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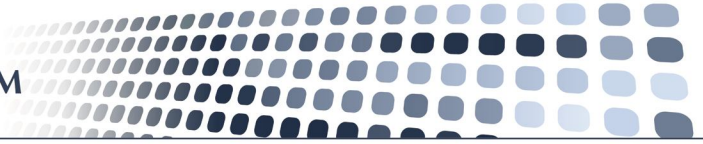


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# Constitutional Interpretation in Federations and its Impact on the Federal Balance

by  
Arun Sagar

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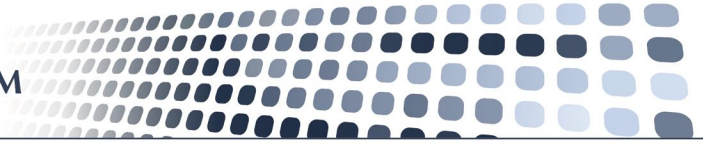


## Abstract

Most of the existing literature on judicial interpretation of federal constitutions focuses either on individual federations or on comparative studies of specific judicial techniques and/or specific fields. This paper argues that the general interpretative philosophy underlying the judicial approach has a huge impact on the balance of power in a federation; an originalist interpretation tends to favour the constituent units, while progressive or 'living' constitutionalism tends to have a centripetal effect. However, even the adoption of an originalist approach is not sufficient to fully counter the general centralising trend noticeable in the constitutional jurisprudence of all the federations studied. Further, the analysis suggests that constitutional courts often adopt a different approach to interpretation in federalism-related issues than they do in other areas of constitutional law, such as fundamental rights.

## Key-words:

Comparative federalism, division of powers, constitutional interpretation, originalism



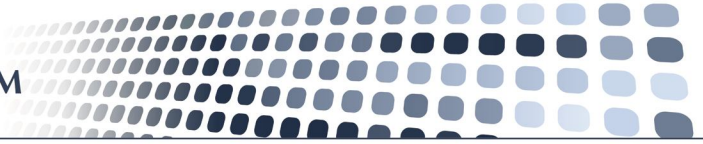
*"Federalism ... means legalism - the predominance  
of the judiciary in the constitution -"*

*- A.V. Dicey*

## 1. Introduction

Constitutions play a special role in federal systems. A federal constitution, while retaining all the essential characteristics of unitary constitutions, is at the same time conceived of as a compact between theoretically sovereign entities. This traditional vision is not directly applicable to federations formed by disassociation, but in these cases it is precisely the creation of entities with a specifically defined sovereignty that gives the federal constitution its special character. However, contemporary constitutional discourse often tends to overlook, or at least ignore, this particularity of federal constitutions. In most of the older federations, sovereignty-based arguments are not as prevalent today as they were in the early stages of constitutional debate. Appeal to 'fundamental principles' is more common in other areas, of which the most evident is that of fundamental rights. Even when the 'federal balance' and 'state sovereignty' are invoked, the notion of the constitutional document as a compact, or an agreement between the governments constituting the federation, does not come to the fore.

When a federal constitution is looked at in this classical perspective, the distribution of powers and functions between the federation and its constituent units as contained in the constitutional document takes on a particular significance. This distribution is not merely a question of practical convenience; the constitutional provisions defining legislative and executive powers are in effect the concrete embodiment of the theoretical sharing of sovereignty that federalism is supposed to entail. Even more so than in unitary systems, precise attention to these provisions is thus fundamental both to understanding federalism and to 'working' federalism. This explains the above quotation from Dicey about legalism in federations and the role of the judiciary: given this conception of what a federal constitution is, the interpretation and application of constitutional rules and principles are essential factors that determine how federalism functions in practice. Specifically, the interpretation of the division of legislative competence laid out in the constitution plays an



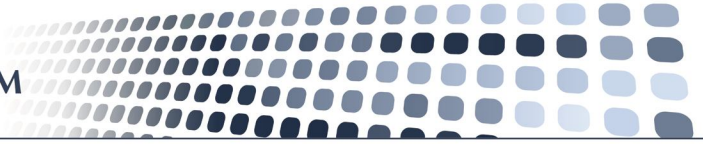
important role in defining what one may call the federal equilibrium or the federal balance, i.e. the balance of power between the federation and the constituent units.

This role is well-recognized by both scholars and practitioners. There is a vast literature on how constitutional courts interpret certain specific grants of power in various federal constitutions: the commerce clause in the United States, the ‘peace, order and good government’ clause in Canada, the corporations power in Australia, and so on. Comparative studies often focus on the evolution of case-law in these areas in different federations. There is also extensive analysis of specific interpretative concepts applied by the courts, such as the negative commerce clause, or the doctrine of pith and substance, or the notion of occupied field preemption. In-depth comparative studies of these technical aspects, while rare, have also been attempted (Gilbert 1986; Taylor 2006).

However, there is little comparative work that attempts to coherently analyse trends in constitutional interpretation in federations in a more general perspective. This is because of the extremely heterogeneous character of federalism jurisprudence in different federations. Among the older federations, in particular, the body of case-law on the division of powers is so vast, and so complex, that attempting to make sense of any one system is in itself a difficult task. An attempt to reach comparative conclusions is therefore fraught with the danger of losing oneself in a swamp of technical analysis at the one extreme, and, at the other, the danger of relying on – or arriving at – too-general notions of how and why constitutional decision-making actually proceeds in this fundamental area.

These epistemological remarks are necessary in order to clearly define the limited parameters of the analysis attempted here. This paper studies the impact not of specific interpretative techniques but of the more general interpretative philosophy underlying constitutional decision-making in several federations. I limit my discussion of actual cases to a minimum, referring instead to more detailed and in-depth work pertaining to each of the jurisdictions studied.

I start with the hypothesis that the judicial approach to constructing the specific constitutional provisions allocating powers between the units of a federation is conditioned, implicitly or explicitly, by how judges conceive of the nature and function of the constitutional document. The process of determining what a constitution *says* necessarily involves certain assumptions as to what a constitution *is*. It is hoped that more detailed and systematic, technical analyses of case-law will benefit from an understanding

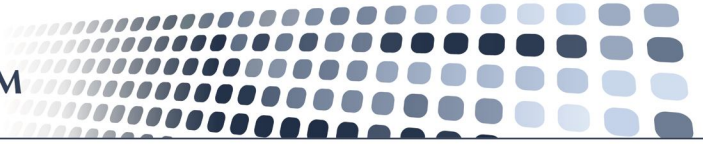


of how these assumptions influence and condition the interpretation of the constitutional division of powers.

I will attempt to show that an originalist interpretation that sees the constitution as a fixed body of rules tends to favour the constituent units in a federation, whereas progressive or 'living' constitutionalism, i.e. treating the constitution as a set of general principles to be adapted to changing circumstances, tends to have a centripetal effect on the federal balance. It is also true, however, that all the federations studied have shown a general tendency towards centralisation over the course of their evolution. While a full analysis of the myriad economic and social factors at work in this process is beyond the scope of this paper, I will discuss how some of them influence the interpretation of the legislative competences attributed by federal constitutions. Particular attention will be paid to the oft-neglected aspect of scientific and technological development. These factors are analysed through the prism of the formal distribution of powers in constitutional provisions; the study shows that certain structural elements of this distribution in several federations tend to facilitate the process of centralisation.

Finally, I will touch briefly on the question of whether constitutional courts adopt different interpretative philosophies in federalism-related issues than they do in other areas of constitutional law - such as fundamental rights - due to the particular nature of federalism jurisprudence, i.e. the definition not of the extent of state power but of the relative limits of power between different levels of government within the state. This suggests, further, that comparative studies of constitutional interpretation need to take into account not only the overall interpretative approach prevalent in different legal systems, but also how these approaches vary according to the subject matter in question.

For this study I focus on the United States, Canada and Australia, and, additionally, on Austria due to the special importance of originalism in Austrian constitutional doctrine. Discussion of younger federations is limited for the simple reason that the originalism debate is less relevant in these federations: due to the relatively short period of time that has elapsed since the writing of the constitution, the divide between 'original meaning' and other possible meanings is much less significant.



## 2. Modes of constitutional interpretation

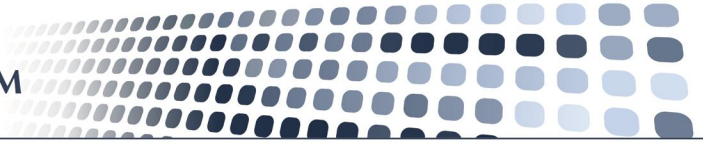
Constitutional scholarship and judicial doctrine have developed several different theories of constitutional interpretation. The subject has become an especially fashionable one in the last few decades, and there is no dearth of commentary in the area. It is hardly possible to elaborate an exhaustive list of the theoretical approaches developed in the academic literature, as each one comprises several variations and the same words are sometimes used to describe rather different approaches.<sup>1</sup> Further, the actual process of interpretation involves various steps and assumptions that one cannot always classify under a well-defined theory. “Meaning” itself is a nebulous concept that can refer to several different aspects and be defined in several different ways (Balkin 2009: 552; Lessig 1993: 1174-1178). It is not my intention here to explore these issues in detail.

However, for the limited purposes of this paper, it is possible to briefly identify the major strands of academic discourse on the subject, revolving around certain basic ‘modes’ of interpretation. Originalist approaches stress the need to interpret the constitution in light of its original meaning. In this perspective, the constitution provides a fixed set of rules for governance, which are to be applied as such by the legislative, executive and judicial branches. Originalists argue that continuous evolution of these rules by judges defeats the very purpose of adopting a constitution (Kay 1998). They consider the alternatives to originalism as being incompatible with the democratic foundations of constitutionalism, allowing too much judicial discretion as well as admitting too much indeterminacy in applying the constitution (Scalia 1989).

Opponents of originalism, on the other hand, believe that the constitution should be considered a living document that provides general guidelines and principles of governance. This approach emphasizes that fidelity to the constitution should not necessarily involve strict conformity to the framers’ intentions (Friedman and Smith 1998: 6). Further, non-originalists point out that some of today’s cherished constitutional values would be incompatible with such a strict interpretation (Grey 1975: 710-714).

Related to these notions is the debate between interpretivism and non-interpretivism, i.e. whether or not judges should restrict themselves to applying norms explicit or implied in the text of the constitution. The interpretivist answer is in the

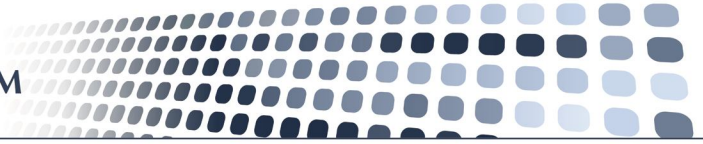




affirmative, while non interpretivists argue that judges may enforce norms and use principles not found within the constitutional document (Goldford 2005: 96; Grey 1975: 703).

Other 'modes' of interpretation often cited in academic literature are 'textualism', 'intentionalism' and 'purposive interpretation'. Some idea of the semantic hazards in this area can be had from the fact that textualism and intentionalism are sometimes considered two branches of originalism (Brest 1980; Lyons 1993), while some authors identify the search for the original 'public meaning' as a third branch (Smith 2007: 162-163). Others speak of textualism as a theory separate from - even opposed to - originalism, emphasizing the idea of an 'objective' textual meaning (Pushaw 2006; Nelson 2005). And in the same logic, 'originalism' is sometimes considered a synonym for 'intentionalism'. Opponents of originalism have indeed pointed out that the term actually covers several disparate and even mutually contradictory theories (Colby and Smith 2009). Some commentators attempt, through various steps of theoretical and semantic argument, to put forward a synthesis of originalism and living constitutionalism (Balkin 2009). Finally, 'progressive interpretation' is sometimes contrasted not just with originalism but also with textualism in its independent form.

For the purposes of this paper, I will work with a simplistic contrast between the two general ideas of original meaning-based interpretation - including all its various branches - and progressive interpretation, i.e. interpretation that seeks to adapt the constitution to changing circumstances, as they have been applied in federal systems. This admittedly reductionist approach is adopted as the subject of this paper is not an evaluation of - or a contribution to - theories of interpretation, but an analysis of how interpretation in federal constitutions conditions federal-state relations. The two very general conceptions of originalism and progressivism are therefore taken to represent two contrasting ways of defining the nature and functions of a constitutional document, i.e. whether it is to be conceived of as a fixed set of rules intended to rigidly define judicial, legislative and executive practice, or rather as a flexible framework that can be evolved and adapted.



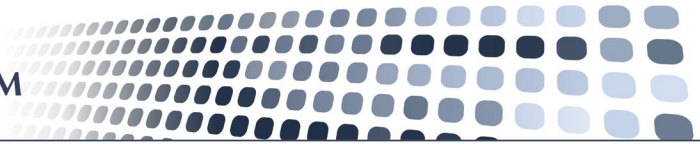
### 3. The 'original meaning' of federalism

How do these different ways of approaching constitutional provisions influence how we conceive the relationship between the federal government and the states or provinces in a federation? Returning to the idea of the constitution as a compact, classical federalism doctrine envisioned the creation of a system in which the constituent units reserved significant spheres of power for themselves. In the United States and Australia, as in many other modern federations, this idea manifests itself in the residual competence which the constitution attributes to the states. The states were seen as equal partners in the system, retaining sovereignty in many areas of governmental action.

Adherence to the original meaning of constitutional texts naturally favours this underlying vision of what a federation is<sup>11</sup>, and this translates into an interpretation of constitutional heads of power that is more likely to attempt to safeguard state sovereignty. Commerce clause jurisprudence in the United States provides a clear example: the generous interpretation of the commerce power since the New Deal of the 1930s up until some decisions of the Rehnquist court in the 1990s was very far from the original conception of the role of the federal government in regulating inter-state commerce, and it greatly eroded state legislative power in a number of areas. The federation was originally intended to have specific, well-defined powers, and the unlimited expansion of federal regulation to all things even remotely commercial was hardly compatible with this vision (Tushnet 2006: 36-37).

The idea of a progressive and adaptive interpretation was of course already present in American constitutional debate, having been invoked for example as far back as Chief Justice Marshall's famous judgement in *McCulloch v. Maryland* [17 US 316 (1819)]. But despite subsequent shifts in judicial trends, it never translated into as one-sided a vision of the division of legislative power as during the New Deal period and after. The economic and political context for the New Deal court's interpretation of the commerce power are of course common knowledge: the measures needed to lift the country out of the Great Depression required a new role for the federal government in regulating the economy, which put political pressure on the court to accept the constitutionality of the new federal





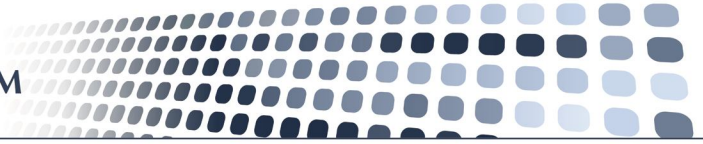
laws. This is certainly an example of how judicial interpretation of federalism provisions in the constitution provides a legal framework for the centralisation of power in a federation, while at the same time being shaped and influenced by 'external' economic, social and political factors.

However, the progressive nature of the U.S. Supreme Court's interpretation was largely implicit, there being no clear and authoritative pronouncement on the interpretative methodology employed. This is in stark contrast to Canadian constitutional doctrine, where since 1930 the Judicial Committee of the Privy Council, and then the Supreme Court of Canada, have clearly and explicitly stated that the constitution must be adapted to reflect changing circumstances, a principle embodied in the metaphor of the 'living tree'. The 'living tree' image comes from the Privy Council decision *Edwards v. Attorney-General for Canada* [(1930) AC 124], in one of the most famous passages in Canadian constitutional law:

*"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits ... Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation. ...."* (per Lord Sankey).

*Edwards* was actually a decision about a woman's right to stand for election to the Senate. But it has been often cited in support of a generous interpretation of the legislative powers enumerated in the constitution (Hogg 2006: 87). Even before *Edwards*, the Privy Council tended to reject originalist arguments, refusing for example to admit evidence of the drafter's intentions as relevant to the interpretative process (Hogg 2006: 74-79). However, this earlier period – as well as a handful of later Privy Council decisions – was certainly much more favourable to the provinces than the subsequent evolution of case-law under the Supreme Court.<sup>111</sup>

It is, of course, too simplistic to cast the 'original meaning' of Canadian federalism in the same mould as that of the United States. The drafters of the British North America Act were conscious of the need to avoid troubles such as those which occurred between the American States in the 19<sup>th</sup> century, and hence took a deliberate decision to create a strong central government. It is, however, no coincidence that the markedly centralising tendency in Canadian jurisprudence began *after* the adoption of the 'living tree' metaphor as

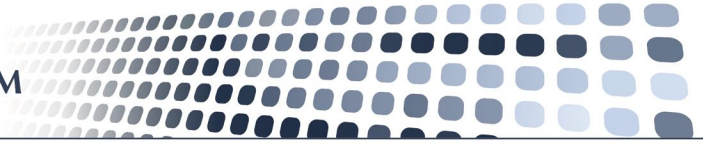


a guiding principle in constitutional interpretation. This shows that the centripetal effect of progressivism is not solely dependent on the contrast with an originally state- or province-centred federalism.

The place of originalism in Australian constitutional law is more ambiguous. In the first two decades of its existence, the High Court of Australia was very sensitive to the original understanding of federalism in the constitution: the restrictive interpretation of federal legislative competences and the 'reserved powers' doctrine was consistent with the drafters' concern for preserving state sovereignty (Allan and Aroney 2008). The example of the United States was very influential, as the High Court worked with the double presumption that the drafters were aware of the evolution of American doctrine, and that the similarity between the two constitutions meant that they should generally be interpreted in the same manner. Faithfulness to original intentions was obviously reinforced by the fact that several High Court judges had themselves been involved in the drafting process (Allan and Aroney 2008: 266).

However in its seminal decision *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.* [(1920) 28 CLR 129], the High Court declared that the Constitution ought to be interpreted so as to give it its 'natural' and 'clear' meaning, and that the constitutional text itself was paramount. This brand of textualism - often called 'literalism' or, more generally, 'legalism' - dominated Australian judicial doctrine for most of the 20th century (Goldsworthy 2006; Selway and Williams 2005; Tucker 2002).

While the rejection of originalism was not as explicit and systematic as it was in Canada<sup>IV</sup>, the emphasis on the text tended to relegate the drafters' intentions to the background, which allowed the Court to move away from its earlier approach towards one much more favourable to the federal government. For instance, before *Engineers*, the reserved powers doctrine had been invoked to interpret the federal heads of power in a holistic manner, so that what was impliedly left out of one head of power was not admitted under another. Thus, the grant of power with respect to 'interstate commerce' was interpreted as implying that purely intra-state commerce did *not* come under federal jurisdiction, and that other enumerated powers – such as the power with respect to 'corporations' – were therefore not to be read in a manner that would permit federal regulation of commerce that did not have a clear interstate dimension. The move away from the drafter's intentions meant that this interpretative approach was gradually rejected.



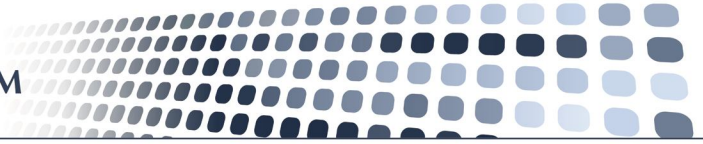
Under the new paradigm, each federal power was to be interpreted independently of the others; no restrictions were to be read into the words used in the grant of power by Sections 51 and 52 of the Constitution.<sup>v</sup>

Whether or not one characterizes the post-*Engineers* approach as 'progressive', it is beyond doubt that the change in interpretative philosophy reflected an underlying change in how judges conceived of the relation between the federation and the States. In fact, the *Engineer's* court explicitly rejected the classical American doctrine of double sovereignty - which until then had been followed in Australia<sup>vi</sup> - stating that federal powers needed to be interpreted generously in order to ensure that the federation could effectively handle issues requiring regulation on a national scale. This underlying problem of an increasing need for national regulation was of course similar to the one faced by the New Deal court in the United States.

#### 4. Austria: originalism concretized

Austria provides a unique example of the dynamic discussed in this paper, due to the special role of originalism in Austrian constitutional law. According to the theory of 'petrification' (*Versteinerungstheorie*), the words employed in constitutional provisions are 'petrified' at the time of their coming into force, and must therefore be given the exact same meaning today as they had then (Douin 1977: 49-52; Gamper 2005: 15-16; Taylor 2006: 98-103). The singularity of Austrian constitutional doctrine is that the theory of petrification is not an underlying philosophy or a guiding principle - as originalism or progressivism are in other jurisdictions - but a specific, well-established rule applied systematically in the process of interpreting the constitutional texts.

This concretization of originalism as an interpretative technique means that the anti-centralising effects of originalism are even more evident in Austria. The constitutional division of powers in itself heavily favours the federation, as it is granted extensive exclusive competences as well as concurrent and framework competences. While the residual competence is attributed to the *Länder*, they have very few enumerated powers, and these only in certain carefully defined fields; if federal powers were to be interpreted broadly, there would be very little scope remaining for *Länder* legislation. The theory of



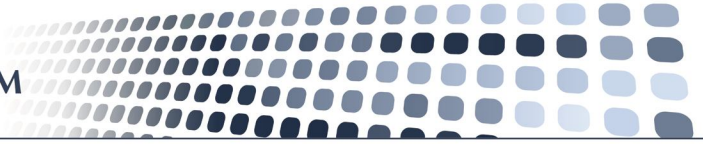
petrification helps to preserve state power by not allowing enumerated federal powers to be interpreted expansively. As their meaning and scope is 'petrified' in time, new areas of legislation cannot be accommodated under a certain head of power in the constitution. The categorical rejection of progressivism helps maintain the federal balance, albeit only to a certain extent.

## 5. The structure of the division of powers

Our discussion of the Austrian constitution demonstrates that, apart from external factors, the centripetal effect of progressive interpretation is also related to the manner in which powers are distributed in the constitution. As we have seen, the residual power is given to the states in many federations, but in the American and Australian model it is also the *only* power the constitution gives them. These constitutions do not contain an enumerated list of state powers. How does this affect judicial interpretation of the powers that are in fact enumerated, i.e. federal powers?

There are several complex factors at work. Firstly, a deep-seated respect for the separation of powers influences how judges interpret legislative powers. Many courts start with the basic presumption that the legislature is acting within its competence. Being conscious of the need to avoid encroaching on legislative functions, judges tend to avoid a finding that otherwise validly adopted laws are in fact void for lack of legislative competence in a certain field.<sup>vii</sup> There is thus a predilection for 'justifying' the constitutionality of a law by bringing it within the scope of a certain head of power. Secondly, constitutional provisions are often framed in more general terms than ordinary statutes, and general terms allow for more flexible interpretation than specific terms.

As a result, the meaning of the words used in the enumeration of powers - and hence the limits of the fields of power they define - are consistently open to a wider interpretation, which allows a wider variety of laws to be adopted within the scope of the same power. This is where the structure in which the division of powers is expressed becomes relevant: when state powers are not enumerated, they cannot benefit from this expansive interpretation. At the same time, in such cases, the expansion of federal enumerated powers is not limited by the existence of well-defined fields of state power; in

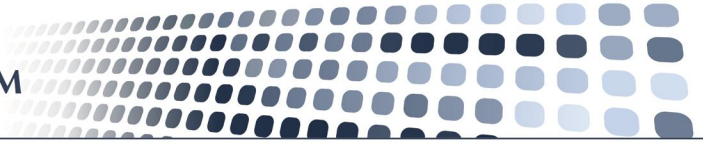


some ways, the enumeration of state powers provides a barrier against the ever-widening interpretation of federal fields of competence. Judges may also tend to favour specific enumerated powers over a vague and undefined 'residual' power. Thus, in federations where only federal powers are enumerated, there is a very marked tendency towards progressive centralisation (Herperger 1991).

The question of a generous interpretation is related to the originalism-progressivism debate, because in this context 'progressive' usually translates to 'generous'. It is important to note that there need not be an automatic equation of the two: in principle, a progressive interpretation could very well demand a *restrictive* interpretation of a certain constitutional provision or head of power (Miller 2009: 13; Allan 2006: 6). But in practice, the progressive interpretation of an enumerated head of legislative power tends to broaden the scope of the power. Consequently, when the only enumerated powers are federal powers, a gradual erosion of state sovereignty becomes almost inevitable.

But what about those federations where the constitution enumerates powers for the both the federation and the constituent units? The Canadian constitution, for example, contains two lists of enumerated powers: federal powers in Section 91 and provincial powers in Section 92. On the simple hypothesis that the generous interpretation of an enumerated competence expands the legislative power of the level of government concerned to the detriment of the other level, the fact that there are two lists of exclusive powers means that this dynamic can work in both directions, i.e. favouring either the federation or the provinces.<sup>VIII</sup> And, yes, despite the clear choice of progressivism over originalism, Canadian federalism jurisprudence presents a less one-sided picture of the division of legislative power than its Australian and American counterparts, at least in the 20th century. In fact, for several decades of Privy Council jurisprudence, it was the provinces that benefited from a generous interpretation of enumerated powers, as the provincial competence with respect to 'property and civil rights' was extended so as to cover a very wide range of legislation (Hogg 2007: 392, 499-500).





## 6. The overall centralising tendency

But whatever the structure of the division of powers and the choice of interpretative approach, a general tendency towards centralisation in each of the federations studied can be clearly established.<sup>x</sup> The enumeration of state powers or the emphasis on original meaning counter this tendency only to a certain extent.

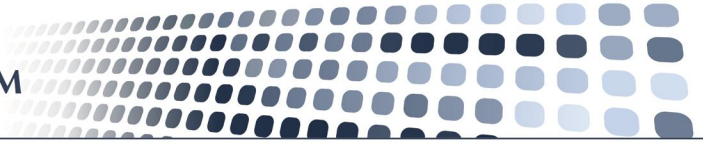
For example, despite the exception of the property and civil rights clause, on the whole the scope of federal powers in Canada has widened far more significantly than that of provincial powers, especially since the abolition of appeals to the Privy Council in 1949.

This can be explained in part by various external, i.e. non-constitutional developments. We have already seen how a perceived need for greater federal control over commercial affairs influences the choice of interpretative approach with respect to the division of powers. This aspect has been extensively analysed by scholars, in particular in the United States, and so I do not intend to explore it in greater detail here.

However, another non-constitutional factor - much less remarked-upon - that shapes the interpretation of the heads of legislative power is the development of new technologies that require new forms of government regulation not always envisaged at the time of drafting. In such cases, a progressive interpretation is required almost by definition, since *none* of the existing constitutional provisions would be sufficient if understood strictly in their original sense. The equation of 'progressive' and 'generous' is quite justified in this context, as these developments usually do require an expansion of government power to deal with unforeseen situations.

So, judges must decide how new technologies are accounted for in the division of legislative competence. In Canada, the Privy Council and later the Supreme Court were faced with several questions as to which level of government retained legislative power over matters such as telephony, television, aeronautics and atomic energy. But the very nature of these technologies often required uniform regulation on a national scale, as their application and functioning transcended provincial boundaries.<sup>x</sup> It is not surprising, therefore, that the decisions of both the Privy Council and the Supreme Court in these areas were generally in favour of the federal government, albeit sometimes based on very different reasoning.

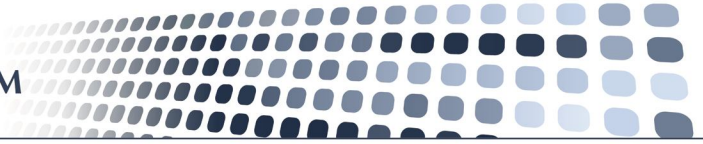




Thus, the federation was held to retain legislative power with respect to aeronautics, at first by virtue of the federal competence to conclude international treaties [*In Re Regulation and Control of Aeronautics in Canada* (1932) AC 54], and later under its residual 'peace, order and good governance' power as it was a matter of national interest [*Johannesson v. West St. Paul* (1952) 1 SCR 292]. Telecommunications provides another example: the federation was held to be competent to regulate telephone companies by virtue of its power over works and undertakings connecting the provinces or extending beyond the limits of a province, under the exceptions to provincial power listed in Section 92(10) [*Toronto v. Bell Telephone Co.* (1905) AC 52]. While this particular ruling seems perfectly logical, the centralising tendency becomes evident in later decisions where the federation was allowed to regulate even those companies operating entirely within provincial limits (on the ground that they had the technical capacity to provide national and international connections) [*Alberta. Government Telephones v. CRTC* (1989) 2 SCR 225; *Téléphone Guèvremont v. Québec* (1994) 1 SCR 878].

Similarly, the petrification theory in Austria, while usually favouring the *Länder* due to its restrictions on the possible expansion of federal enumerated powers, was relied upon to reach a pro-central conclusion in a decision concerning legislative competence over radio broadcasting [VfSlg 2721/1954]. The Constitutional Court held that since the radio had already been invented when the Constitution was drafted, the framers had to have been aware of its existence. And since there was a relation between radio broadcasting and the telegraph, the fact that there was no mention of the former in the Constitution meant that it was intended to be grouped with the latter. By this rather tortuous reasoning, the Court succeeded in adhering to the letter of the petrification theory while actually employing a generous interpretation of the federal power in order to accommodate national regulation.

Interestingly, in an earlier decision on the Canadian constitution, the Privy Council – soon after elaborating its 'living tree' metaphor - had also accepted an expansive definition of 'telegraph' so as to include radio broadcasting under the federal power in Canada, as telegraphs are also listed as exceptions to provincial power under Section 92 (10) [*In re Regulation and Control of Radio Communications in Canada* (1932) A.C. 304]. And the same generous interpretation of the competence with respect to telegraphs under Section

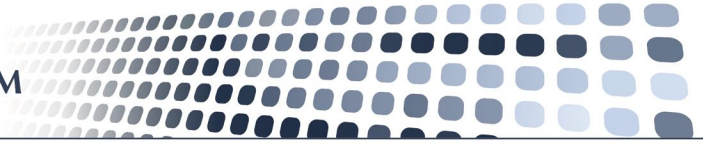


52(v) of the Australian constitution was used as well by the High Court of Australia, with the same result [*R. v. Brislan* (1935) 54 CLR 262].

Another aspect of Austrian constitutional doctrine is the concept of 'intra-systemic' powers, according to which the federal government can legislate on a matter not falling directly within the ambit of a 'petrified' head of power as long there is a close link between the federal law and the original power (Gamper 2005: 16; Taylor 2006: 101). This facilitates a much more generous interpretation of an enumerated power than would otherwise be permitted under the petrification theory.

And finally, the ease with which the Constitution is amended has further diluted the pro-*Länder* effects of the petrification theory in Austria. As the words in the Constitution are petrified in their meaning at the time of original enactment, new words introduced by a later constitutional amendment are to be understood in the meaning they had at the time of the amendment. Since the procedure for constitutional amendment is much simpler in Austria than in many other federations, it is much easier for federal powers to be updated to meet changing circumstances. And on the whole, amendments to the division of powers have indeed been favourable to the federation (Douin 1977: 54-58).

In the United States and Australia, too, the centrifugal effects of originalism have not been strong enough to reverse the well-entrenched tendency towards increasing federal power. While the United States Supreme Court's decisions in *United States v. Lopez* [514 U.S. 549 (1995)] and *United States v. Morrison* [529 U.S. 598 (2000)] sparked a renewed interest in possible limitations on federal commerce clause regulation, it must be noted that they did not give rise to a dramatic change in the federal balance of power, as later Supreme Court cases did not necessarily continue this trend (Williams 2007). One relevant factor is that it would be impossible, as a practical matter, for the Supreme Court to invalidate the entire framework of federal regulation established in the decades since the New Deal. The respect for judicial precedent is also an important element in constitutional interpretation (Tribe 2000: 78-85; Tushnet 2006: 40-42); a certain interpretative approach can become part of the judicial conventions regarding certain constitutional provisions. The U.S. Supreme Court's decades-old refusal to admit limits to federal power, while departed from by the majority in the two decisions mentioned, remains deeply rooted in American constitutional thought.

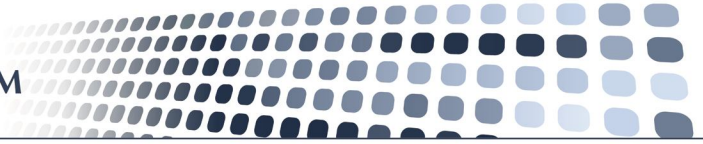


In Australia, the legalism established by the *Engineers* court was also disturbed towards the end of the 20th century, which saw a renewed emphasis on a purposive interpretation that gave more consideration to framers' intentions. But this Australian version of the New Originalism showed itself mainly in the field of implied rights, and it did not have a major impact on Australian federalism (Greene 2009: 43-49). Recent case-law has been as favourable – if not more favourable - to the federation as anything that went before. For example, in the *Work Choices* case of 2006 [*New South Wales v. Commonwealth* (2006) 229 CLR 1] the Court upheld a federal law on industrial relations under the corporations power. Repeatedly citing *Engineers*, the majority explicitly rejected the idea that one should take the federal balance into account when interpreting the constitution.<sup>x1</sup>

## 7. Interpretative philosophy and subject matter

The absence of any notable impact on federalism of the originalist/intentionalist revival in Australia also suggests that very different, even mutually contradictory interpretative approaches may underlie constitutional jurisprudence in different areas. In its implied rights jurisprudence, the High Court has shown a much greater willingness to adopt a teleological, structural interpretation than is evident in *Engineers*-style textualism (Greene 2009: 43-49; Allan and Aroney 2008: 292-293). Similarly, to take an example from a newer federation, the Indian Supreme Court is known for its progressive and expansive interpretation of the fundamental rights provisions in the Indian constitution (Jain 2008: 833); on the other hand, while the Court has recognized federalism as one of the unwritten general principles – the “basic structure” – of the constitution, it has adopted a far more textual approach towards the resolution of federal-state disputes.

One apparent reason for these seemingly contradictory approaches is the fundamental difference between the interpretation of the federal division of powers and the interpretation of provisions guaranteeing fundamental rights. While the latter involves the definition of the scope and limits of government power, the former is more concerned with the distribution of power between different levels of government within the state, i.e. the definition of *relative* limits of power. When a court interprets the division of legislative



competence, one of the two levels of government in the federation retains legislative power; in the interpretation of a provision granting individual rights, an expansive interpretation implies a restriction of *all* legislative power (Huscroft 2004: 422).<sup>xii</sup>

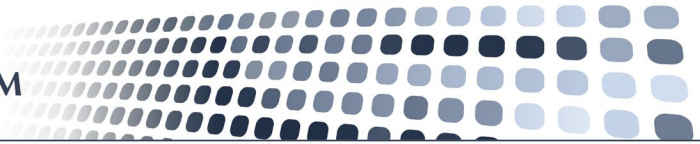
The reasons for the choice of a particular approach in a particular context are manifold, and complex. With respect to fundamental rights, there have been changes in the underlying perception of the relation between the individual and the state. In a more 'realpolitik' perspective, inter-institutional rivalry may also be cited as a relevant factor sometimes favouring a generally expansive interpretation that restricts legislative power. While this is a subject for another study – one that compares the Australian example to those of Canada and the United States as well - its general implication is clear: the interpretative philosophies adopted by constitutional courts are not constant and may change as a function of the subject matter in question. Studies of constitutional interpretation must take this into account when comparing the interpretative approaches prevalent in different legal systems.

## 8. Conclusion

In the final analysis, what does the comparison of constitutional interpretation tell us about federal constitutions, and about federalism?

Judicial interpretation channels the influence of economic, technological and other non-constitutional developments in a federation, while at the same time exerting its own influence in shaping the legal system within which these forces act. As federalism is itself a response to political and social realities, this is to be expected, even welcomed; the progressive centralisation evident in so many federations is only a further manifestation of this dynamic.

While recognizing the interrelatedness of legal and non-legal factors, the 'pure' study of constitutional law can be a valid – and valuable – approach to understanding the phenomenon of federalism. As mentioned above, the legal order provides a framework where the various factors operating in this phenomenon manifest themselves, and it is at the same time one of these factors. And so, noting the influence of economic and technological developments in federal-state relations and on the interpretation of the



constitution should not lead one to overlook the complex nature of these questions, or the fact that the evolution of constitutional law is not a direct function of these developments.

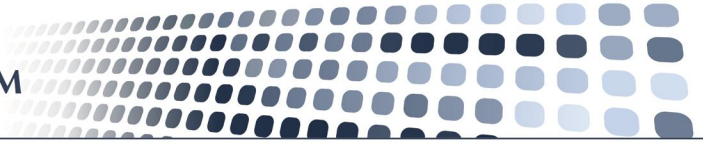
In this perspective, we have seen how the interpretative approach adopted by each jurisdiction tends to influence the federal balance. As stated at the beginning of this paper, the choice of an originalist or progressive approach involves not merely a certain way of looking at the words and expressions used in constitutional provisions, but also a certain way of conceiving what a constitution is and what it is meant to do. At the same time, as judicial interpretation is also conditioned by constitutional language, a study of the concrete terms of these provisions is indispensable to studying the case-law of federalism: the manner in which legislative powers are divided in federal constitutions is an important factor in how the federal balance evolves. Certain forms of distribution of legislative competences, in particular those without enumerated state powers, are more amenable to an expansion of federal power. While it is difficult to 'quantify' the role played by this aspect, the existence of such a role is beyond doubt. The marked differences in the way the constitutional resolution of federalism disputes has evolved in federations with very different structures of power-allocation are in themselves proof of this phenomenon.

Thus, if one's goal is to preserve the balance of power between the federation and its constituent units – and it is important to recognize that such a goal would be a normative, political choice - interpretative techniques are not in themselves sufficient tools without an appropriate structuring of the constitutional division of powers. Other federations provide examples of this: the recent German constitutional reform was necessitated precisely by the need to better organise the allocation of legislative competence between the Bund and the Länder; Switzerland has seen several overhauls of its constitutional structure, often motivated in part by the need to clarify and elaborate the division of powers. These examples put the role of constitutional interpretation as an evolutive factor into perspective; it is only when constituent power is wielded to its fullest extent that Dicey's prediction of judicial predominance may be proved wrong.

### Cases

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- *Attorney-General (NSW) ex rel Tooth & Co Ltd. v. Brewery Employees' Union of NSW* (1908) 6 CLR 469.
- *Edwards v. Attorney-General for Canada* (1930) AC 124.





- *Huddart, Parker & Co. Pty Ltd. v. Moorehead* (1909) 8 CLR 330.
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- *Johannesson v. West St. Paul* (1952) 1 SCR 292.
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- *New South Wales v. Commonwealth* (2006) 229 CLR 1.
- *R. v. Brislan* (1935) 54 CLR 262.
- *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 CLR 468.
- *Téléphone Guèvremont v. Québec* (1994) 1 SCR 878.
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- *United States v. Lopez* 514 U.S. 549 (1995).
- *United States v. Morrison* 529 U.S. 598 (2000).
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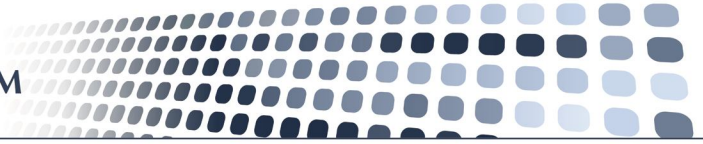
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<sup>I</sup> A useful overview is provided by (Clark 2002).

<sup>II</sup> This is reflected in the fact that the development of the 'New Originalism' in American constitutional jurisprudence and doctrine roughly corresponded with the rise of the 'New Federalism'; indeed, one gets the impressions that the terms are sometimes used almost interchangeably.

<sup>III</sup> In a classic study, J. Brossard identified several different pro-central and pro-provincial periods in the Privy Council's jurisprudence: (Brossard 1968: 169-186).

<sup>IV</sup> As is to be expected, how this jurisprudence is characterised varies according to the definition of 'originalism' adopted. Certain writers conceive of Australian legalism as nothing but a form of originalism: see for example (Greene 2009).

<sup>V</sup> Examples of the later approach are provided by the decisions in *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 CLR 468 and the *Work choices* case (discussed below). For a detailed analysis of the reserved powers doctrine, see (Allan and Aroney 2008). For an overall discussion of the corporations power, see (Zines 2008: 107-137)

<sup>VI</sup> Good examples of the early State-centred approach are provided by the High Court's decisions in *Attorney-General (NSW) ex rel Tooth & Co Ltd. v. Brewery Employees' Union of NSW* (1908) 6 CLR 469 and *Huddart, Parker & Co. Pty Ltd. v. Moorehead* (1909) 8 CLR 330.

<sup>VII</sup> As suggested in the final section of the paper, however, this does not always hold true in other areas of constitutional doctrine.

<sup>VIII</sup> Some scholars note that the existence of two relatively long and detailed lists of powers has tended to give a greater importance to judicial interpretation in determining the balance of intergovernmental relations in Canada; see for example (Hodgetts 1974).

<sup>IX</sup> This has of course been the subject of extensive comment in each of the federations mentioned. However, detailed and in-depth comparative studies of this phenomenon – as opposed to brief remarks - are surprisingly rare. For one such attempt, see (Orban 1984). A recent study undertakes an empirical analysis of the broad phenomenon of 'legal unification' in several different federations: (Halberstam and Reimann 2010)

<sup>X</sup> The centralising or decentralising effects of technological developments in the larger social and political context are more complex and ambiguous. The nationalisation of information and communication systems tends to be a centralising factor, but some scholars argue that the spread of these systems and the growth of interactive technologies may have the effect of decentralising power to citizens: see generally (Dutton 1982, 110-111).

<sup>XI</sup> Some commentators see the *Work Choices* decision as a clear abandonment of originalism in Australia; see (Gisonda 2007). The author notes that only the dissenting judgement of Callinan J. explicitly endorsed originalism as the best interpretative approach.

<sup>XII</sup> In the same logic, G. Sawyer observes: "If the purpose of the liberal interpretation is to extend the range of competence of a legislature – usually the Centre legislature – then in dealing with prohibitions it is necessary to *narrow* the meaning syndrome of the relevant class expressions." (Sawyer 1969: 177). While I do not explore this subject here, it is worth noting that, in general, scholars tend to hold the view that the development of fundamental rights in federal systems favours the federal government; see for example (Morton 1995; Orban 1991: 72-76; Bothe 1991: 130-131).