstheorie*).[359]

In theory, as one might expect, the meaning of the words in the Constitution is declared to be the official criterion for determining the scope of federal powers, although of course this does not always get us very far owing to the usual difficulties related to the imprecision of language.[360] Equally, the systematic construction of the division of powers can be used in some circumstances to draw conclusions about how each power should be interpreted,[361] although this obviously cannot occur as frequently as in Canada, where it is necessary to distinguish between express federal and express provincial powers and drawing this distinction is the major systematic task facing the Supreme Court of Canada.

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358 Funk, *Das System*, p. 88.

359 The German language can often be a more picturesque language than the English, and this applies in many areas of law too. *Versteinerungstheorie* actually contains the word "stone", and the force of the word would be clearer if liberties were taken with English morphology and it were translated "enstonement theory".

360 Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht* (Springer, Vienna 1997), vol. I p. 317; Funk, *Das System*, pp. 67f; Hauenschild, *Straßenverkehr und Kompetenzverteilung* (Universitätsverlag, Vienna 2002), pp. 34f.

361 Hauenschild, *Straßenverkehr*, p. 36.

In Austria it is possible to draw interpretative conclusions having regard to the wording only of various federal powers. One good example of a situation in which the Constitution is obviously trying to tell us something by setting up a particular system is the distinction between the complete federal power – legislative as well as administrative – over motor vehicle law under Article 10 (1) (9) and the federal legislative power over road traffic law, which the States are required to administer (Article 11 (1) (4)).[362] For the reasons given, however, the division of powers does not get us very far, and in the example given the question boils down to who is to administer federal law, in itself not a matter of great moment.

In reality therefore the practice has grown up of searching for the historical meaning of the words used in the Constitution and using them as the chief guide to the scope of federal power.[363] In relation to what is perhaps the most significant federal power, the Austrian Constitutional Court[364] explained in 1967 that

> the subject-matter of civil law includes only those areas which were seen as matters of civil and procedural law, or as relating to the execution of the civil law, according to the system of the legal order as it existed when the division of powers in the federal Constitution came into force [1 October 1925], although new rules of law can be included to the extent that their content is systematically included within the civil law, civil procedure or the law relating to the execution of the civil law.[365]

This quotation well summarises the two limbs to the Court's basic approach to questions of scope (both in relation to this power and all the others). I shall analyse it in two parts.

The first half of the quotation (to 'into force') is the reason why the petrification theory is so called.

The petrification theory, as the 'central rule of interpretation',[366] states that the division of powers is to be interpreted as giving effect to the classifications adopted by the legal system when the division of powers came into effect, which, as mentioned, occurred on 1 October 1925. This is done by looking at the state of the law as it existed in 1925 and assuming that the powers conferred on the federation were meant to follow that pattern, so that the power over civil law, for example, covers those areas in which there were laws answering the description of civil law in 1925. If the federation wishes to legislate on a field that might be thought as a matter of ordinary language to be included within the concept of civil law, but was not in fact included in the civil law as it existed in 1925, its only option is to seek an amendment of the Constitution to have a new power conferred upon it.

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362 This was dealt with recently in öVerfGH, Erk Slg 15 885/2000.

363 Wiederin, "Anmerkungen zur Versteinerungstheorie" in Haller *et al.* (eds.), *Staat und Recht: Festschrift für Günther Winkler* (Springer, Vienna 1997), p. 1249.

364 For an interesting note on the origins of the Court, see Öhlinger, "The Genesis of the Austrian Model of Constitutional Review of Legislation" (2003) 16 Ratio Juris 206.

365 öVerfGH, Erk Slg 5 534/1967, p. 331.

366 Schäffer, *Verfassungsinterpretation*, p. 97.

(We shall see below that this is far from an insuperable hurdle.) This approach affects federal powers only, for the residue left to the States, being undefined, is not subject to this process and is not petrified.[367]

As far as I am aware, no convincing justification has been put forward for regarding 1925 rather than 1920 – the date on which the first version of the division of powers was enacted rather than the date on which it came into effect with some amendments – as the relevant date of petrification for those parts of the distribution of powers that were not amended in 1925, and one leading essay on the subject sees this as a mistake.[368] This would seem to be correct: it is easy to imagine that the federation, in the period from 1920 to 1925, might have decided to enact all sorts of laws before its powers were limited. The central legislature was certainly not inactive in that period: we shall come across at least two examples of laws enacted in 1923 below. The petrification theory also assumes, obviously, that laws enabling us to discover what the federal power was intended to mean actually existed in 1925; this is usually so, but if such laws did not exist, the Court is said to have recourse to the "actual position", whatever that may be.[369]

A later date than 1925 is of course adopted in relation to amendments to the catalogue of powers,[370] which are interpreted as intending to reflect the state of the law as it existed when the amendment came into force. This is a rather obvious qualification of the general approach which will be taken as read in what follows. This proposition, however, again assumes that there was such a thing as an identifiable basis for petrification at the time of the amendment. This is not always the case if, for example, environmental powers are newly conferred on the federation.[371] On the other hand, the addition of a power over the protection of animals to Article 11 in September 2004 was achieved by a federal law which contained several articles.[372] Article 1 amended the Constitution to add the power over protection of animals, and Article 2 enacted the sub-constitutional law for the protection of animals. In such a case the petrification theory will be relatively easy to apply.

The petrification theory, because it combines the historical state of the law and a reference to systematics at the time of the coming into force of the Constitution, has been accurately described as 'a variant of historical interpretative methods with specific systematic elements'.[373]

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367 Funk, *Das System*, p. 74; Hauenschild, *Straßenverkehr*, p. 51.

368 Wiederin, "Anmerkungen", pp. 1237f.

369 Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, p. 317; Funk, *Das System*, p. 75.

370 For an exception to this exception relating to the federal power over road traffic law, see Funk, *Das System*, pp. 72f.

371 Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, p. 317; Funk, "Die Zuständigkeit des Bundes zur Abwehr von gefährlichen Umweltbelastungen: Verfassungsrechtliche Konstruktionsschwächen im Umweltschutzrecht" ZfVB 1986, 525, 527.

372 BGBl I 28 September 2004.

373 Funk, JBl 1976, 449, 452.

c. Intra-systemic development

Returning to the quotation at footnote 365 above – and what is now to be said reflects the second important point in the quotation, in the phrase beginning 'although' – the Court recognises that the petrification rule, if adopted with absolute strictness, would indeed lead to the complete petrification of federal law as it existed in 1925. The federation could do nothing more than continuously re-enact the law as it existed then, or restrict its scope.[374] Accordingly, the idea has developed that new federal law is permissible if, as it is often put, the new law falls within the concept of 'intra-systemic development',[375] that is to say within the system as it notionally or potentially existed in 1925 – within the set of potential norms that could have been counted as part of the relevant concept had they existed.[376] A leading textbook sums this up by stating that it is the *system* as it existed in 1925, rather than the individual norms within that system, that is petrified.[377] 'The interpreter is thus required to fill out a particular historical systemic conception.'[378]

This raises obvious difficulties of determining what the system was, which will be dealt with shortly. For the moment, I propose to consider briefly one rather interesting illustration of this distinction. It is necessary to remind ourselves first that the petrification approach is applied not merely to the civil law power, but to all conferrals of power in the federal Constitution (and indeed to the interpretation of the rest of the federal Constitution as well,[379] although this essay is not concerned with that). Thus, when required to decide in 1986 whether a federal law permitting free access to forests came under the federal subject-matter of "forestry affairs" (Article 10 (1) (10)), the Court did not simply say that it directly affected forests, and therefore was valid, as the American or Australian Courts might. Rather, it held that

> in accordance with what is known as the "petrification theory" it is necessary to consider whether permission to enter forests at the time at which this subject-matter came into operation (1 October 1925) was dealt with by the legal system in connexion with forestry affairs.[380]

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374 Hauenschild, *Straßenverkehr*, p. 58.

375 This phrase (*intrasystematische Fortentwicklung*) may be found in various cases, *e.g.* öVerfGH, Erk Slg 9 337/1982, p. 126; Erk Slg 11 777/1988, p. 904; Erk Slg 13 237/1992, p. 445; Erk Slg 14 187/1995, p. 932.

376 öVerfGH, Erk Slg 7 074/1973, p. 411 (with further references).

377 Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, p. 318; see also Werner, "Die Kompetenzartikel der Bundesverfassung in der Rechtsprechung des Verfassungsgerichtshofes" JBl 1960, 161, 163.

378 Funk, JBl 1976, 449, 460.

379 Funk, *Das System*, p. 70; Walter/Mayer, *Grundriß des österreichischen Bundesverfassungsrechts* (9th ed., Manz, Vienna 2000), p. 154; Wiederin, "Anmerkungen", p. 1232.

380 öVerfGH, ÖJZ 1986, 247.

Looking at forestry laws dating back to 1852, the Court found no such provision, but it held that free access to the forest was a prescriptive right that existed, might have been set out in forestry laws before 1 October 1925, and would have been enshrined in law had the occasion to do so actually arisen; accordingly, the federal law was valid. This therefore is an example of a federal law that potentially or notionally existed in 1925; accordingly, its enactment later by the federation was not a trespass into a new field, but merely the realisation of a potential that had existed since 1852 at least. It was the further development of the existing system rather than a breaking out of that system into a new area.

We shall come across further examples of this as we proceed.

d. The petrification theory and originalism

It is convenient to refer at this stage, before proceeding further with the analysis, to the obvious parallels between the petrification theory and originalist theories of constitutional interpretation. It is not this author's intention to add to a debate which has already been the subject of many contributions. It is however necessary to point out that Austrian constitutional structure and political history contain two features which makes Austria, perhaps, a more appropriate jurisdiction for originalist interpretation than, say, the United States of America.

In Austria, too, it might be feared that the use of originalist theories might tend towards tying constitutional interpretation too strongly to the past – to what a leading Austrian commentator calls a '*process of loss of relevance of constitutional norms* in their relationship to societal reality'.[381]

But there is a special feature of Austrian constitutional politics which works against this danger. This feature is that – to exaggerate only slightly – the Austrian Constitution has, for substantial periods of time since the Second World War, been amendable by the federal government. This unusual state of affairs arose because a two-thirds majority of the total number of members in each House of federal Parliament is necessary to amend the federal Constitution's provisions on the federal division of power[382] – there is no participation by the State legislatures beyond their representation in the Upper House of federal Parliament[383] – and, as the Austrian federal government consisted from 1947 to 1966 and 1987 to 2000 of a coalition between the main right-of-centre party and the socialists, which were easily the two largest parties in Parliament, the government has frequently also had the necessary majority to amend the Constitution. (Even in the period from 1966 to 1987 the two major parties co-operated on many questions, although not formally in coalition.) No doubt politicians had to decide whether the federal coalition would bear the strain of any proposed amendment to the Constitution, and States' representatives in the Upper House did not meekly accept whatever their federal

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381 Funk, *Das System*, p. 72. Emphasis in original.

382 Article 44 (1), (2).

383 Under Article 35 (1), the members of the Upper House are elected by the State legislatures.

colleagues decided; and in fact the Constitution's provisions on the federal division of power, while they have been freely amended, have hardly been transformed beyond recognition by the addition of vast new areas of federal power.

To the extent, however, that the case for originalism is based in part on the need to ensure that amendments to the original design receive democratic approval and legitimacy through the prescribed system for amending the Constitution, Austria is an unusually promising case for such an argument given that the process for amending the Constitution was not unduly difficult and constitutional development will accordingly not grind to a halt if the case law does not move very much. It may be usefully contrasted in this respect with Australia, which lies at the opposite end of the spectrum: the process of amending the Constitution by referendum has proved to be very effective at preventing change to the text of the document, so that even on the most generous interpretation of the concept there have been only five mostly minor additions to federal power since the Constitution came into force in 1900.[384]

In the Austrian setting, it is much easier for the Court to say – as it did in a decision in 1995 in which the federal government complained that the consequences of excluding a particular topic from its competence led to untenable results – that that complaint was 'merely an objection based on legal and constitutional policy to the federal division of powers which came into force on 1 October 1925, which the Constitutional Court is not empowered to decide upon'.[385] The unspoken message here, of course, is that Parliament should decide whether the result really is untenable and, if it is, take action to fix the problem.

There is one other reason why Austrian conditions are rather well suited by an interpretation of federal powers oriented strongly towards the preservation of the existing system rather than towards creating possibilities for the occupation of new fields by the federation. It is the lack of concurrent powers in the Constitution. This means that the recognition of anything as belonging to the federal sphere immediately and automatically withdraws it from the State sphere[386] (at least as a general principle – unless, for example, some clever argument can be constructed to the contrary, for example, along the lines that the a State law is actually regulating a different topic because it has a different purpose, a question which will be dealt with in a moment). In order to ensure that the States' powers are not unduly restricted by the mere potential for the federation to exercise legislative power, it makes sense to restrict potential but unexercised federal power so that it does not greatly exceed the power actually exercised. (This may also explain the extraordinary level of detail to be found in the Constitution: care has to be exercised in order not to deprive the States of power inadvertently.)

Nevertheless, given the highly controversial status of originalism in American debate, surprisingly little criticism has been expressed of the petrification theory in

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384 Sections 51 (xxiiiA), (xxvi) (addition of power over Aborigines by deletion of words expressly withholding that power), 105 (deletion of restriction of power to debts existing at the establishment of the Commonwealth), 105A (2), (3).

385 öVerfGH, Erk Slg 14 187/1995, p. 932.

386 öVerfGH, Erk Slg 11 777/1988, p. 899.

Austria.[387] Partly, no doubt, this is because its results could be relatively easily overcome in cases where they were undesired or inconvenient. It is no doubt also a result of the fact that its origins lie quite far back in Austrian constitutional law, so that it is something with which all modern Austrian constitutionalists have grown up and may well see as the natural order of things. The roots of the petrification theory can be traced to the short period (1920 – 1934) during which the current Austrian Constitution was in force before the Second World War,[388] and the word "petrification" entered the discourse of the Constitutional Court as early as 1952.

In the decision of 1952, which invalidated some provisions of a State law on charitable foundations and funds, the Court was faced with the argument that defining the content of federal powers by reference to the classifications adopted by the law in 1925 would lead to an undesirable petrification of the law. It responded by stating that such a

> "petrification" appears not only not to be undesirable, but positively required. This is because the legal content of the constitutional concepts which form basic pillars of the entire structure of the state are not meant to be changed by means of interpretation according to currently dominant views; rather, the alteration of the concepts, once they have been laid down, should be reserved for amendment only by the special procedure for constitutional amendments.[389]

This reasoning accords rather well, it may be noted in passing, with one of the chief justifications for originalism just mentioned.

The petrification theory has accordingly been the settled law since the 1950s,[390] so that there is probably no Austrian constitutionalist alive today who studied law before it had that status.

That having been said, it should be noted that the proposition that the drafters of the Constitution – among whom was of course Hans Kelsen[391] – actually intended the state of the ordinary law to be petrified is a reconstruction rather than an actual report of their subjective intentions, so that the Austrian approach is originalist in a rather limited sense. In fact, the idea that the drafters intended to refer in dividing powers to the system of the law as it existed in 1925 may be somewhat wide of the mark, given that the catalogue of legislative responsibilities was, it seems, originally intended as a list indicating the distribution of responsi-

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387 A summary of the debate as it existed in 1971 may be found in Schäffer, *Verfassungsinterpretation*, pp. 109-116.

388 Wiederin, "Anmerkungen", p. 1231.

389 öVerfGH, Erk Slg 2 318/1952, pp. 164f. A similar point is made by Schäffer, *Verfassungsinterpretation*, p. 107.

390 Wiederin, "Anmerkungen", p. 1232.

391 See further Paulson, "Constitutional Review in the United States and Austria: Notes on the Beginnings" (2003) 16 Ratio Juris 223, 231f; Schmitz, "The Constitutional Court of the Republic of Austria 1918 – 1920" (2003) 16 Ratio Juris 240.

bilities among the various federal ministries rather than a document dealing expressly with federal-State relations.[392]

This confirms a point already made, in a different context, above – namely, that the Austrian approach is really a sort of combination between historical and systematic approaches[393] rather than a "purely" historical/originalist one. Or, as a most insightful essay on the petrification theory puts it:

> The historical framers of the Constitution lived in a world in which much of that which today appears strange and unclear to us was taken for granted. In order to reconstruct the framers' intentions, it is therefore necessary to remind ourselves of the traditions on which they built. [... But] the will of the constitutional framers is not empirically discovered. It is hypothetically investigated, if not invented.[394]

On the other hand, there is nothing obviously wrong or self-contradictory in interpreting the catalogue of responsibilities according to the state of the law as it existed in 1925 (subject to the point already made that 1920 might have been a more accurate starting-point). If later laws were taken as the basis for interpretation, that would of course be a flagrant case of *petitio principii* or begging the question. There is no inherent contradiction of this sort in assuming that the state of the law as it existed in 1925 was intended to be the basis for interpretation of the lists of federal responsibilities in the Constitution.

And it is certainly a more plausible view than the now more or less abandoned rule that any federal power using the noun suffix "*-wesen*" ("matters") – although not the word "*Angelegenheiten*", which is virtually identical in meaning – was to receive a particularly liberal interpretation, possibly even one transcending the usual limitations imposed by the petrification theory.[395]

Thinking further about this, however, we might ask ourselves whether the petrification theory does not simply transfer the problem of characterisation (in the broad sense, including determining the scope of a power) to 1925. If we are told to look at the laws that were classified as (say) civil law in 1925 in order to determine the potential scope of the civil-law power now, how do we know whether a particular law that existed back then was to be classified as belonging to the civil law?

However, this is a problem which is not discussed by Austrian commentators, as far as I am aware, and rarely if ever arises in practice. That is, first, because, as in Germany, there is a strong tradition of classifying laws within the legal system into pigeonholes which makes recognising the divisions within the legal system as

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[392] Schäffer, *Verfassungsinterpretation*, p. 115.

[393] See above, fn 373.

[394] Wiederin, "Anmerkungen", p. 1236. See also Hauenschild, *Straßenverkehr*, p. 52.

[395] öVerfGH, Erk Slg 2 733/1954, pp. 315f; weakened in Erk Slg 4 348/1963, p. 15; see further Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, p. 320; Funk, *Das System*, p. 83; Funk, JBl 1976, 449, 452f; Hauenschild, *Straßenverkehr*, pp. 49f; Schäffer, *Verfassungsinterpretation*, pp. 117f; Walter/Mayer, *Grundriß*, p. 155; Werner, JBl 1960, 161, 164.

it existed in 1925 fairly easy. And of course often the law tells us what it is about using a description that corresponds to something we find in the catalogue of federal powers: thus, in working out what comes under the civil-law power we need only look at the Civil Code of 1811 as it existed in 1925. With a codification of such venerability, it is easy to see how a well understood delimitation of what is encompassed within the civil law has arisen. This is often also the case with less frequently used powers: we saw above, for example, that the power over forestry affairs refers back to a law on forests dating from 1852. The trade and industry law of 1859 is another example which we shall encounter shortly.

e. Illustrations from the case law

That is not however to say that the petrification theory can always be applied mechanically without the need for making difficult judgments. Whether a new law can be justified as within federal power under the concept of "intra-systemic development" sketched above – as part of the system as it potentially existed in 1925 – depends, in the final analysis, on the degree of abstraction with which the subject-matter of the laws existing in 1925 is described,[396] so that, as we might expect, mere reference to the state of the law in 1925 does not automatically solve all our problems for us (something which, of course, no theory will ever be able to do).

What new rules can come within "civil law", for example – how far can they build on the system as it existed in 1925 without breaking new ground, but rather merely filling in the existing system? The question of determining the level of abstraction with which the laws existing in 1925 should be described is one on which the Court has failed to develop any general theory, or even to say how other approaches to interpretation could assist; it mostly appears to fly by the seat of its pants.[397] That having been said, the question is far from an easy one.

In general, however, it can be said that the Court has taken a remarkably narrow approach to this question over the decades. Thus, the existence of price control laws in 1925 for consumer purchases does not enable the federal legislator to take measures, under its trade and industry power, for price stabilisation at the wholesale level;[398] forest law does not include requirements to take precautions against damage to the forest by wild animals, as the Forest Law of 1852 said nothing about this;[399] civil law does not include laws relating to charitable collections;[400] the protection of monuments does not include their protection against offensive buildings in their vicinity as distinct from things attached to them, as a law

[396] Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, p. 319; Funk, *Das System*, pp. 75, 78; Funk, JBl 1976, 449, 460f; Hauenschild, *Straßenverkehr*, p. 58; Schäffer, *Verfassungsinterpretation*, p. 109.

[397] Hauenschild, *Straßenverkehr*, p. 59.

[398] öVerfGH, Erk Slg 3 394/1958, pp. 275f.

[399] öVerfGH, Erk Slg 4 348/1963.

[400] öVerfGH, Erk Slg 9 337/1982. See however below, text at fn 410.

of 1923 (note the date!) indicated that the former was not included in the federal power conferred by the Constitution.[401]

In a fairly recent decision,[402] it has been held that a law about nursing homes for the chronically ill, handicapped and aged who are not in need of constant medical attention was invalid despite the existence of four possible federal powers that might have supported them in the absence of the petrification theory. Such nursing homes, the Court held, did not fall under the federal power over institutions for healing and caring for the sick, as a law of 1920 showed that those institutions are concerned primarily with medical treatment rather than nursing with occasional medical treatment; nor under the federal power over public welfare establishments, as a law of 1919 showed that this meant things like youth clubs, sporting institutions, and so on; nor under the federal power over health matters, as this covered only the removal of dangers to public health; nor finally under the federal trade and industry power, as this was to be judged by the state of the law in 1859, when the law on trade and industry in force in 1925 was passed, and when nursing homes were mostly conducted by charities rather than on a for-profit basis, and therefore did not fall within the concept of trade and industry.

Indeed, as one might expect, the fact that the meaning of trade and industry in the Constitution is that current in 1859 – as that was the date of the law in force on that subject when the Constitution was passed – means that that concept is interpreted surprisingly narrowly. It has been held, for example, that the States continue to have power over bed-and-breakfast establishments, as they were not trade and industry in 1859 (and that this was so even if they served alcohol, despite the fact that the serving of alcohol had not been included within the concept of a bed-and-breakfast in 1925; this might be called a case of intra-systemic *non*-development).[403] Cottage industries are also not trade and industry, as they were not in 1859.[404] The same applies to country inns (*Buschenschanke*), as the Court decided in October 2003,[405] applying a concept of trade and industry that by then was almost a century and a half old. The petrification theory thus serves to restrict federal power quite effectively. As we saw in relation to Canada, some such device has to be adopted if a power over trade and industry is not to colonise the whole legal system as the commerce power threatened to do in pre-*Lopez* America. The Austrians, however, adopt a very different means of restricting federal power from that current in Canada reflecting the different possibilities provided by the different structure of their text.

Occasionally there have however been outbreaks of generosity by the Austrian Constitutional Court in favour of less restrictive interpretations favouring the federation. As in Canada,[406] this is particularly noticeable as technology develops in

401 öVerfGH, Erk Slg 14 266/1995.
402 öVerfGH, Erk Slg 13 237/1992.
403 öVerfGH, Erk Slg 7 074/1973.
404 öVerfGH, Erk Slg 14 187/1995.
405 öVerfGH, Erk Slg 17 000/2003.
406 See above, fnn 116, 119.

the field of radio and broadcasting,[407] but it occurs in other areas as well. Thus, as well as the decision about free access to forests summarised above,[408] the Court was prepared to hold that the criminal law power included a modernised law for young offenders for which there were only limited precedents in the law as it existed in 1925;[409] the federal power over "prevention of unfair competition" includes power over undertakings by charitable foundations.[410]

This last decision is especially interesting because the Court adopted something like a measuring-stick for the degree of abstraction which was to be used in interpreting that federal power, and that measuring-stick was quite generous to the federation: it held that 'the central subject of laws against unfair competition is the prevention of acts which are *contra bonos mores* in commercial relationships for the purpose of competition'.[411] There may be thought to be a small element of circularity in this definition, which is actually adapted from s 1 of the *Law Against Unfair Competition* as it existed in 1923,[412] but we can leave that aside, for the important thing for the case at hand is that it did not exclude charities and, more generally, that it adopted a fairly high level of abstraction based on the words of the law of 1923. It was thus easy for the Court to give a wide meaning to the federal power over the prevention of unfair competition and to hold that the federation would not be entering a new field, but filling out an existing one, in legislating about unfair competition by charitable foundations. (In fact the case concerned the validity of a State law, which was accordingly invalid to this extent.)

The case accordingly illustrates one of the areas in which a ready-made definition of a federal power was readily available in the sub-constitutional law as it existed in 1925. It was, in other words, a case in which the theory works very well.

f. Characterisation (in the narrow sense)

In relation to characterising laws in the narrow sense, the Austrian Constitutional Court announced in 1952[413] that the purpose of laws could be relevant only if the list of federal legislative powers expressly referred to purpose (as it rarely does, and not in relation to the most important federal powers such as civil and criminal law). Otherwise, it held, the 'content'[414] of the law was the one and only criterion. It did not however explain how content could be separated from purpose. Nor did it explain how this doctrine could be reconciled with its recognition, only slightly

407 Schäffer, *Verfassungsinterpretation*, p. 108.
408 See above, fn 380.
409 öVerfGH, Erk Slg 5 679/1968; Funk, *Das System*, p. 78.
410 öVerfGH, Erk Slg 9 337/1982, p. 127.
411 At 126.
412 BGBl 1923 p. 1717.
413 öVerfGH, Erk Slg 2 452/1952 was the first case in which this doctrine was laid down: Hauenschild, *Straßenverkehr*, p. 55.
414 öVerfGH, Erk Slg 2 452/1952, p. 561; Erk Slg 2 733/1954, p. 316; Erk Slg 7 074/1973, p. 410.

later, that the two levels of government could enact similar legislation for different purposes – the States regulating, for example, the size of rooms in buildings as part of general building law, and the federation doing so in order to protect workers in those buildings under its labour law power[415] – despite the absence of any concept of concurrent powers in the Constitution.

Over the years, the Court's anti-purpose doctrine became increasingly untenable, for a number of reasons: owing to the general absurdity involved in characterising laws (like any human activity) without regard to their purpose; because the text's express references to purpose were somewhat random and no basis for a general doctrine; and because the need to decide what level of abstraction was to be used in determining the allowable scope of intra-systemic development naturally focused attention on questions of the purpose and aim of the already enacted laws.[416] Then in 1985 the Court invalidated a State tax on empty dwellings on the grounds that its real purpose was not to raise money, but rather to ensure that all dwellings were rented out; thus, the law was not really a tax at all, but rather one about housing policy, a federal power.[417] This indicated that, at least in this case, the Court felt able to look beyond the form to the real purpose of the law – and the decision also of course shows that the Australian "heroin tax" problem could be easily resolved in Austria as well.

The following year, the Court formally abandoned its former line that purpose had generally to be disregarded. In a decision rather reminiscent of the *Murphyores* ruling in Australia, but with a different result, the Court held a law which required industry to observe energy-saving principles invalid on the grounds that the purpose of the law had nothing to do with trade and industry (the subject of the federal power) beyond its legal operation thereon; rather, the statute's purpose was to save energy and help the environment, and thus it could not be enacted by the federation. It referred expressly to the ruling on the empty dwellings tax just summarised as indicating that purpose was a relevant consideration in characterising laws. This was so both when 'the interpretation of the meaning of the words and systematic considerations show that the purpose of the law is decisive for the delimitation of a subject-matter and when, in the light of the petrification theory, the purpose of the law is determinative of the delimitation of a subject-matter'.[418] On close examination this preserves the primacy of the petrification theory and leaves open the possibility that, as in Germany, purpose might not be relevant in relation to some powers if the historical analysis indicates that that is so.

The Court took the opportunity to denounce earlier *dicta* apparently restricting the relevance of purpose as 'taken out of context and misunderstood',[419] although this does not seem to do justice to their categorical nature.

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415 öVerfGH, Erk Slg 4 348/1963, p. 14; Erk Slg 9 337/1982, p. 12; Funk, JBl 1976, 449, 451. The Court added in the first-mentioned case that the laws could not however be 'identical' (at 15), an arbitrary and easily circumvented restriction.

416 Funk, *Das System*, p. 81; Funk, JBl 1976, 449, 461; Schäffer, *Verfassungsinterpretation*, p. 116.

417 öVerfGH, Erk Slg 10 403/1985, pp. 357f.

418 öVerfGH, Erk Slg 10 831/1986, p. 343.

419 At 342.

In the result, it was held that, as there was no indication that compelling industry to save energy had been part of general industrial law in 1925, which the Court expressly referred to (not for the first time) as the 'time of petrification' (*Versteinerungszeitpunkt*),[420] it was not possible to justify the law by means of attributing an expansive scope to the trade and industry power either.

[420] At 342.

7. India

a. Introduction

As well as being the world's largest democracy, India is also a federation of long standing. Although some have doubted its title to this description having regard to the wide powers of interference enjoyed by the centre in the affairs of the States,[421] the Indian Constitution certainly divides powers between the centre and the States in accordance with the traditional federal approach, so that the law of India fully deserves to be considered as part of this essay.

In fact Indian experience with federalism goes back even before independence, as the system set up by the Imperial *Government of India Act* 1935 for British India was a federal system and involved a division of powers between the central administration and what are now called the States[422] which has had considerable influence on the post-independence arrangements, including the questions of characterisation dealt with here.

The basis of the current distribution of powers is set out in s 246 of the Indian Constitution, which refers to the three lists in the Seventh Schedule. List I is a list of federal exclusive powers, of which there are just short of a hundred (making the Indian enumeration by far the longest of any of our six countries'); List II is a list of State exclusive powers which is about two-thirds as long. So far the Indian structure looks similar to the Canadian, and the similarity continues as we find that, under s 248 (1) of the Indian Constitution,[423] the residue of unallotted powers is lodged with the federation – an arrangement found, in our six countries, only in India and Canada. However, the Canadian pattern is broken somewhat by the inclusion of a substantial express list of concurrent powers of the federation and the States in List III. There are just over fifty of them. As in the German-speaking countries, it is common for federal laws in the concurrent fields to be administered by the States, although in India this a matter for the centre to decide when legislating rather than one determined by the Constitution.[424]

Section 246 provides in respect of both of the lists conferring power on the States that they are to be subject to the federal exclusive list (List I), so that if there is a conflict between them the federal list is to prevail. In cases of conflict

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421 See above, fn 19.

422 The term used then was "provinces", and there has been some considerable re-drawing of State boundaries, mergers, *etc.*, since independence.

423 See also List I, entry 97.

424 Jain, *Indian Constitutional Law* (5th ed., Wadhwain, New Delhi 2003), p. 654.

the concurrent list (and thus federal power) also prevails over the exclusive State list. These provisions could of course be used to the great disadvantage of State power, but, as we shall see, the Supreme Court of India has adopted a more balanced approach. It is clear at any rate that, in a highly complicated and finely balanced system for the distribution of powers such as the Indian one, characterisation doctrine will play a crucial role.

The general structure of the Indian distribution of powers is similar to that which obtained under Part V, chapter 1 of the *Government of India Act* 1935, with the exception that, under s 104 of that Act, powers not mentioned on any list were to be distributed, as the need to do so arose, to one level of government or the other at the discretion of the representative of the Crown, the Governor-General. This means that pre-independence jurisprudence on the interpretation of powers is still of use in present-day India, and indeed is sometimes referred to expressly by the Court.

There is a further source from which India is able to receive doctrine. Given the similarity, although not identity, between the Canadian and Indian structures, a number of issues that are raised by the special features of the text in Indian constitutional law are also encountered in Canada. The solutions adopted in India are often similar as well, as we shall see. In the final analysis, this similarity can be traced back to the time when the Privy Council in London was the final Court of appeal for federalism issues for India (in the pre-independence era when the *Government of India Act* 1935 applied) and it applied the doctrine it had developed as the final Court of appeal for Canada to Indian cases as well.[425]

(The Privy Council's doctrine never extended to Australia on this point, however, as s 74 of the Australian Constitution in effect[426] prevented any appeal on federalism issues to it on the grounds that 'it is only those who dwell under a federal constitution who can become adequately qualified to interpret and apply its provisions'.[427] As a result, Australian law developed in isolation from that of the other two federations within the British Empire.)

b. Scope

On questions of scope of power, the most noticeable feature of Canadian doctrine is the great effort which the Supreme Court of Canada puts into delimiting the scope of federal and provincial powers so that neither trespasses on the other's territory and there is a reasonable degree of authority left for each. The outstanding

425 This comes through very clearly in *Krishna* v. *Madras* [1957] AIR SC 297, 301.

426 With one exception. See *Attorney-General (Australia)* v. *Colonial Sugar Refining* [1914] AC 237; *Kirmani* v. *Captain Cook Cruises* (1985) 159 CLR 461. The former case is of some interest from the comparative perspective as it provided an opportunity for Viscount Haldane L.C., the architect of much Canadian characterisation doctrine, to expatiate on what his Lordship saw as the differences between the Canadian and Australian Constitutions ([1914] AC 237, 252-255).

427 *Whitehouse* v. *Queensland* (1961) 104 CLR 635, 638.

example of this is the delimitation between the federal trade and commerce power and the provincial powers over property and civil rights and local and private matters in the province. In reading the catalogues of powers in the Indian Constitution, one has the distinct impression that lessons were learnt by the drafters from experience in both Canada and Australia; one result of this is that, in India, the federal trade and commerce powers (List I, entries 41 and 42) are restricted to international and inter-State trade and commerce. The State power for its part is a power over trade and commerce within the State (List II, entry 26) (and is subject to the concurrent power – that is, in effect, to the federal power – over foodstuffs, cattle fodder, raw cotton and jute and 'the products of any industry where the control of such industry by the Union is declared by Parliament to be expedient in the public interest': List III, entry 33).

Accordingly, the delimitation in relation to which the Supreme Court of Canada takes most care causes less trouble for the Supreme Court of India owing to the more sophisticated Indian text.

In fact, much more effort has to be devoted to determining when a federal law restricting the constitutionally guaranteed freedom of internal trade and commerce (s 301) is nevertheless valid under s 302 of the Constitution, which validates such laws if they are 'required in the public interest'. No Australian reader coming across this provision could fail to be reminded of the long history of attempts to interpret s 92 of the Australian Constitution, and the Indian provisions have obviously been written with the intention of avoiding the difficulties caused by the defective drafting of the Australian provision; but this is not a topic with which this essay deals.

As also in Canada, concern for the preservation of State legislative power is a basic value in Indian constitutional doctrine. For example, the Supreme Court of India overruled earlier authority in 2002 and held that entry 52, List I – 'Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest' – cannot be extended to include sale[428] (or – as was held in 1980 – sales taxes on the raw material used by any industry).[429] As one of the majority Judges put it in 2002:

> The Constitution of India deserves to be interpreted, language permitting, in a manner that it [*sic*] does not whittle down the powers of State Legislature[s] and preserves the federation [*i.e.* federalism] while also upholding the central supremacy as contemplated by some of its articles.[430]

Although this case overruled some earlier authorities, it was quite in accordance with the long-standing rule that, where federal and State powers appear to conflict,

428 Jain, *Indian Constitutional Law*, p. 611.

429 *Ganga Sugar* v. *Uttar Pradesh* [1980] AIR SC 286.

430 *I.T.C.* v. *Agricultural Produce Market Committee* [2002] AIR SC 852, 908. This is a citation from a very widely used, but unofficial series of law reports – the authorised series is not available to me – and accordingly the "*sic*"s do not necessarily reflect on the Court itself.

'a reconciliation was to be attempted by reading the two provisions together and by interpreting and where necessary modifying the language of one by that of the other',[431] a principle which is also applied in Canada, as the Court recognised immediately after the quotation just reproduced by its citation of authority from the Privy Council on appeal from Canada.

Despite the differences between the Indian and Canadian trade and commerce powers just pointed out, the Supreme Court of India is of course acquainted with questions of scope doctrine, as the case just mentioned illustrates. Like its sister Court in Canada it has long been concerned to reconcile the entries on the three lists so as to ensure that each has an appropriate sphere of operation. As early as 1951 the Indian Court was required to determine whether State prohibition legislation, which also prohibited import and possession of imported liquor, fell within what is now List I entry 41 (foreign trade and commerce) or List II entry 8, dealing with intoxicating liquors. It held that the two powers could be easily reconciled by allocating power over the possession of imported liquors to the States, the process of importation having finished by that point, and continued:

> In the United States, the widest meaning has been given to the commerce clause, for there was no question of reconciling that clause with another clause containing the legislative power of the State. Under the provisions of the *Govt. of India Act*, a limited meaning must be given to the word "import" [in the federal list] in order to give effect to the very general words used in [the State list].[432]

Reconciling the scope of the various powers on the three lists does not however always favour the States: the Court has rightly held that the presence of futures markets on the federal list (List I, entry 48) excludes them from the general State power over trade and commerce and the concurrent contracts power. This is a simple application of the rule that specific provisions operate as exceptions to more general ones.[433] It is settled that the residue belonging to the centre is not to be broadly read, or else State powers might be unduly whittled down.[434]

At one stage, however, three Judges of the Court held that, in considering the validity of federal legislation, it need only look at List II, the State list, for if federal legislation did not fall under that list it must come within either the federal exclusive list, the concurrent list or the residue.[435]

This reasoning appears logical, and has a superficial attraction, but on balance it can be seen as fallacious, as it would lead to a tendency to interpret the State list in a manner isolated from the provisions of the other lists, whereas, as we have

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431 *Ramji* v. *Uttar Pradesh* [1956] AIR SC 676, 692. See also *Kerala State Electricity Board* v. *Indian Aluminium Co.* [1976] AIR SC 1031, 1036.

432 *Bombay* v. *Balsara* [1951] AIR SC 318, 324. See also *Karnataka* v. *Reddy* [1978] AIR SC 215, 229f.

433 *Waverly Jute Mills* v. *Raymon & Co.* [1963] AIR SC 90, 95.

434 Jain, *Indian Constitutional Law*, p. 640.

435 *Union* v. *Dhillon* [1972] AIR SC 1061, 1074f.

seen, in a jurisdiction in which each level has its own list, it is necessary to look at all the lists every time in order to come to a balance between them. It might also lead to a gradual growth in the residue and its encroachment on State legislative power. It would produce the strange result that, in deciding upon the extent of federal power, which is expressly itemised at great length in Lists I and III, we should need to look only at the State list, and the federal exclusive and concurrent lists might as well be written out of the Constitution. Accordingly, the approach suggested appears to have been quietly shelved,[436] or at least supplemented and substantially qualified by a reminder that

> [t]he federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by Parliament [the federal legislature] pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected.[437]

Concern to preserve State legislative power[438] is no doubt one of the reasons why both federal and State legislation are 'rarely'[439] held invalid in India.

The first entry on the Indian concurrent list (List III) begins 'criminal law including all matters included in the Indian Penal Code at the commencement of the Constitution [...]'. A couple of things should be noticed about this. The reference to the law existing at the commencement of the Constitution – a similar reference can also be found in entry 2 on the list in relation to criminal procedure – is an interesting, although doubtless unconscious, echo of the German practice,[440] as indeed are the Court's occasional pronouncements that legislative powers in which the expression "sale of goods" is used are to be interpreted in accordance with the meaning that that phrase had in the *Sale of Goods Act* 1930.[441]

Secondly, in placing criminal law on a concurrent list rather than the federal exclusive list where it is to be found in Canada, the Indian Constitution adopts a much more sensible approach which places correspondingly less pressure on scope doctrine. Criminalising various forms of moderately objectionable conduct in conjunction with regulatory schemes is an everyday procedure in modern legal systems, and the Indian Constitution reflects the need for both levels of government to be able to do this.[442]

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436 Pandey, *Constitutional Law of India* (38th ed., Central Law Agency, Allahabad 2002), p. 554.

437 *International Tourist Corporation* v. *Haryana* [1981] AIR SC 774, 778.

438 Jain, *Indian Constitutional Law*, p. 625.

439 Jain, *Indian Constitutional Law*, p. 605.

440 There is also one "framework" power like those found in the German and Austrian Constitutions: List III, entry 35. See also List II, entry 57; Awasthi, *The Constitution of India* (3rd ed., Dwivedi, Allahabad 2003), p. 718; Jain, *Indian Constitutional Law*, p. 601.

441 E.g. *Deputy Commercial Tax Officer* v. *Enfield India Ltd. Co-operative Canteen* [1968] AIR 838, 840f.

442 See however List I, entry 93; List II, entry 64.

c. "Pith and substance" again

Dealing with characterisation in the narrow sense, the Supreme Court of India adopts the "pith and substance" approach used in Canada, because the Privy Council adopted it in relation to the pre-independence arrangements[443] and the Supreme Court of India continued to use it after independence.[444] This is not however merely a matter of habit; as we have seen, the "pith and substance" approach is a sensible one to use, and particularly sensible in relation to constitutional arrangements involving express lists of powers for each level of government as in Canada and India.[445] As the Privy Council once pointed out in an appeal from India, if matters were otherwise then, given the supremacy of federal legislation in cases of conflict between valid federal and State legislation, 'much beneficent legislation would be stifled at birth, and many of the subjects entrusted to [State] legislation could never be effectively dealt with'.[446]

As in Canada, the "pith and substance" doctrine involves consideration of the purpose and the effect of legislation, neither consideration alone being decisive; the subjective motives of the legislature are however not relevant.[447] A recent and controversial case involving this doctrine is *Faruqui* v. *Union*.[448] There the question arose whether federal legislation for the acquisition of a certain religiously fraught area at Ayodhya fell within the exclusive State power over public order (List II entry 1) or the concurrent acquisitions power (List III entry 42). Although the purpose of the statute was clearly the maintenance of public order, the Court, applying the "pith and substance" approach, held that it fell within the concurrent rather than the State power[449] and that the statute was valid.

It is as hard to see the relationship between purpose and effect here as it was occasionally in Canada. Surely the *effect* of the statute concerned was to acquire property, while its *purpose* was to maintain public order – but the Court did not expressly face the consequences of this disjunction.

However, this approach actually makes sense if we consider further the nature of a power to acquire property. Acquisition of property will rarely be an end in itself; the power is really an ancillary one, enabling property to be acquired for some purpose for which the relevant legislature has the power to make laws. In this respect, it is like the German power over evidence/procedure. There is therefore a good case for interpreting such a power non-purposively even in jurisdictions in which characterisation according to purpose is the general rule. What the Court failed to do is recognise this and go one step further by telling what purpose the property here was actually being acquired for.

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443 *Mukherjee* v. *Bank of Commerce* (1947) 74 Ind App 23.

444 Including in relation to taxation powers: Jain, *Indian Constitutional Law*, p. 665.

445 As the Court recognised in *Kerala State Electricity Board*, [1976] AIR SC 1031, 1036f.

446 *Mukherjee*, (1947) 74 Ind App 23, 43.

447 *Welfare Association A.R.P. Maharashtra* v. *Gohil* [2003] AIR SC 1266, 1279, 1283, 1287.

448 [1995] AIR SC 605.

449 At 625.

What about the State power over public order, however? There are reasons for interpreting it, conversely, quite narrowly. Now the usual (and rather unhelpful) Indian rule is that each power, both federal and State, should be given a wide meaning so as to ensure that legislative powers at all levels are sufficiently broad.[450] However, the State power over public order, because of its very width and the great likelihood of clashes between it and the criminal-law power, constitutes something of an exception to this. Again, we have come across this point in other federal countries.

Recently, in *People's Union for Civil Liberties* v. *Union*,[451] it was argued that the federal *Prevention of Terrorism Act* 2002 fell under the exclusive State power over public order. The maintenance of public order must surely be one of the aims of such a statute (after all, terrorists can have an effect on public order without killing anyone, simply by instilling fear), but the Court gave this argument short shrift. Compared with the statute's more obvious purpose of supplementing the criminal law, the public order aspect of it fades into the background.

The *Faruqui* and *People's Union* cases are therefore more than usually instructive, involving as they do two powers which, for unique reasons, need to be interpreted in an especially careful way. It reminds us that general characterisation doctrine will get us only so far, and that it cannot be applied thoughtlessly to any one power without considering the special nature of that power and its relationship to all others in the system.

In addition to the doctrine presented so far the Supreme Court of India has developed a doctrine of "colourable legislation". Although successful invocation of this doctrine is 'rare',[452] it applies when, as one of the Judges of the Court once picturesquely put it, a legislature has sought 'to achieve on the sly what it dare not do straight'.[453] Precedents may be found for the use of this concept, too, in the decisions of the Privy Council on federalism disputes coming to it from Canada.[454] The concept was first floated in India in 1952 in a case in which it was held that a State statute which purported to lay down principles of compensation for acquired property (then the subject of a concurrent power in List III entry 42, which has since assumed a different form) in fact did no such thing, as the compensation it gave was so meagre as to equate to confiscation; the so-called principles of compensation which the Act laid down were merely a colourable attempt to bring the Act within State legislative power.[455]

In this specific context the employment of this term is understandable, but it was an unfortunate one as it might be thought to require an enquiry into legislative motives across the board. To say that legislation is "colourable" is however in reality nothing more than a fancy way of saying that, in pith and substance, a law

450 *Welfare Association*, [2003] AIR SC 1266, 1278.
451 [2005] 1 LRC 115.
452 Jain, *Indian Constitutional Law*, p. 628.
453 *Ganga Sugar*, [1980] AIR SC 286, 293.
454 For example, *Attorney-General (Canada)* v. *Attorney-General (Ontario)* [1937] AC 355, 367. See also *Pillai* v. *Mudanayake* [1953] AC 514, 528f.
455 *Bihar* v. *Singh* [1952] AIR SC 252.

does not fall within the powers of the legislature that enacted it; like the Nova Scotian abortion law in *Morgentaler*, the pith and substance of the law is not where it appears to be looking only at the terms of the law; the term "colourable" has accordingly nothing to do with the subjective motives of the legislature concerned.[456] The term might therefore be laid to rest.

However, the Supreme Court of India has, ever since using this term, had to fight against its attractiveness to those attacking the constitutionality of legislation with reminders such as this one:

> [I]t is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority [...]. For the purpose of this investigation the Court could certainly examine the effect of the legislation and take into consideration its object, purpose or design [...]. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.[457]

As late as 1997, by this time no doubt cursing the choice of the highly attractive phrase "colourable legislation" by an earlier generation of Judges, the Supreme Court found it necessary to point out again that

> the expression "colourable legislation" seeks to convey that by enacting the legislation in question the legislature is seeking to do indirectly what it cannot do directly. But ultimately the issue boils down to the question whether the legislature had the competence to enact the legislation because if the impugned legislation falls within the competence of the legislature the question of doing something indirectly which cannot be done directly does not arise.[458]

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[456] Jain, *Indian Constitutional Law*, pp. 627f. This appears to have been recognised in *Welfare Association*, [2003] AIR SC 1266, 1283.

[457] *Deo* v. *Orissa* [1953] AIR SC 375, 379. See also, *e.g.*, *Shankaranarayana* v. *Mysore* [1966] AIR SC 1571, 1575; *Venkataraman* v. *Madras* [1970] AIR SC 508, 512; *Madhya Pradesh* v. *Mahalaxmi Fabric Mills* [1995] AIR SC 2213, 2227; Jain, *Indian Constitutional Law*, pp. 626-628.

[458] *Naga People's Movement of Human Rights* v. *Union* [1998] AIR SC 431, 451. See also *Bola* v. *Sardana* [1997] AIR SC 3127, 3190, 3195.

d. Incidental power

The Supreme Court of India has also on occasion said that there is an incidental power attached to each law-making power in the Constitution.[459] It may be questioned whether such a doctrine is necessary in a "pith and substance" jurisdiction in which questions of the character of laws do not depend on the narrow question of what they directly operate upon as a matter of black-letter law. In a "pith and substance" jurisdiction, each law can be characterised according to its "true" subject matter, and any incidental matters with which it may deal can be subsumed under that. As the Supreme Court of India once pithily put it, in Indian constitutional law '[e]ffect is not the same thing as subject-matter'.[460] Accordingly, '[t]he constitutionality of [a] law is to be determined by its real subject-matter and not by the incidental effect which it may have on any topic of legislation [...]'.[461] For reasons such as these, the 'better view'[462] in Canada, despite occasional outbreaks of what looks like incidental powers reasoning, is that there is no concept of (implied) incidental power there. The same doctrine should hold good in India.

Using the "pith and substance" method, for example, provisions creating regulatory criminal offences can easily be subsumed under the area regulated rather than under the criminal law if they are truly incidental to the regulatory scheme.[463] As the Supreme Court of India itself said in 1957:

> [W]hat has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might *incidentally* trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts could severally fall, and by that process determine what portions thereof are *intra vires*, and what are not.[464]

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459 For references, see, *e.g.*, *Rajasthan* v. *Chawla* [1959] AIR SC 544, 546; Kumar, *Constitutional Law of India* (3rd ed., Pioneer, Faridabad 2002), pp. 576f.

460 *Kannan Devan Hills Produce Co.* v. *Kerala* [1972] AIR SC 2301, 2307. See also *Ganga Sugar*, [1980] AIR SC 286, 295.

461 *Sharma* v. *Rajasthan* [1974] AIR SC 1373, 1375.

462 See the references in Hogg Q.C., *Constitutional Law*, p. 15-36.

463 Possibly the best case for recognising an incidental aspect to power, even despite the reservations expressed in the text, was *R. Quader & Co.* v. *Sales Tax Officer* [1964] AIR SC 922; and the Court rejected it. See also *Babulal & Bros.* v. *Patel* [1968] AIR SC 445, 448.

464 *Krishna* v. *Madras* [1957] AIR SC 297, 303. Emphasis added to 'incidentally'. See also *Ishwari Khetan Sugar Mills* v. *Uttar Pradesh* [1980] AIR SC 1955, 1964 for a more recent passage to a similar effect.

While this approach is not the same as that which the Supreme Court of Canada says it adopts, it could equally well explain the result in cases such as *Vapor Canada* and *General Motors*.

e. Pakistan

Pakistan and India are not of course the same country. However, a brief excursion into Pakistan is warranted, although the analysis cannot be on the same scale as that of Indian characterisation doctrine. There are a number of reasons for this. There is less case law. The materials are more limited. The materials available to the author are even more limited. Interruptions to fully constitutional government in Pakistan may also be responsible in part for the lack of materials and case law.

However, the recent and learned judgment of Ch. Ijaz Ahmad J. in the High Court of Lahore in *Syed Bhais* v. *Punjab*[465] very handily collects a number of cases decided to date on characterisation in Pakistan, making it possible to say something about the constitutional law of that country.

The first thing one notices on reading the case is that reference is very freely made to Indian doctrine. The reference to Indian law is however not surprising. The two countries share, of course, a common history, and are neighbours. Pakistan is a co-heir with India of the jurisprudence of the Privy Council before partition. India is also a larger jurisdiction, and accordingly it has more case law to refer to. However, the current Constitution of Pakistan, which dates from 1973, does not exhibit quite the same general structure as the Indian Constitution. Under Article 142, there is a federal exclusive list and a concurrent list; there is no provincial list, but the residue of matters not on either of the two lists (as well, of course, as those on the concurrent list) is with the provinces. There was a provincial list until 1959, when its contents were transferred to the concurrent list.[466]

The *Syed Bhais* case involved a provincial luxury tax on vehicles. The question was whether the tax came under entry 50 on the exclusive federal list ('Taxes on the capital value of the assets, not including taxes on capital gains on immovable property') or under entry 33 on the concurrent list ('mechanically propelled vehicles'). This, the Court decided, was to be resolved by determining the pith and substance of the law, a proposition for which it cited authority from India and the Privy Council as well as local case law.[467] The Court also referred to the idea of colourable legislation in similar terms to the Indian doctrine.[468] In the result it

[465] [2000] PLD Lahore 20. As this work was about to go to press, the author received a copy of Chaudhri, *Constitution of the Islamic Republic of Pakistan with Commentary* (Lahore Law Times, Lahore 2005), which does not appear to mention this case or issues relating to characterisation.

[466] See *Rashid-ud-Daula* v. *Chief Administrator (Auqaf)* [1971] PLD SC 401, 413, 415f, 420.

[467] [2000] PLD Lahore 20, 36-39.

[468] At 44. It has also been referred to recently in a different context by the Supreme Court of Pakistan: *Pakistan* v. *Mian* [1999] PLD SC 1026, 1058f.

held, without explaining its reasoning at great length, that the Act was within provincial power.[469] The decision shows that the pith and substance doctrine is also applied in Pakistan in order, as the Court put it, to avoid 'blind observance to a strictly verbal interpretation [that] would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere'.[470]

None of this was new in Pakistani law (although it is very handy to have it collected in the one place). The pith and substance doctrine was adopted by the Supreme Court of Pakistan under previous Constitutions with a different structure (including a provincial list). In so doing, the Court relied on Indian case law from before partition and that foundational case from Canada, *Citizens Insurance Co. of Canada* v. *Parsons*.[471] In Pakistan, there is, it is true, no longer a provincial list to provide a possible list of alternative purposes of laws, as may be found in Canada and India, but the concurrent list supplies that deficiency to some extent.

469 [2000] PLD Lahore 20, 47.

470 At 44.

471 *East Pakistan* v. *Patwari* [1966] PLD SC 854, 911, 940; *Rashid-ud-Daula,* [1971] PLD SC 401, 416-419. See also *Amritsar-Pathankot Transport* v. *West Pakistan* [1960] PLD Lahore 407, 413.

8. Works in progress: South Africa, Malaysia and Scotland

In this chapter the law of three countries will be considered which, for various reasons, have not developed a settled characterisation doctrine. This means that the focus has to be a rather more detailed one than in previous chapters, as it is necessary to describe developments so far by reference to such case law as does exist.

a. South Africa

Views might well differ about whether South Africa's current Constitution is federal, quasi-federal or something else. A leading commentary on it, in a chapter entitled "Federalism", states that it 'can perhaps best be described as a federal system with unitary features'.[472] As with countries such as Canada and India in which the Constitution has mixed features, constitutional practice, which takes time to emerge, will decide the issue.

It is certainly not necessary to attempt to decide the question here, for one thing the South African Constitution definitely does have is lists of powers and emerging characterisation doctrine. Given the recent date (1996) of the current South African Constitution and the fact that cases have recently been decided under the interim (1993) instead of the final (1996) version of the Constitution, it cannot be said that that case law is settled. However, it is worth describing the main features of the South African Constitution and the case law that is emerging under it. What follows relates to the final (1996) Constitution unless otherwise indicated.

Under s 44 (1) (a) (ii), the central Parliament has 'the power to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to sub-section (2), a matter within a functional area listed in Schedule 5'. The provinces have powers over the matters in Schedules 4 and 5 (s 104 (1) (b) (i), (ii)), so that in the result Schedule 4 is a list of concurrent subject-matters and Schedule 5 is a list of exclusive provincial subject-matters, while anything not on any list falls within the general central power under s 44 (1) (a) (ii).

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[472] Klaaren in Chaskalson *et al.*, *Constitutional Law of South Africa* (loose-leaf, Juta, Kenwyn, 9th update 1999), p. 5-1.

Section 44 (1) (a) (ii) mentioned that it was subject to sub-section (2). This provides:

> (2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –
>
> (a) to maintain national security;
>
> (b) to maintain economic unity;
>
> (c) to maintain essential national standards;
>
> (d) to establish minimum standards required for the rendering of services; or
>
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

This is an interesting provision indeed, but it falls largely outside the scope of this essay and will be considered only in passing here.

There is also an express incidental power, s 44 (3):

> (3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

Schedule 4 is headed 'Functional Areas of Concurrent National and Provincial Legislative Competence' and contains a list of just over thirty subject-matters, which it irritatingly does not number but does list alphabetically, together with a Part B containing a list of concurrent powers over local government matters which will also not be considered in detail here. Schedule 4 includes a number of wide-ranging topics such as agriculture, consumer protection, cultural matters, education other than tertiary education, the environment, health services, housing, language, public transport, trade, urban and rural development and welfare services.

Schedule 5 is about 'Functional Areas of Exclusive Provincial Legislative Competence', and includes (other than, again, the items relating to local government in Part B) a dozen topics, most of little importance. There are so few that they can all be listed here: abattoirs; ambulance services; archives other than national archives; libraries other than national libraries; liquor licences; museums other than national museums; provincial planning; provincial cultural matters; provincial recreation and amenities; provincial sport; provincial roads and traffic; and veterinary services, excluding regulation of the profession.

It is clear that most provincial powers will be exercisable in the concurrent area and will thus be rather vulnerable to central pre-emption. The shape of federalism in South Africa will clearly depend to a large extent on the use which the central legislature decides to make of its concurrent powers. Section 44 (2), on the other hand, is unlikely to prove of much importance unless the exclusive powers of the provinces in Schedule 5 are interpreted quite broadly. It is also the case that South Africa, unusually, provides an example of an arrangement in which the residue of power is clearly the most significant conferral of power in the system.

Characterisation doctrine has begun to emerge under the new arrangements in South Africa. There have been four cases so far, of which Ex parte *Speaker of the KwaZulu-Natal Provincial Legislature;* Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of *1995*[473] was the first.

This case, which clearly is not the easiest one for those unversed in the culture to understand fully, dealt with statutes of the province of KwaZulu-Natal relating to the payment of the King of the Zulus and other traditional leaders. The disputed provisions purported, in brief, to prevent the King and traditional leaders from accepting any remuneration except under the Acts concerned or otherwise from the province. The case arose under the interim (1993) Constitution which is now repealed, further adding to the obscurity of the case. However, the Constitutional Court, in holding that the Bill would be a valid provincial enactment if passed, had this to say:

> If the purpose of legislation is clearly within Schedule 6 [which listed the legislative powers of the provinces in the interim Constitution of 1993], it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case the Court would hold that the province has exceeded its legislative competence.

At this point the Court inserted a footnote referring to Canadian case law such as the case from Alberta involving the tax on banks.[474] The Court continued:

> It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature.[475]

[473] [1996] 4 S Af 653.
[474] See above, fn 144.
[475] [1996] 4 S Af 653, 662f.

As mentioned, the Court held that this was so. It has since indicated that it will refer to evidence of legislative history and common knowledge in determining the question of purpose, as the Canadian Courts also do.[476]

In Ex parte *President of the Republic of South Africa;* Re *Constitutionality of the* Liquor Bill,[477] the Court referred for the first time in relation to characterisation to the permanent Constitution of 1996. It held that the

> Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'.[478]

Although 'functional vision' is perhaps not the happiest or most elegant collocation imaginable, it is easy to see the Court's point here. The very word 'functional' suggests a purposive (function-oriented) interpretation of the areas of power listed in the Schedules.

The Court mostly upheld the proposed central legislation in issue in the case. In so doing, it held that 'trade' in Schedule 4 was not restricted to inter-provincial or overseas trade,[479] which again is clearly correct. The analogy of the Canadian Constitution would be a false one on this question of scope as the exclusive provincial powers are so meagre that there is no difficulty in accommodating the few that exist to central control of all aspects of trade minus abattoirs, liquor licences and veterinary services.

The Court refused 'to consider the utility or applicability of the Canadian "pith and substance" cases to the development of an indigenous South African jurisprudence regarding national and provincial legislative competencies'.[480] However, it confirmed its earlier holding in the Ex parte *Speaker of the KwaZulu-Natal Provincial Legislature* case about the relevance of purpose and effect in addition to form.[481] It has done so again recently,[482] so that this appears to be becoming settled characterisation doctrine under the permanent Constitution of 1996.

In the result, the Court in the Liquor Bill *Case* held that part of the Bill unconstitutional that would have dealt with retail liquor licences; they fell under the provincial exclusive power over that very topic and were not justified under the extraordinary federal power of intervention in s 44 (2). In so doing, the Court divided the proposed law up into three separate components, holding that there was no requirement 'to subject the Bill to a uniform analysis directed at yielding a sin-

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476 *Western Cape* v. *North-West* [2001] 1 S Af 500, 519 (legislative history; see also *Mashavha* v. *South Africa* [2005] 2 S Af 476, 492); matters of common knowledge are referred to throughout the judgment.

477 [2000] 1 S Af 732.

478 At 760.

479 At 761f.

480 At 764.

481 At 765.

482 *Mashavha*, [2005] 2 S Af 476,, 489.

gle characterisation',[483] a point which it has confirmed since.[484] Given that the question was the purpose and effect of the law rather than just its legal operation, and each part of the Bill received one character at the hands of the Court, this looks closer to the German practice of dividing Bills up but giving each part a single dominant characterisation rather than to the multiple possible characterisations approach followed in Australia.

It is worth making especial mention of one *dictum* in the judgment. At one stage the Court refers to the purposes of the statute as regulation of the liquor trade and the promotion of racial equality in it. It then states that the fact that 'the ends the national legislature so seeks to attain fall within its power does not automatically entail that the means it has chosen, namely a system of liquor licensing, are competent'.[485] This is a slightly surprising thing to read given the emphasis that has been placed on statutory purpose to this point. The Court might be thought to be abandoning this here and stating that the purpose ('ends') of the statute are one thing and its validity another, quite unrelated thing – the means rather than the end are decisive.

This appears to mean that 'liquor licences', the subject of the exclusive provincial power, is so limited a field that it is not possible to extract an approved legislative purpose from it. A statute either deals with liquor licences or it does not. Liquor licences are either granted or they are not. They are not a purpose, they are simply the granting or the withholding of permission. On this view, this phrase might be more suitable for the Australian "direct legal operation" test than for a purposive test. Such a reading would moreover promote and preserve the very limited exclusive legislative powers of the provinces by not confining them to something along the lines of "statutes about liquor licences for the purpose(s) of…". The same thing might be said of other provincial powers over institutions such as libraries, or abattoirs, although perhaps not of more purposively-worded powers such as provincial planning or ambulance services.

However, liquor licences could, I think, be a purpose in the sense of an end in themselves as distinct from a colourable way of doing something else, such as regulating inter-provincial trade or preventing one's enemies from making an honest living.

We might easily say of a particular statute, "The purpose of this statute is to deal with the granting of liquor licences". If we are asked, "Why?", our response would be, "It does not matter. As long as that is the purpose of the statute, not some other colourable purpose, the statute is valid because its proximate purpose accords with the grant of power." If pressed, we might even use our general knowledge to come up with a list (which is likely to be non-exhaustive, at least at first) of legitimate purposes for which liquor licences exist, such as to ensure public order in the vicinity of licensed premises, the absence of corruption in the retail liquor industry, the proper payment of taxes, the sale of liquor only to adults and so on.

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483 [2000] 1 S Af 732, 766.

484 *Western Cape*, [2001] 1 S Af 500, 520; *Mashavha*, [2005] 2 S Af 476, 492, 497.

485 [2000] 1 S Af 732, 766f.

If, however, a broad reading is to be given to provincial exclusive powers and any trespass on them by direct operation of central legislation in the exclusive fields is to result in the invalidity of the central statute concerned, this can be explained only by the need not to eliminate the very meager provincial exclusive powers by interpretation. We have seen in the case of Australia that a test of direct legal operation will regularly result in the broadening of powers. If it is applied here, it will at least preserve local powers rather than expand central ones.

b. Malaysia

The structure of the division of powers under the Malaysian Constitution is similar to that of India. There is a federal list, a State list and a concurrent list. Article 74 of the Constitution does not use the terminology of exclusive powers, but it does provide that the federal Parliament has powers over the subject-matters in the concurrent and federal lists and the States over those in the concurrent and State lists, so that the result is that the federal list is exclusive to the federation and the State list to the States.

Unlike in India, however, the residue is with the States under Article 77. However, as we have now seen in various countries, it is also true in Malaysia there is 'very little residual power, for the legislative lists are extensive and detailed'.[486] It is clearly the federation which has the dominant share of power under the Malaysian arrangements.[487] The federation's hand is further strengthened by Article 76 (4), which enables the federal Parliament to make laws about a variety of subjects related to land in West Malaysia only (Article 95D) 'for the purpose only of ensuring uniformity of law and policy'.

The legislative lists are set out in Schedule 9. As indicated, the federal list (List I) is very extensive, and it includes external affairs (item 1; also covered in Article 76 (1) (a)); defence; criminal law; finance; trade, commerce and industry; communications and transport; education; and medicine and health (items 2, 3-4, 7, 8, 10, 13 and 14). The concurrent list (List III) is less sweeping, but it contains some important topics such as social welfare; town and country planning; public health; and housing (items 1, 5, 7 and 9C). Extra powers were conceded to the States of Sabah and Sarawak as part of their agreement to enter the Federation. Their additional concurrent powers are set out in List IIIA and include personal law (marriage, divorce, *etc.*).

List II, the State list, contains important powers over the Islamic religion and personal law (item 1); land law (subject to the overriding federal power indicated above) (item 2); and a variety of other local topics. There is again a List IIA for Sabah and Sarawak, very recently amended to add water supplies and services to

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486 Vohrah/Koh/Ling, *Sheridan & Groves, The Constitution of Malaysia* (5th ed., Malayan Law Journal, Kuala Lumpur 2004), p. 342.

487 Vohrah/Koh/Ling, *Sheridan & Groves*, p. 7.

the areas over which, of the States, only they have power.[488] In addition, Article 161E (4) somewhat obscurely guarantees their jurisdiction over entry into their respective States (in effect a power over internal immigration – a most important and unusual power within a federation).[489]

Given its importance in the case to be discussed, and because of the impressive level of detail which it contains, it is worth quoting the conferral of power on the States in List II, item 1 in full:

> Except with respect to the Federal Territories of Kuala Lumpur and Labuan, [the States have power over] Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

There have not been many cases dealing with the approach to characterisation to be adopted under the Malaysian Constitution. In fact, searches by this author and reference to a very recent commentary[490] have revealed only one case. This has

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488 *Constitution (Amendment) Act* 2005 (Malaysia) s 4. The same amendment in effect transformed water supplies and services into a concurrent power in the other States. It also added the subject of 'Preservation of heritage' to the concurrent list. Internet newspaper reports available at the time of writing suggest that the aim of transferring the power over water supplies and services was originally the privatisation of the water supply in West Malaysia, but that that plan had been abandoned. The use to which these new areas of federal power will be put remains unclear, therefore.

489 Fung, "The Constitutional Position of Sabah" in Lee/Trindade (eds.), *The Constitution of Malaysia: Further Perspectives and Developments – Essays in Honour of Tun Mohamed Suffian* (O.U.P., 1986), p. 98; Jemuri bin Serjan, "The Constitutional Position of Sarawak" in *id.*, pp. 117f.

490 Vohrah/Koh/Ling, *Sheridan & Groves*. See also Fung, "Constitutional Position of Sabah", pp. 105f; Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal, Kuala Lumpur 1996) pp. 170f

nothing to do with the age of the Constitution, for the Constitution came into force on independence in 1957. Rather, the lack of case law can be explained, on the one hand, by the extensive nature of the powers conferred on the federation, and, on the other, by various political, cultural and legal factors.

There has however been one case in which the approach to characterisation was laid down. In *Mamat bin Daud* v. *Malaysia*,[491] a challenge raising issues of legislative purpose and colourable legislation was brought to s 298A of the Federal Penal Code. By a majority of three Judges to two, the section was declared invalid as outside the powers of the federal Parliament. It is worth examining this case at some length given its inherent interest, the fact that it is our only clue to the characterisation doctrine in this jurisdiction, and the fact that the report of the case may not be available to many readers of this essay. The fact that federal legislation was invalidated in this case also indicates that the Court was not merely going through the motions. (It is interesting to reflect on the fact that, when this case was decided, no federal statute had been invalidated on federalism grounds by the Supreme Court of the United States for just over half a century.)

Section 298A purported to create an offence of doing an act which was likely to cause religious disunity or upset religious harmony among persons professing the same or a different religion. It listed a large number of possible ways in which this might be done, from imputing apostasy, heresy or schism (although those words were not used in the section) to failing to use the usual burial ground or place of worship to purporting to act as a religious official without authority. There was no defence of honest belief; that was specifically withdrawn from the field by subsection (7). It was on the face of it a surprising provision, a broad and sweeping one with the potential to involve the state in a large number of disputes about who was a proper religious official and what were the true doctrines of various religions; but it was also, on its face, an entirely neutral provision to the extent that it did not single out any one religion for protection against the evils named in it.

The federation sought to justify the provision under its general public order power (List I, item 3 (a)). If the legal operation of the provision were the sole criterion, as in Australia, there would seem to be little escape from the conclusion that the section was indeed justified under that power and/or the power over criminal law.

However, the States' power over various aspects of the Islamic religion is extensively set forth in List II and is, one can be sure, also most jealously guarded. That was relevant to the characterisation of s 298A, for, as Salleh Abas L.P.[492] put it in his majority judgment:

> [T]hese prohibited acts [are] referable to, and could be understood only in the context of, the practices and ceremonies carried out recently by certain groups of Muslims, including the petitioners [seeking the invalidity of the statute], who, rightly or wrongly, according to the religion of Islam, refuse

491 [1988] 1 MLJ 119.

492 Lord President (of the Supreme Court of Malaysia).

> to conform to the practices allowed by the established religious authority. Instead, they adopted different practices.

His Lordship accordingly held that

> [s]urely, a legislation to prevent them from carrying out such practices amounts to a legislation upon Islamic religion, on which only the States have legislative competence. [...] It appears that the indirect method was resorted to, because it is an attempt to hide the reality of legislating upon an impermissible subject or matter behind the general facade of constitutionality. This to be seems to be a colourable legislation, a proper case for the application of the pith and substance approach of judicial interpretation.[493]

His Lordship cited no authority on the origin of the pith and substance test. Concurring, however, Mohamed Azmi S.C.J., with whom Seah S.C.J. agreed, referred to Indian and Canadian authority supporting it[494] and added that

> [t]he object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject-matter to which it really belongs. But the Court should not be concerned with the motives which induced the legislature to exercise its power [...].[495]

Applying this test, their Lordships also held that the legislation concerned was 'colourable legislation in that it pretends to be a legislation on "public order" when in pith and substance it is a law on the subject of religion'.[496]

For their part, the dissenting Judges also applied the "pith and substance" test[497] and would have held that s 298A's 'real object' was 'the preservation of public order'.[498]

Although cases from Malaysia on characterisation doctrine are certainly far from numerous, the single example certainly makes up for the lack of quantity by its inherent interest. A number of points may be made as a result of the Malaysian case.

The first and most obvious one is that Malaysian doctrine on characterisation in the narrow sense is similar to that in Canada and India. Not only is the terminology of "pith and substance" borrowed; the Courts also feel able to look behind the legal operation of the law to its real purpose, taking into account general public knowledge in order to determine that a law which appears to be about one thing is

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493 [1988] 1 MLJ 119, 121. It is interesting to note in passing that "legislation" can in the usage of the English language in Malaysia be used as a count noun and thus both be preceded by an indefinite article and have a plural form. The same phenomenon occurs in Indian and Pakistani usage.

494 At 123f.

495 At 123.

496 At 126.

497 At 127, 128f.

498 At 127.

in fact about another. That is what the Canadian Court also did in cases such as *Morgentaler*.

Secondly, the Court, as also in Canada, assumed that the law had to have one dominant character – public order or the Islamic religion. As we have seen, this is only natural in an environment in which each power is exclusive, one to the federation and the other to the States. One does wonder, however, why the federation's possibly more extensive power over criminal law was not also considered, and also about the rather insouciantly inaccurate statement that the States have power over the 'Islamic religion' *simpliciter* above. One may think that, as sometimes happens in all jurisdictions, the Court has framed its question with an eye to the ultimate answer.

Thirdly, however, there are some more complicated unexpressed assumptions about scope doctrine in operation in Malaysia. As the dissenting Judges claimed, it could surely also be said that the preservation of public order was one of the objects of the statute, if not indeed its chief object. Why then was it not valid under the federation's power over that subject-matter?

The answer to this question consists, I think, of two parts. The first part is a reminder that the States' power over various aspects of the Islamic religion is set out, as we have seen, in great detail in the State exclusive list. It is the first item on the list; it is one of the few State powers of any significance; its very detail indicates that extremely careful thought has been given to it; it is a power which clearly goes to the heart of the cultural identity of each State. On the other hand, the federal power over public order is expressed laconically, and is of such generality that if interpreted literally it would approach, although it does not reach, the point of meaninglessness. It also has a fairly well understood nucleus of application – preventing drunkenness on the streets, for example. There was therefore every reason to read the public order power more or less as if it contained an exception for, or was to give way to, the highly detailed power over the Islamic religion that is conferred on the States. We have already encountered a similar case in India involving the reading down of the public order power. It is a power of last resort because of its great generality.

In fact, it could be said of a very large number of statutes that they exist in order to promote public order. Allowing such a broadly expressed power to receive a wide interpretation would carry the danger that other powers, especially of course those conferred exclusively on the States, might fade into the background. That is another reason to require that power to give way to any that might appear to cover the same field, regardless of the level of detail it contains.

Secondly, to the extent that it could be said that the statute's ultimate aim was the preservation of public order, that had nevertheless to yield, as the "official" purpose of the statute, to the more detailed constitutional purpose relating to the Islamic religion. That was, it might be said, the more immediate aim of the statute: it desired to suppress certain acts leading to religious disunity in order (among other things) to ensure public order. This is also a matter of distinguishing between proximate and more remote purposes.

Is it the case that public order, being really the distant goal of much legislation, is always to be demoted to a subsidiary goal unless there is some good reason to see it as the immediate concern of a statute, as would be the case, for example, with legislation about drunkenness or demonstrations? (One is reminded here of similar statements by the German Federal Constitutional Court along the same lines.)[499] Or would it be worth venturing to state a more general proposition that less proximate purposes are always to be disregarded in favour of more proximate ones?

In summary, this interesting case shows that Malaysia has laid a firm foundation for characterisation doctrine. Adopting the Canadian and Indian doctrine is a good start, both because of the soundness of that doctrine and because it is suited to the structure of the Malaysian text.

c. Scotland

The most recent example of the devolution of legislative power (in the English-speaking world at least) provides in addition a rare example of an express constitutional provision laying down a basic approach to questions of characterisation.

The *Scotland Act* 1998 (U.K.) devolves legislative authority to the Scottish Parliament subject to reservations outlined in s 29 (2) of, and Schedules 4 and 5 to, the Act. The classes of reservations include extraterritorial legislation; matters retained by the central Scottish Parliament as not appropriate for devolution; European law; European human rights law; and the Lord Advocate's position as head of the criminal justice system of Scotland.

The second of those classes of legislative responsibilities not devolved to the Westminster Parliament is referred to, logically enough, as 'reserved matters'. There are a large number of them, and they include general topics such as the constitution of the United Kingdom, the conduct of foreign affairs and defence, together with the specific reservations: various other subject areas or particular central statutes which are not within the authority of the Scottish Parliament. The specific reservations are very numerous and are grouped under eleven heads: financial and economic matters; home affairs; trade and industry; energy; transport; social security; regulation of the professions; employment; health and medicine; media and culture; and miscellaneous.[500]

Section 29 (3) of the *Scotland Act* 1998 provides that:

> (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.[501]

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499 See above, fn 312.

500 For further details, one can of course refer to the statute itself; a helpful guide is Craig/Walters, [1999] PL 274, 282f.

501 See the rest of s 29, Schedule 4, Part I, cl. 3 and Schedule 5 for the full story; for the background, see Ashton/Finch, *Constitutional Law in Scotland* (W. Green, Edinburgh

In order to understand the reason why this provision was inserted, it is worth quoting the thoughts of the Minister responsible for this sub-section at some length. The quotation indicates that considerable thought and learning has gone into designing the sub-section. The quotation also provides us with a reference to case law under the scheme for devolution to Northern Ireland which was abandoned in the 1970s, and contains a familiar phrase.

> In interpreting what is meant by 'relates', it is intended that the Courts should rely upon the respection doctrine which they developed in dealing with cases arising from the Commonwealth constitutions and the *Government of Ireland Act* 1920 [which dealt with devolution to Northern Ireland until the mid-1970s]. The classic statement is found in the words of Lord Atkin in *Gallagher* v. *Lynn* in 1937 where he stated:
>
>> It is well established that you ought to look at the true nature and character [, ...] the pith and substance of the legislation. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field.[502]
>
> In other words, it is intended that any question as to whether a provision in an Act of the Scottish Parliament 'relates to' a reserved matter should be determined by reference to its 'pith and substance' or its purpose and if its purpose is a devolved one then it is not outside legislative competence merely because 'incidentally it affects' a reserved matter. A degree of trespass into reserved areas is inevitable because reserved and other areas are not divided into neat watertight compartments.
>
> [...] In the absence of such a provision, it is possible that the Courts would apply a literal approach and hold that a provision 'relates' to a reserved matter merely if it affects it. If the Courts were to adopt this approach, this would severely fetter the Scottish Parliament's ability to legislate about subjects which are, in terms of the White Paper, to be devolved.
>
> For example, the White Paper intended that pollution control should be devolved. However, an Act of the Scottish Parliament containing provisions about water pollution from coal-mines or dust from open-cast coal-mining would affect the reserved matter of coal-mining. If the Courts were to apply a literal approach, they could hold that these provisions related to the reserved matter and would therefore be beyond the legislative competence of the Scottish Parliament. This would make a nonsense of the devolution

2000), p. 109, Himsworth/Munro, *The* Scotland Act *1998* (2^{nd} ed., Sweet & Maxwell, Edinburgh 2000), p. 40.

502 [1937] AC 863, 870.

of pollution control. The same point applies, for example, to planning or local government or even the Courts and the administration of justice.

[The sub-section] is designed to solve this problem by providing expressly that any question as to whether a provision in an Act of the Scottish Parliament 'relates to' a reserved matter is to be determined by reference to its purpose. The Courts can determine that a provision is for a permitted purpose, even if, as an ancillary matter, it affects reserved matters. In ascertaining the purpose of the provision, the Courts are required to have regard, among other things, to its effect in all the circumstances. In my example of pollution control, the Courts would take into account that the pollution control provision had an effect upon the reserved matter of coal-mining but may nevertheless consider that its purpose was about pollution control and not about coal-mining.

In the vast majority of cases the ancillary effects of such provisions upon reserved matters are likely to be minor but in some cases they could be significant.

Whether the effect of a provision on reserved matters is minor or significant, if it is to be within the powers of the Scottish Parliament it must in every case satisfy the test that its purpose is a devolved one. The *Gallagher* case which I mentioned earlier provides a very good illustration of how substantial an incidental effect can be. Northern Irish legislation about milk was found to be for the lawful purpose of promoting the health of the inhabitants of the Province, even though it had a substantial effect upon the reserved matter of cross-border trade by preventing such trade in milk.[503]

Writing in advance of any case law on this section, which at the time of writing this essay has still not appeared,[504] an excellent commentary on this provision accurately identified the fact that s 29 (3) means 'that the Australian cases on the classification of impugned legislation offer little or no assistance to the classification of Scottish Acts. However, some value might be derived from the Canadian cases.'[505] Although obviously not the full picture, s 29 (3) would indeed be a tolerably accurate statutory summary of a large portion of Canadian characterisation doctrine.

The Minister's statement shows that the Australian approach was rejected because it would have resulted in too broad an interpretation of the reservations (just

503 Hansard, House of Lords, 21 July 1998, coll. 818-820.

504 The first case questioning the lawfulness of an Act of the Scottish Parliament was *Anderson* v. *Scottish Ministers* [2003] 2 AC 602. It raised issues under s 29, but not s 29 (3) as the allegation was that the Act of the Scottish Parliament in question exceeded its competence on human-rights grounds rather than by dealing with a reserved matter. Computer and conventional searches have failed to reveal any further case law on s 29.

505 Craig/Walters, [1999] PL 274, 299.

as positive grants of federal power are interpreted too broadly in Australia) and thus too great a restriction of Scottish legislative power. This is certainly so given the vast number of wide-ranging reservations to which Scottish legislative power is subject. Wherever else the Australian approach might be applied, it could not sensibly be applied to these provisions withdrawing power as distinct from those granting it.

Given that Scottish doctrine is, by statute, to be roughly the same as Canadian doctrine, the same issues will have to be faced in dealing with Scottish constitutional law as arise from time to time in Canada. In particular, the provision leaves open the relationship between effect and purpose. What happens, in particular, if effect is different from purpose, or if it is not possible to say what the (practical) effect of legislation is before it begins to operate?[506] Indeed, we can go one step further, having reviewed Australian case law, and ask mischievously whether the practical as distinct from the legal effect of a statute is relevant at all. The statute does not say it is. But it might be hard to determine purpose without looking at practical effect. Sometimes.

These issues will have to await the decisions of the Courts. As yet there are no decisions on the powers withdrawn (or "reserved") from the Scottish Parliament. Section 29 (3) is certainly better than nothing, but it does not answer all possible questions in advance. Indeed, no statute could be expected to do so.

[506] Himsworth/O'Neill, *Scotland's Constitution: Law and Practice* (Lexis Nexis U.K., Edinburgh 2003), p. 185.

9. Concluding remarks

The background against which the *Scotland Act* 1998 operates is admittedly different in one respect from that in the six countries considered in detail here, as the approach to characterisation set out in s 29 (3) is applied only to provisions withdrawing power from the Scottish Parliament rather than conferring power on it: the Scottish Parliament has a general power to make laws subject to defined exceptions rather than a list of defined subject-matters on which it can legislate. Nevertheless, it would certainly be possible to lay down expressly the basic rules of characterisation in the constitution of a federal country in the same way as the *Scotland Act* 1998 does.

The *Scotland Act* 1998 is quite exceptional – and quite praiseworthy – in relieving Courts of the necessity to choose among interpretative approaches by telling them how to go about it. In the absence of such provisions, however, such questions, which might have been resolved by the framers of the constitutional document concerned, are left entirely to the Courts, as in Canada, Australia, Germany, Austria, the United States and India.

The analysis presented here allows us to group those six countries into three major camps. Canada and India naturally belong together. Despite the differences, their constitutional texts are similar in one respect which produces a broadly similar scope doctrine: each contains at least one list for each level of government, and thus requires fancy interpretational footwork in order to reconcile various powers allotted to the two levels of government. The two countries share the same willingness to characterise according to purpose, but above all, and even more noticeably, the "pith and substance" doctrine which is the legacy of the Privy Council's jurisprudence.

As we have seen, the "pith and substance" doctrine has become something of an export item, invented in London but further developed in Ottawa. It has been adopted in India and Pakistan, favourably noticed in Germany, considered for adoption in South Africa, and become the basis for the emerging case law of Malaysia.[507]

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[507] It may also be found in an early case from Nigeria, having reached that country by roughly the same route: *Akwule* v. *R* [1963] NNLR 105, 110. Those without ready access to this case (which is available through the British Library) will find further details in Elias Q.C., *Nigeria: The Development of its Laws and Constitutions* (Stevens & Sons, London 1967), pp. 262f; Joye/Igweike, *Introduction to the 1979 Nigerian Constitution* (MacMillan, London 1982), pp. 77f; Nwabueze, *Constitutional Law of the Nigerian Republic* (Butterworths, London 1964), p. 161; Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst, London 1982), p. 73.

There are perhaps reasons for that in addition to its intrinsic merit. Its dual Canadian and Indian associations disguise its origins in the Imperial jurisprudence of the Judicial Committee of Her Majesty's Most Honourable Privy Council and instead associate it with two countries with impeccable reputations as, respectively, a model world citizen and one of the first and most successful products of post-War decolonisation. But it is of course also a thoroughly sensible approach, especially in countries with competing lists of federal and State powers when a single character may have to be assigned to a law in order to allocate it to one list or to the other. By mandating the consideration of purpose, it avoids the aura of formalism, legalism and disconnexion with reality that surrounds the Australian doctrine.

Germany and Austria also belong together as examples of a historically-based approach to determining questions of scope coupled with consideration of purpose in characterising laws. The historical approach is rather more dominant in Austria, however, and we have seen that the reasoning behind the distinctive Austrian version of originalism includes the lack of concurrent powers in Austria, resulting in an inability to recognise federal powers beyond those already exercised without simultaneously denying them to the States. Furthermore, the ease with which the Constitution has been able to be amended in many periods of post-War Austrian history means that the system is not as tied to the past as it may appear.

Australia and the United States also seem to belong together, to the extent that any conclusions can be drawn about the United States at this point in its development. Not only do they share the same basic textual set-up (mostly concurrent powers to the federation, residue to the States); they also ignore purpose in characterising and, rather than following the "pith and substance" doctrine, take a "multiple possible characterisations" approach recognising that a law can have many characters and that only one need be on the federal list for the law to be validly enacted by the federation. An analysis of recent American case law also suggests that the Supreme Court has, without knowing it, analysed the commerce power, at least, in accordance with the long-standing Australian system of core and incidental powers, the former involving a formalistic consideration of direct legal operation and the latter the vexed question of sufficiency of connexion. As stated, however, characterisation in the United States is still a work in progress, and all conclusions must necessarily be preliminary.

On the assumption that characterisation according to purpose is rejected, the Australian distinction between the core and incidental aspects of a power does provide a useful analytical tool and might well be adapted with advantage in the United States. If purpose is not generally relevant, and regard is paid to legal operation only, then there must be some way of determining what the legal operation of a law is. This task is greatly assisted by sub-dividing the question into two: whether the law directly operates on the subject-matter concerned (the core power), or, if not, has a sufficiently close connexion to it to justify characterising it as a law on the subject-matter (the incidental power) – a task which, given the multiplicity of possible connecting links in this complex world of ours, cannot be reduced to a one-size-fits-all formula but will always involve sound judgment and an element of intuition. We have seen that the American case law so far lends itself very well indeed to such an analysis, and that it assists in analysing the validity of doubtful cases such as the endangered species and child-support laws. Nor should the Australian provenance of the doctrine alarm us: it is not necessarily incompatible with the assumption that some powers are reserved to the States, a consideration which can effortlessly be incorporated into scope doctrine and with minor adjustments only into incidental powers analysis as well.

One thing stands out in all our countries: everywhere (except in South Africa, in which the Constitution is unusually clear in this respect), residues tend to be fairly small in extent. This is just as much true of Canada and India, where the residue is with the centre and there are lists of powers for each level of government, as it is of the four countries where it is with the regions.

It has sometimes been thought that leaving a residue with one level of government or the other will result in the strengthening of that level: thus in Canada, which was meant to have a strong if not dominant centre, the residue was with the centre, while in Australia and the United States, which were meant to have stronger States, the residue was left with them.[508] In each case the level of government without the residue has found its enumerated powers more than sufficient. The residue has markedly contracted over time in the United States and Australia, and was never extensive in Germany or Austria; in India, too, it is rather in the shadow of the express federal and provincial powers.

It is perhaps easy to understand why residues should everywhere be in the shadow of the enumerated powers, whether the enumeration encompasses the powers of only one or of both levels of government. Legislatures with enumerated powers can select the form of their legislation carefully so as to bring it under one of those powers; and "everything else" has perhaps less attraction as a classification for laws than an express power. Writers of federal constitutions would be advised to confer express powers if they want either level of government to be strong, and to recognise that little weight will attach to an unspecified residue.

There are however also numerous differences among our six countries. Some use the concept of the purpose of laws in characterisation, while others do not. It is, however, merely a coincidence that the two federations in which there are lists of both federal and local powers – Canada and India – also characterise according to purpose. Admittedly the existence of multiple lists of powers in Canada and India provides several alternative lists of possible legislative purposes, and the list of powers granted to each level of government might be read as a list of purposes denied to the other level of government. They make it much easier to declare that a law which seems to be about one topic is in fact about another, because there is a list of possible "other" topics. But the legislator's purpose in enacting a statute can generally be ascertained quite readily, and compared even with one list of powers. This is done in Germany and Austria, for example. It could also be done with the "heroin tax" puzzle. The lack of a second list imposes a limitation on the occasions when a law can be said to be aimed at some topic outside the single list of powers, but it does not make it impossible in all cases. Indeed, s 29 (3) of the *Scotland Act* 1998 mandates the consideration of purpose in relation to a list of powers

[508] Field, "The Differing Federalisms of Canada and the United States" (1992) 55 Law & Contemp Probs 107, 107-109 (not referring to Australia).

which applies to only one level of government, although it is of course a list of powers withdrawn rather than conferred.

Willingness to consider purpose also cannot be said to reflect the strength of the regional legislatures in the countries concerned – there is a vast gulf between the powers of the Canadian provinces and those of the German or Indian States, for example.

Rather than having a decision about whether to take purpose into account imposed on them by some hidden structural feature of the text, the Courts in each of our countries have chosen whether or not to have regard to purpose. The decision they make is a true choice. In Austria, as we have seen, the Court has even changed its mind about the relevance of purpose in characterisation without any prompting from the text, and added it to the factors to be considered. The text is at best an influential factor in deciding whether to take purpose into account in characterising laws. Thus there seems to be no good reason why purpose could not be considered across the board in Australian or American law – other than (in Australia) the settled law against doing so and (in both countries) the federal statutes which have long been considered valid but might be invalidated if it were. After all, purpose is exceptionally considered in Australia in relation to the purposive/incidental group of powers.

In Australia, especially, the dominance of "legalistic" methods of interpretation during the development of characterisation doctrine has a lot to do with the disinclination to consider purpose. It also makes the Judges' task easier, because purpose can be (but is not always) a trickier thing to discover than mere legal operation. More evidence is required: one need think only of the *Morgentaler* case in Canada in which evidence of the legislature's true purpose had to be sought from a variety of sources. The legislature might also take it amiss if Courts regularly declared that, in effect, it had lied about what it was doing.

In the end, too, there is also no doubt some degree of unwillingness on the part of some centrally-minded Judges to accept a result that would restrict federal power by a doctrine that not only the operation but also the purpose of federal laws must be within federal power. (The external trade power in Germany provides an example of this in a limited area from a jurisdiction in which purpose is normally considered – it is exempted from the usual need to consider purpose in the interests of complete federal power over external trade.) Otherwise, it makes little sense to try to characterise a law without paying any regard at all to its purpose. This might possibly have been a defensible view in the 1920s, but it is not now. A purposeless law is an impossibility: we cannot fully describe what a legislature is trying to do by enacting a law without having regard to its purpose.

One thing that does need further work in those countries that do consider purpose is the relationship between purpose and effect. The injunction of s 29 (3) of the *Scotland Act* 1998 that the nature of legislation 'is to be determined [...] by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances' is rather vague. Even the case law of Canada does not get us very much further, although the Canadian distinction between legal and practical effect, and caution about the relevance of the latter, is better than nothing.

But some issues still await resolution in a case which raises the point squarely. For example, what happens if legislation achieves effects which it was not within the purpose of the legislature to bring about? What sort or extent of effects is required to nullify a constitutionally valid purpose? It would be obviously wrong to allow legislation to remain in force if its effect diverged so greatly from its purpose that none of its purpose was actually achieved. But what of side-effects or effects on the market which would be beyond the legitimate goals that the legislature concerned might have pursued?

In discussing the case law of Canada and Malaysia, it became possible to identify a distinction between proximate and remote purposes of statutes. This is an undeveloped area, and it would be of value if this distinction could be developed in the case law as the occasion arises. It will of course not always be of use. Sometimes the remote purpose of a statute will be merely to benefit society, which is no basis for characterisation; sometimes proximate and remote purposes, while more specific, may both fall under the one list. There have however, as we have seen, been cases in which remote and proximate purposes do not do so. In such a case, and if the two lists are exclusive, it is especially necessary to come up with one single purpose for the statute. The cases suggest that the Courts determine the purposes of statutes based on a wide variety of evidence, but in the end using their intuition to indicate the conclusion to which that evidence leads them about the purpose of the statute. Such a procedure cannot be avoided in characterisation doctrine. But criteria can be developed to help guide our intuition and to assist in determining the outcome of future cases.

Sometimes a good deal depends on the nature of the two rival purposes. We have seen, for example, that public order, even if set out expressly named on a list of conferred powers, will often have to take a back seat to more specific powers.

We have seen that there appears to be only a weak conceptual correlation between exclusive lists of powers and the consideration of purpose; but it is suggested that there is some correlation between the multiple characterisation doctrine and the existence of only one list of powers (on the one hand) and (on the other) the existence of lists of powers for both levels of government and the "pith and substance" approach.

This comes across most strongly in Canada, in which a decision that a law was about both *x* (a subject on the federal list) and *y* (a subject on the provincial list) would, as a rule, cause what might be called a program error given that the two longest and most important lists of federal and provincial powers are exclusive. It is however a much harder task to determine that a law has as its true or – better – predominant character a subject belonging to the States if there is no list of State powers in the Constitution and no strong feeling that certain powers belong naturally to the States.

In a most interesting and thoughtful work, Professor Michael Detmold writes:[509]

> Consider the following quite ordinary constitutional reasoning:

[509] *The Australian Commonwealth*, pp. 161f.

> 1. All [federal] laws with respect to aliens are valid.
> 2. This law is with respect to aliens.
> 3. Therefore it is valid.
>
> Legislation does not cease to be with respect to one thing because it is with respect to another (even if the other might be supposed to be the more important object of the legislature's attention). This holds in all cases except where the two things are logically incompatible. That it holds generally is evident from an examination of the practical syllogism just given.
>
> [...]
>
> It is a logical mistake to say in the matter of the minor premise of our practical syllogism that the law is not with respect to one thing because it is with respect to another unless the two things are logically incompatible. Aliens and beer are not logically incompatible, thus the law ["No alien shall drink beer"] is still with respect to aliens despite its being with respect to beer.

This may well be an accurate description of Australian doctrine and of the reasoning behind it. However, analysis has shown that it is not a universal rule. The interpretation of a Constitution involves a text, which cannot be expected always to obey the rules of strict logic (whatever they are). Indeed, it is a Constitution which, on the face of it, seems to contain the most illogical structure – the Canadian – which is the most successful at providing a real federal balance.

Professor Detmold might however respond that two things which are not logically incompatible in the "real world" are incompatible in the universe of Canadian constitutional discourse if one is on the federal list and the other on the provincial list. There would certainly be something in this, but it seems less trouble, and more in tune with what the cases actually say, to recognise that in Canada a statutory provision must have one character only, and to concede that strict logic is not the only guide to the interpretation of a power.

We must at any rate be wary of statements which purport to lay down general rules based on the nature of things, and remember that our interpretative doctrine must always accommodate itself to the structure of the text we are interpreting. It must also, as we have occasionally seen above, accommodate itself to the shape of each individual power. One need only think of the countries in which a power over public order has been interpreted narrowly, for good reasons and despite the conflict that that approach creates with the more general approaches to characterisation followed in the country concerned.

What, however, of Germany, in which there is no list of powers but the interpretative method does seem to have some similarities with the "pith and substance" method? There, the missing list of State powers is to some extent supplied by the strong tradition of dividing the law into sub-categories, so that any law can be fitted into a sub-category that exists independently of federal arrangements as part of the broader structure of legal discourse there, and the federation has power over only some of the categories. There is, for example, a strong feeling that a law which falls within the areas of education or culture belongs to the States. This is in essence a reserved powers doctrine in a jurisdiction in which the categories of laws reserved to the States, while not set out in any constitutional document, are to a large extent to be gathered from the structure of the rest of the legal system.

Even in the United States, the Supreme Court has started to talk again of a police power reserved to the States and to identify laws that meet that description. It is only in Australia that such talk would be heresy. It would amount to interpreting the list of federal powers on the assumption that some powers must be reserved to the States.

The High Court of Australia took the view in 1920 that doing so would involve disloyalty to the text and judicial choice. But the decision made in the 1920 is itself a choice, not an inevitability, as the doctrine adopted in other federations shows. The Supreme Court of the United States has recently said that it assumes that the police power is generally reserved to the States in the interests of maintaining a proper balance between federal and State powers. In doing so, it is, as we saw, merely giving effect to the overall federal design of the United States Constitution. It is absurd to interpret a federal constitution as if it were not a federal constitution, as if 'the Constitution's enumeration of powers does not presuppose something not enumerated'[510] or as if the apparatus of State governments set up by the constitution was meant to be allowed to degenerate into nothing more than sound and fury, signifying nothing and having no power.

No such error has been made in Canada, Germany, India, Austria or (under the newer doctrine) the United States. To this extent, therefore, Australia provides an example of what not to do – how to interpret the distribution of powers in a federal constitution badly.

It was identified that India and Canada are close to one another on technical questions relating to characterisation. Nevertheless it is true to say, as a broad generalisation, that the powers of the Indian States are much less than those of the Canadian provinces.[511] This reminds us of the importance of the rest of the text and, indeed, of the whole societal background against which a federal constitution operates. There is no one cause for any of the differences identified here in the interpretative methods adopted by federal countries and in the results they produce[512] – but it is noticeable that Canada includes Quebec, and thus there is a need to be incredibly careful about regional sensitivities there.

However, a wide range of other factors that influence characterisation doctrine can also be identified. They include of course the text, but also the age of the doctrine and the extent to which it can be changed as jurisprudence develops, the identity and approach of the tribunal which first set it up, the shape of the rest of the legal system, the ease with which the constitutional document concerned can be amended, and the extent to which federalism is taken seriously as a valuable in-

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510 See above, fn 203.

511 Watts, *Comparing Federal Systems*, p. 79.

512 Gilbert, *Australian and Canadian Federalism*, pp. 6, 25, 152, 156f.

stitution to be protected in the country concerned generally and by its Courts specifically.

The constitutional text is an attempt to lay down a division of powers in advance, but if it does not include any principles of characterisation it is only half complete. It is like a highly sophisticated criminal code without a corresponding code of criminal procedure which tells us how the impressive promises of the main codification are actually to work in practice. But the experience of Canada, for example, shows that there are on the other hand limits to what any text, no matter what its contents, can do given the characteristics of the society in which it operates.

To some extent each federation will find its own natural level, regardless of the text and of characterisation doctrine; characterisation doctrine and even the text itself will adapt themselves to some greater or lesser degree to the requirements of the polity and society in which they operate. It is worth recalling that federalism is a political and social phenomenon, not merely a legal one.[513] Lawyers occasionally need reminding that their ability to change the world by using words is limited by a host of external factors that are largely beyond their control.

[513] See above, fn 2.

Appendix – Basic Constitutional Provisions

a. Australia

Legislative Powers of the Parliament

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: —

(i.) Trade and commerce with other countries, and among the States:
(ii.) Taxation; but so as not to discriminate between States or parts of States:
(iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
(iv.) Borrowing money on the public credit of the Commonwealth:
(v.) Postal, telegraphic, telephonic, and other like services:
(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.
(vii.) Lighthouses, lightships, beacons and buoys:
(viii.) Astronomical and meteorological observations:
(ix.) Quarantine:
(x.) Fisheries in Australian waters beyond territorial limits:
(xi.) Census and statistics:
(xii.) Currency, coinage, and legal tender:
(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:
(xiv.) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
(xv.) Weights and measures:
(xvi.) Bills of exchanging and promissory notes:
(xvii.) Bankruptcy and insolvency:
(xviii.) Copyrights, patents of inventions and designs, and trade marks:
(xix.) Naturalisation and aliens:
(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
(xxi.) Marriage:
(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

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(xxiii.) Invalid and old-age pensions:
(xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances:
(xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
(xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
(xxvi.) The people of any race for whom it is deemed necessary to make special laws:
(xxvii.) Immigration and emigration:
(xxviii.) The influx of criminals:
(xxix.) External Affairs:
(xxx.) The relations of the Commonwealth with the islands of the Pacific:
(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
(xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
(xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
(xxxiv.) Railway construction and extension in any State with the consent of that State:
(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
(xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
(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:
(xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:
(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Exclusive powers of the Parliament

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to

(i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:
(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government or the Commonwealth:
(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

b. Canada

Powers of the Parliament

91. 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,—

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (a) Lines of Steam or other Ships, Railways, Canals, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (b) Lines of Steam Ships between the Province and any British or Foreign Country:
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
   (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
   (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

   whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any power or rights that a legislature or government of a province had immediately before the coming into force of this section.

Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

93A. Paragraphs (1) to (4) of section 93 do not apply to Quebec.[515]

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions

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 matters.

Agriculture and Immigration

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 SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,
   (a) production from a non-renewable natural resource is primary production therefrom if
   (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
   (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
   (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

[515] Section 93 is also affected by various provisions in the Terms of Union of some provinces.

c. United States of America

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;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

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.

d. Germany[516]

Article 72 [Concurrent legislative power of the Federation: definition]

(1) On matters within the concurrent legislative power, the *Länder*[517] shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.

(2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by *Land* law.

Article 73 [Subjects of exclusive legislative power]

The Federation shall have exclusive power to legislate with respect to:

1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passports, immigration, emigration, and extradition;
4. currency, money, and coinage, weights and measures, and the determination of standards of time;
5. the unity of the customs and trading area, treaties respecting commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;
6. air transport;

6a. the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance, and operation of tracks belonging to federal railways as well as the imposition of charges for the use of such tracks;

7. postal and telecommunication services;
8. the legal relations of persons employed by the Federation and by federal corporations under public law;
9. industrial property rights, copyrights, and publishing;
10. cooperation between the Federation and the *Länder* concerning
    (a) criminal police work,
    (b) protection of the free democratic basic order, existence, and security of the Federation or of a *Land* (protection of the constitution), and
    (c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany,

as well as the establishment of a Federal Criminal Police Office and international action to combat crime;

11. statistics for federal purposes.

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517 *I.e.,* the States. The singular form, used below, is *Land*. This applies to both Germany and Austria.

Article 74 [Subjects of concurrent legislation]

(1) Concurrent legislative powers shall extend to the following subjects:

1. civil law, criminal law, and corrections, court organization and procedure, the legal profession, notaries, and the provision of legal advice;
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and establishment of aliens;

4a. the law relating to weapons and explosives;

6. matters concerning refugees and expellees;
7. public welfare;
9. war damage and reparations;
10. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;

10a. war graves and graves of other victims of war or despotism;

11. the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance);

11a. the production and utilization of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionizing radiation, and the disposal of radioactive substances;

12. labor law, including the organization of enterprises, occupational safety and health, and employment agencies, as well as social security, including unemployment insurance;
13. the regulation of educational and training grants and the promotion of research;
14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;
15. the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise;
16. prevention of the abuse of economic power;
17. the promotion of agricultural production and forestry, ensuring the adequacy of the food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;
18. real estate transactions, land law (except for laws respecting development fees), and matters concerning agricultural leases, as well as housing, settlement, and homestead matters;
19. measures to combat dangerous and communicable human and animal diseases, admission to the medical profession and to ancillary professions or occupations, as well as trade in medicines, drugs, narcotics, and poisons;

19a. the economic viability of hospitals and the regulation of hospital charges;

20. protective measures in connection with the marketing of food, drink, and tobacco, essential commodities, feedstuffs, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;
21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;
22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;
23. non-federal railways, except mountain railways;
24. waste disposal, air pollution control, and noise abatement;

25. state liability;
26. human artificial insemination, analysis and modification of genetic information, as well as the regulation of organ and tissue transplantation.

(2) Laws adopted pursuant to clause 25 of paragraph (1) of this Article shall require the consent of the *Bundesrat.*

Article 74a [Concurrent legislative power of the Federation: remuneration, pensions, and related benefits of members of the public service]

(1) Concurrent legislative power shall also extend to the remuneration, pensions, and related benefits of members of the public service who stand in a relationship of service and loyalty defined by public law, insofar as the Federation does not have exclusive legislative power pursuant to clause 8 of Article 73.

(2) Federal laws enacted pursuant to paragraph (1) of this Article shall require the consent of the *Bundesrat.*

(3) Federal laws enacted pursuant to clause 8 of Article 73 shall likewise require the consent of the *Bundesrat,* insofar as they contemplate standards for the structure or computation of remuneration, pensions, and related benefits including the classification of positions, or minimum or maximum rates, that differ from those provided for in federal laws enacted pursuant to paragraph (1) of this Article.

(4) Paragraphs (1) and (2) of this Article shall apply *mutatis mutandis* to the remuneration, pensions, and related benefits of judges of the *Länder.* Paragraph (3) of this Article shall apply *mutatis mutandis* to laws enacted pursuant to paragraph (1) of Article 98.

Article 75 [Areas of federal framework legislation]

(1) Subject to the conditions laid down in Article 72, the Federation shall have power to enact provisions on the following subjects as a framework for *Land* legislation:
1. the legal relations of persons in the public service of the *Länder,* municipalities, or other corporate bodies under public law, insofar as Article 74a does not otherwise provide;
1a. general principles respecting higher education;
2. the general legal relations of the press;
3. hunting, nature conservation, and landscape management;
4. land distribution, regional planning, and the management of water resources;
5. matters relating to the registration of residence or domicile and to identity cards;
6. measures to prevent expatriation of German cultural assets.

Paragraph (3) of Article 72 shall apply *mutatis mutandis.*

(2) Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions.

(3) When the Federation enacts framework legislation, the *Länder* shall be obliged to adopt the necessary *Land* laws within a reasonable period prescribed by the law.

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Article 10

(1) The Federation has powers of legislation and execution in the following matters:

1. the Federal Constitution, in particular elections to the National Council, and referenda as provided by the Federal Constitution; the Constitutional Court;
2. external affairs including political and economic representation with regard to other countries, in particular the conclusion of international treaties, notwithstanding *Länder* competence in accordance with Art. 16 para. 1; demarcation of frontiers; trade in goods and livestock with other countries; customs;
3. regulation and control of entry into and exit from the Federal territory; immigration and emigration; passports; deportation, turning back at the frontier, expulsion, and extradition from or through the Federal territory;
4. Federal finances, in particular taxes to be collected exclusively or in part on behalf of the Federation; monopolies;
5. the monetary, credit, stock exchange and banking system; the weights and measures, standards and hallmark system;
6. civil law affairs, including the rules relating to economic association but excluding regulations which render real property transactions, legal acquisition on death by individuals outside the circle of legal heirs not excepted, with aliens and transactions in built-up real property or such as is earmarked for development subject to restrictions by the administrative authorities; private endowment affairs; criminal law, excluding administrative penal law and administrative penal procedure in matters which fall within the autonomous sphere of competence of the *Länder*; administration of justice; establishments for the protection of society against criminal or otherwise dangerous elements; the Administrative Court; copyright; press affairs; expropriation in so far as it does not concern matters falling within the autonomous sphere of competence of the *Länder*; matters pertaining to notaries, lawyers, and related professions;
7. the maintenance of peace, order and security including the extension of primary assistance in general, but excluding local public safety matters; the right of association and assembly; matters pertaining to personal status, including the registration of births, marriages and deaths, and change of name; aliens police and residence registration; matters pertaining to weapons, ammunition and explosives, and the use of firearms;
8. matters pertaining to trade and industry; public advertising and commercial brokerage; restraint of unfair competition; patent matters and the protection of designs, trade marks, and other commodity descriptions; matters pertaining to patent agents; matters pertaining to civil engineering; chambers of commerce, trade, and industry; establishment of professional associations in so far as they extend to the Federal territory as a whole, but with the exception of those in the field of agriculture and forestry;
9. the traffic system relating to the railways, aviation and shipping in so far as the last of these does not fall under Art. 11; motor traffic; matters, with exception of the highway police, which concern roads declared by Federal law as Federal highways on account of their importance for transit traffic; river and navigation police in so far as these do not fall under Art. 11; the postal and telecommunications system; environmental compatibility examination for projects relating to these matters

where material effects on the environment are to be anticipated and for which the administrative regulations prescribe an alignment definition by way of ordinance;

10. mining; forestry, including timber flotage; water rights; control and conservation of waters for the safe diversion of floods or for shipping and raft transport; regulation of torrents; construction and maintenance of waterways; regulation and standardization of electrical plants and establishments as well as safety measures in this field; provisions pertaining to electric power transmission in so far as the transmission extends over two or more *Länder* matters pertaining to steam and other power-driven engines; surveying;
11. labour legislation in so far as it does not fall under Art. 12; social and contractual insurance; chambers for workers and salaried employees with the exception of those relating to agriculture and forestry;
12. public health with the exception of burial and disposal of the dead and municipal and first aid services, but only sanitary supervision with respect to hospitals, nursing homes, health resorts and natural curative resources; measures to counter factors hazardous to the environment through the transcendence of input limits; clear air maintenance notwithstanding the competence of the *Länder* for heating installations; refuse disposal in respect of dangerous refuse, but in respect of other refuse only in so far as a need for the issue of uniform regulations exists; veterinary affairs; nutrition affairs, including foodstuffs inspection; regulation of commercial transactions in seed and plant commodities, in fodder and fertilizer as well as plant preservatives, and in plant safety appliances including their admission and, in the case of seed and plant commodities, likewise their acceptance;
13. archive and library services for the sciences and specialist purposes; matters pertaining to Federal collections and establishments serving the arts and sciences; matters pertaining to the Federal theatres with the exception of building affairs; the preservation of monuments; religious affairs; census as well as – allowing for the rights of the *Länder* to engage within their own territory in every kind of statistical activity – other statistics in so far as they do not serve the interests of one *Land* only; endowments and foundations when their purposes extend beyond a single *Land*'s sphere of interests and they have hitherto not been autonomously administered by the *Länder*;
14. organization and command of the Federal police and the Federal gendarmerie; settlement of the conditions pertaining to the establishment and organization of other protective forces with the exception of the municipal constabularies; settlement of the conditions pertaining to the armament of the protective forces and their right to make use of their weapons;
15. military affairs; matters pertaining to war damage and welfare measures for combatants and their surviving dependants; care of war graves; whatever measures seem necessary by reason or in consequence of war to ensure the uniform conduct of economic affairs, in particular with regard to the population's supply with essentials;
16. the establishment of Federal authorities and other Federal agencies; service code for and staff representation rights of Federal employees;
17. population policy in so far as it concerns the grant of children's allowances and the creation of burden equalization on behalf of families;
18. elections to the European Parliament.

(2) In Federal laws on the right of succession to undivided farm estate as well as in Federal laws promulgated in accordance with para. 1 sub-para. 10 above *Land* legislatures can be empowered to issue implementing provisions with respect to individual provisions

which must be specifically designated. The provisions of Art. 15 para. 6 shall be analogously applied to these *Land* laws. Execution of the implementing laws issued in such cases lies with the Federation, but the enabling ordinances, in so far as they relate to the implementing provisions of the *Land* law, need foregoing agreement with the *Land* government concerned.

(3) The Federation must allow the *Länder* opportunity to present their views before its conclusion of treaties which within the meaning of Art. 16 render necessary enabling measures or affect the autonomous sphere of competence of the *Länder* in another way.

Article 11

(1) In the following matters legislation is the business of the Federation, execution that of the *Länder*:

1. nationality;
2. professional associations in so far as they do not fall under Art. 10, but with the exception of those in the field of agriculture and forestry as well as in the field of alpine guidance and skiing instruction and in that of sport instruction falling within *Länder* autonomous competence;
3. social housing affairs except for the promotion of domestic dwelling construction and domestic rehabilitation;
4. traffic police;
5. sanitation;
6. inland shipping as regards shipping licences, shipping facilities and compulsory measures pertaining to such facilities in so far as it does not apply to the Danube, Lake Constance, Lake Neusiedl, and boundary stretches of other frontier waters; river and navigation police on inland waters with the exception of the Danube, Lake Constance, Lake Neusiedl, and boundary stretches of other frontier waters;
7. environmental impact assessment for projects relating to these matters where material effects on the environment are to be anticipated; in so far as a need for the issue of uniform regulations is considered to exist, the approval of such projects;
8. the protection of animals, to the extent that it is not a federal legislative matter by virtue of other provisions, but with the exception of hunting and angling.[518]

(2) In so far as a need for the issue of uniform regulations is considered to exist, the administrative procedure, the general provisions of administrative penal law, the administrative penal procedure and the administrative execution also in matters where legislation lies with the *Länder*, in particular too in matters pertaining to taxation, are to be prescribed by Federal law; divergent regulations can be made in Federal or *Länder* laws settling the individual spheres of administration only when they are requisite for regularization of the matter in hand.

(3) Enabling ordinances to the Federal laws promulgated in accordance with paras. 1 and 2 above shall be issued, save as otherwise provided in these laws, by the Federation. The manner of publication for enabling ordinances whose issue by the *Länder* in matters concerning para. 1, subparas. 4 and 6 above is empowered by Federal law can be prescribed by Federal law.

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518 Paragraph (8) translated by the author of this book from the official text: BGBl I, 28 September 2004.

(4) The application of the laws promulgated pursuant to para. 2 and the enabling ordinances issued hereto lies with the Federation or the *Länder*, depending on whether the business which forms the subject of the procedure is a matter for execution by the Federation or the *Länder.*

(5) Federal laws can lay down uniform output limits for atmospheric pollutants in so far as a need for the issue of uniform regulations exists. These may not be exceeded in the Federal and *Land* regulations prescribed for the individual sectors of the administration.

(6) In so far as a need for the issue of uniform regulations is considered to exist, Federal law shall likewise prescribe the citizens participation procedure for projects to be governed by Federal law, the participation in the administrative procedures subsequent to a citizens' participation procedure, and consideration of the results of the citizens' participation procedure at the time of the issue of the requisite permissions for the projects in question as well as the approval of the projects specified in Art. 10 para. 1 sub-para. 9. In respect of the execution of these regulations para. 4 applies.

(7) In matters relating to para. 1 sub-para. 7 the decision after exhaustion of all appeal stages in the sphere of execution of each *Land* lies with the independent environment tribunal. The latter moreover is within the meaning of the regulations prescribing the administrative procedure the relevant senior authority concerned. The independent environment tribunal consists of the chairmen, judges and other legally versed members and will be constituted at the competent Federal Ministry. The establishment, the duties, and the procedure of the tribunal are prescribed by Federal law. Its decisions are not subject to repeal or amendment by way of appeal; complaint to the Administrative Court is admissible.

(8) If a project pursuant to para. 1 sub-para. 7 encompasses several *Länder*, the participant *Länder* shall in the first instance proceed by mutual agreement. If a mutually agreed decision is not issued within a period laid down by federal law, competence passes at the request of a *Land* or a party concerned in the matter to the independent environment tribunal.

(9) In the matters specified in para. 1 sub-paras. 7 and 8 the following powers are vested in the Federal Government and in the individual Federal ministries as against a *Land* Government:
1. the power to inspect via Federal agencies documents of the *Land* authorities;
2. the power to demand the transmission of reports respecting the execution of laws and ordinances issued by the Federation;
3. the power to demand for the preparation of the issue of laws and ordinances by the Federation all information necessary respecting execution;
4. the power in certain instances to demand information and the presentation of documents in so far as this is necessary for the exercise of other powers.

Article 12

(1) In the following matters legislation as regards principles is the business of the Federation, the issue of implementing laws and execution the business of the *Länder*:
1. social welfare; population policy in so far as it does not fall under Art. 10; public social and welfare establishments; maternity, infant and adolescent welfare; hospi-

tals and nursing homes; requirements to be imposed for health reasons on health resorts, sanatoria, and health establishments; natural curative resources;
2. public institutions for the adjustment of disputes out of court;
3. land reform, in particular land consolidation measures and resettlement;
4. the protection of plants against diseases and pests;
5. matters pertaining to electric power in so far as they do not fall under Art. 10;
6. labour legislation and the protection of workers and employees in so far as it is a matter of workers and employees engaged in agriculture and forestry.

(2) In matters pertaining to land reform the final decision and that at *Land* level lies with tribunals composed of a chairman and judges, administrative officials, and experts; the tribunal qualified to pronounce final judgment will be constituted within the framework of the competent Federal Ministry. The organization, the duties and the procedure of the tribunals as well as the principles for the organization of other authorities concerned with matters pertaining to land reform will be prescribed by Federal law. This shall provide that the decisions by the tribunals are not subject to repeal and change by way of administrative ruling; the exclusion of ordinary appeal from the authority of first instance to the *Land* jurisdiction is inadmissible.

(3) If and inasmuch as the rulings of *Land* authorities in matters pertaining to electric power deviate from one another or a *Land* Government was the sole competent *Land* authority, the competence in such a matter passes, provided a party so demands within the deadline to be fixed by Federal law, to the Federal Ministry competent in the business. As soon as the Ministry has reached a decision, the rulings hitherto made by the *Land* authorities are invalidated.

(4) Fundamental laws and fundamental provisions in Federal legislation shall be expressly specified as such.

Article 13

(1) The competences of the Federation and the *Länder* in the field of taxation will be prescribed in a special Federal constitutional law ("Constitutional Finance Law").

(2) The Federation, the *Länder*, and the municipalities must aim at the securement of an overall balance in the conduct of their economic affairs.

Article 14

(1) Save as provided otherwise in the following paragraphs, legislation and execution in the field of schooling and in the field of education in matters pertaining to pupil and student hostels are the business of the Federation. The matters settled in Art. 14a do not belong to schooling and education within the meaning of this Article.

(2) Save as provided otherwise by para. 4 subpara. a below, legislation is the business of the Federation, execution the business of the *Länder* in matters pertaining to the service code for and staff representation rights of teachers at public compulsory schools. Such Federal laws can empower *Land* legislatures to issue implementing provisions to individual provisions which shall be precisely specified; in these instances the provisions of Art. 15 para. 6 apply analogously. The enabling ordinances in respect of such Federation laws, save as provided otherwise herein, shall be issued by the Federation.

(3) In the following matters legislation as regards principles is the business of the Federation, the issue of implementing laws and execution the business of the *Länder*:
   a) composition and disposition, including their members' appointment and remuneration, of the boards to be constituted in the *Länder* and political districts as part of the Federal school authorities;
   b) framework organization (structure, organizational forms, establishment, maintenance, dissolution, local districts, sizes of classes and instruction periods) of public compulsory schools;
   c) framework organization of publicly maintained student hostels provided exclusively or mainly for pupils of compulsory schools;
   d) professional employment qualifications for kindergarten teachers and educational assistants to be employed by the *Länder*, municipalities, or municipal associations at the centres and student hostels provided exclusively or mainly for pupils of compulsory schools.

(4) In the following matters legislation and execution is the business of the *Länder*:
   a) competence of authorities, on the basis of laws promulgated pursuant to para. 2 above, to exercise the service prerogative over teachers at public compulsory schools; the *Länder* laws shall provide that the Federal school authorities in the *Länder* and political *Bezirke* must participate in appointments, other selections for service positions, and awards as well as in eligibility and disciplinary proceedings. The participation in appointments, other selections for service positions, and awards shall at all events comprise a right of nomination on the part of the primary level Federal school authority;
   b) the kindergarten system and the centres system.

(5) In the following matters legislation and execution are, in deviation from the provisions of paras. 2 to 4 above, the business of the Federation:
   a) public demonstration schools, demonstration kindergartens, demonstration centres and demonstration student hostels attached to a public school for the purpose of practical instruction as provided by the curriculum;
   b) publicly maintained student hostels intended exclusively or mainly for pupils of the demonstration schools mentioned in sub-para. a above;
   c) the service code for and staff representation rights of teachers, educational assistants and kindergarten teachers at the public institutions mentioned in sub-paras. a and b above.

(6) Public schools are those schools which are established and maintained by authorities so required by law. The Federation is the authority so required by law in so far as legislation and execution in matters pertaining to the establishment, maintenance and dissolution of public schools are the business of the Federation. The *Land* or, according to the statutory provisions, the municipality or a municipal association is the authority so required by law in so far as legislation or implementing legislation and execution in matters pertaining to establishment, maintenance and dissolution of public schools are the business of the *Land*. Admission to public school is open to all without distinction of birth, sex, race, status, class, language and religion, and in other respects within the limits of the statutory requirement. The same applies analogously to kindergartens, centres and student hostels.

(7) Private schools are other than public schools; they shall be accorded public status according to the statutory provisions.

(8) The Federation is entitled, in matters which in accordance with paras. 2 and 3 above appertain to execution by the *Länder*, to obtain confirmation about adherence to the laws and ordinances issued on the basis of these paragraphs and can for this purpose delegate officials to the schools and student hostels. Should shortcomings be observed, the State Governor can be instructed (Art. 20 para. 1) to redress the shortcomings within an appropriate deadline. The Governor must see to the redress of the shortcomings according to the statutory provisions and, to effect the execution of such instructions, is bound also to employ the means at his disposal in his capacity as an authority acting on behalf of the *Land* in its autonomous sphere of competence.

(9) The general rules in Arts. 10 and 21 as to the distribution of competences for legislation and execution regarding conditions of service with the Federation, the *Länder*, the municipalities and the municipal associations apply in respect of the service code for teachers, educational assistants and kindergarten teachers, save as provided otherwise by the preceding paragraphs. The same applies to the staff representation rights of teachers, educational assistants, and kindergarten teachers.

(10) In matters pertaining to the school authorities of the Federation in the *Länder* and political districts, compulsory schooling, school organization, private schools, and the relationship between school and the Churches (of various denominations) including religious instruction at school, the National Council, in so far as matters pertaining to universities and fine arts academies are not concerned, can vote Federal legislation only in the presence of at least half the members and by a two thirds majority of the votes cast. The same applies to the ratification of treaties negotiated on these matters and which fall into the category specified in Art. 50.

Article 14a

(1) Save as provided otherwise in the following paragraphs, legislation and execution are the business of the *Länder* with regard to agricultural and forestry schooling as well as with regard to agricultural and forestry education in matters pertaining to student hostels and in matters pertaining to the service code for and staff representation rights of teachers and educational assistants at the schools and student hostels falling under this Article. Matters pertaining to university training do not fall under agricultural and forestry schooling.

(2) Legislation and execution is the business of the Federation in the following matters:
   a) secondary agricultural and forestry schools and schools for the training and supplementary training of teachers at agricultural and forestry schools;
   b) technical colleges for the training of forestry employees;
   c) public agricultural and forestry technical colleges linked organizationally with one of the public schools mentioned in sub-paras. a and b above or with a Federal agricultural and forestry research institute to ensure provision of the demonstrations scheduled in the curricula;
   d) student hostels exclusively or mainly designated for pupils of the schools mentioned in sub-paras. a to c above;
   e) service code for and staff representational rights of the teachers and educational assistants in the establishments mentioned in sub-paras. a to d above;
   f) subsidies for staff expenditure of the denominational agricultural and forestry schools;

g) Federal agricultural and forestry institutes linked organizationally with an agricultural and forestry school supported by the Federation to ensure provision of the demonstrations scheduled in the curricula of these schools.

(3) Save as it concerns matters mentioned in para. 2 above, legislation is the business of the Federation, execution the business of the *Länder* in matters of:
a) religious instruction;
b) the service code for and staff representation rights of teachers at public agricultural and forestry vocational schools and technical colleges and of educational assistants at publicly maintained student hostels exclusively or mainly designated for pupils of these schools, excepting however matters of official competence for the exercise of the service prerogative over these teachers and educational assistants.

Land legislatures can be authorized in Federal laws promulgated by reason of the provisions under sub-para. b above to issue implementing provisions for individual regulations which shall be precisely specified; in this connection the provisions of Art. 15 para. 6 apply analogously. Enabling ordinances for the Federal laws shall, save as otherwise provided there, be issued by the Federation.

(4) Legislation as regards principles is the business of the Federation, the issue of implementing laws and execution is the business of the *Länder*
a) as regards the agricultural and forestry vocational schools in matters pertaining to definitions of the instructional objective, the obligatory subjects, and free tuition as well as in matters pertaining to compulsory schooling and the transfer from the school in one *Land* to the school in another *Land*;
b) as regards the agricultural and forestry technical colleges in matters pertaining to the definition of admission prerequisites, instructional objective, organizational forms, extent of the teaching and obligatory subjects, free tuition, and the transfer from the school in one *Land* to the school in another *Land*;
c) in matters pertaining to the public status of private agricultural and forestry vocational schools and training colleges with the exception of schools falling under para. 2 subpara. b above;
d) as regards the organization and competence of advisory boards who in the matters pertaining to para. 1 above participate in the execution by the *Länder*.

(5) The establishment of the agricultural and forestry technical colleges and research institutes specified under para. 2 sub-paras. c and g above is only admissible if the government of the *Land* in which the vocational school or technical college is to have its location has agreed to the establishment. This agreement is not requisite if the establishment concerns an agricultural and forestry school which is to be organizationally linked to a school for the training and supplementary training of teachers and agricultural and forestry schools to ensure provision of the demonstrations scheduled in their curricula.

(6) It lies within the competence of the Federation to see to the observance of the regulations issued by it in matters whose execution in accordance with paras. 3 and 4 appertains to the *Länder*.

(7) The provisions of Art. 14 paras. 6, 7, and 9 analogously also hold good for the spheres specified.

(8) Federal laws on matters pursuant to para. 4 above can be passed by the National Council only in the presence of at least half the members and by a two-thirds majority of the votes cast.

Article 14b

(1) Legislation regarding public procurement, to the extent not covered by para. 3, is business of the Federation.

(2) Execution regarding matters of para. 1 is
1. Federal business regarding
   a) the award of contracts by the Federation;
   b) the award of contracts by endowments, funds and institutions as defined in Art. 126b para. 1;
   c) the award of contracts by enterprises as defined in Art. 126b para. 2, if the financial participation or the influence of the Federation, secured by other financial or other economic or organizational measures, is at least equivalent to the financial participation or the influence of the *Länder*;
   d) the award of contracts by autonomous administrative corporate bodies established under Federal law;
   e) the award of contracts by legal entities not specified in subparas. a to d and para. 2 subparas. a to d
      aa) financed by the Federation, provided that the share of finance through the Federation equals at least that of the *Länder*,
      bb) subject to the supervision of the Federation as far as their management is concerned, to the extent that the award is not subject to subpara. aa or para. 2 subpara. e;
      cc) the administrative, managerial or supervisory bodies which consist of members appointed by the Federation, provided that the Federation has appointed at least the same number of members as the *Länder*, to the extent that the award is not subject to subparas. aa or bb or para. 2 subpara. e lit. aa or bb;
   f) the joint award of contracts by the Federation and the *Länder*, provided that the Federation's share in the estimated total order value is at least equivalent to the total of the *Länder* shares;
   g) the award of contracts by legal entities not contained in subparas. a to f and para. 2;
2. *Länder* business with regard to
   a) the award of contracts by one of the *Länder*, the municipalities and the municipality associations;
   b) the award of contracts by endowments, funds and institutions in terms of Art. 127 para. 1 and Art. 127 a paras. 1 and 8;
   c) the award of contracts by enterprises in terms of Art 126b para. 2, to the extent that it is not subject to para. 1 subpara. c, as well as the award of contracts by enterprises in terms of Art. 127 para. 3 and Art 127a paras. 3 and 8;
   d) the award of contracts by self governing corporate bodies instituted by *Länder* legislation;
   e) the award of contracts by legal entities not contained in para. 1 subparas. a to d
      aa) financed by one of the *Länder* or jointly with the Federation or other *Länder*, to the extent the award is not subject to para. 1 subpara. e sublit. aa;

bb) subject to *Länder* supervision of their management, to the extent that the award is not subject to para. 1 subpara. e sublit. aa or bb or sublit. aa;

cc) the administrative, management or supervising bodies which consist of members appointed by one of the *Länder*, to the extent the award is not subject to para. 1 subpara. e sublit. aa to cc or sublit. aa or bb;

f) the joint award of contracts by the Federation and the *Länder*, to the extent it is not subject to para. 1 subpara. f, as well as the joint award of contracts by more than one of the *Länder*.

Irrespective of the size of their population, municipalities are considered legal entities which in terms of para. 1 subparas. b and c and para. 2 subparas. b and c are subject to the jurisdiction of the Federal Board of Audit. Within the scope of para. 1 subparas. b, c, e and f, purchasers in terms of para. 1 are considered to belong to the Federation and purchasers in terms of para. 2 are considered to be part of the respective *Länder*. If in terms of para. 2 subparas. c, e or f more than one of the *Länder* are involved, the jurisdiction for execution shall depend on the relative weight of the characteristic which in terms of the respective subpara. (sublitera) of para. 1 is or would be relevant for the subdivision of the jurisdiction for execution between the Federation and the *Länder*, furthermore on purchaser's domicile, on the domicile (main residence) of the awarding authority; if however it is still not possible to define the jurisdiction, it shall rest with such *Land* which at the time of institution of the award procedure holds the chair or most recently held the chair of the Federal Council.

(3) Business of the *Länder* is the legislation and execution in matters of review within the scope of contract awards by purchasers in terms of para. 2 subpara. 2.

(4) The Federation shall involve the *Länder* in the preparation of draft bills regarding matters of para. 1. Federal acts adopted in accordance with para. 1 which regulate matters to be executed by the *Länder* are only allowed to be promulgated with previous consent of the *Länder*.

(5) Unless provided differently in the respective Acts, the implementing regulations to the federal Acts adopted under para. 1 are to be issued by the Federation. Para. 4 applies to such regulations accordingly.

(6) The administrative authorities having jurisdiction to carry out review proceedings may also be called upon to review the supreme bodies of execution named in Art. 19 para. 1, the municipalities and municipality associations, as well as by private persons.

Article 15

(1) In so far as a matter is not expressly delegated by the Federal Constitution to the legislation or also the execution of the Federation, it remains within the autonomous sphere of competence of the *Länder*.

(2) In matters of local public security police, that is that part of public security police which exclusively or preponderantly affects the interests of the local community personified by the municipality and which, like preservation of public decency and defence against the improper creation of noise, can suitably be undertaken by the community within its local boundaries, the Federation has authority to supervise the conduct of these matters by the municipality and to redress any observed shortcomings by instructions to the

Governor. Inspectoral authorities of the Federation can for this purpose be delegated to the municipality; in each and every case the Governor shall be informed hereof.

(3) The provisions of *Länder* legislation in matters pertaining to theatres and cinemas, public shows, performances and entertainments shall assign to the Federal Police Directorates within their territorial sphere of competence at least the superintendence of the events, in so far as this does not extend to technical operation, building police and fire police considerations, and the participation by the administration in the initial stage of grant of licences as stipulated by such legislation.

(4) To what extent the Federal Police Directorates shall within their territorial sphere of competence be assigned executive responsibility in the domain of the traffic police, except the local traffic police (Art. 118 para. 3 sub-para. 4) and the river and navigation police on the Danube, Lake Constance, Lake Neusiedl, and boundary stretches of other frontier waters, shall be prescribed in corresponding laws of the Federation and the *Land* concerned.

(5) In so far as executive acts in building matters concern Federal-owned buildings which serve public purposes, like accommodation for Federal authorities and offices or public institutions including herein also schools and hospitals or barracks quarters for members of the Army or other Federal employees, these executive acts fall under the indirect Federal administration; the final decision on appeals rests with the Governor. Nevertheless determination of alignment and level in these cases too falls under the executive power of the *Länder*.

(6) In so far as legislation as regards principles has been reserved to the Federation, detailed implementation within the framework laid down by Federal law is incumbent on *Land* legislatures. The Federal law can fix for the issue of the implementing legislation a deadline which may not, without the consent of the Federal Council, be shorter than six months and not longer than one year. If a *Land* does not observe this deadline, competence for the issue of the implementing legislation passes from that *Land* to the Federation. As soon as the *Land* has issued the implementing legislation, the Federal implementing legislation becomes invalidated. If the Federation has not established any principles, *Land* legislation is free to settle such matters. As soon as the Federation has established principles, the provisions of *Land* legislation shall within the deadline to be appointed by Federal law be adjusted to the legislation as regards principles.

(7) If an executive act on the part of one *Land* in matters covered by Arts. 11, 12, 14 paras. 2 und 3, and 14a paras. 3 und 4 is to be effective in several *Länder*, the participant *Länder* shall take the lead in reaching an agreed basis. If within six months from the legal business arising no agreed ruling has been laid down, the competence for such an act passes, upon request by one of the *Länder* or one of the parties participation in the matter, to the competent Federal Ministry. The details can be settled by Federal laws promulgated under Arts. 11, 12, 14 paras. 2 und 3, and 14a paras. 3 und 4.

(8) In matters reserved to Federal legislation in conformity with Arts. 11 and 12, the Federation is entitled to control the observance of the regulations it has issued.

(9) Within the field of their legislation, the *Länder* are competent to adopt the provisions necessary for the regulation of subject also in the field of criminal and civil law.

(10) *Land* legislation which alters or settles along new lines the existent organization of the ordinary public administration in the *Länder* may be promulgated only with the consent of the Federal Government.

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Table of cases

AUSTRALIA

AUSTRIA

CANADA

GERMANY

INDIA

MALAYSIA

NIGERIA

PAKISTAN

SOUTH AFRICA

SRI LANKA

SWITZERLAND

UNITED KINGDOM

UNITED STATES OF AMERICA

Index