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THE COMMERCE CLAUSE—
COMMONWEALTH COMPARISONS

Greg Taylor*

Abstract: As is well known, the United States (U.S.) Supreme Court appears to be re-defining its approach to the commerce clause: limits on federal power again are being enunciated. However, the debate on this issue in the United States is taking place without any significant consideration of the comparative law on the subject from Canada and Australia, which have similar clauses in their constitutions. As this Article shows, Canadian and Australian law confirm that the approach of the Supreme Court majority is preferable to that of the minority. Furthermore, the minority’s fear that drawing boundaries may prove impossible is shown, by consideration of the experience of Canada and Australia, to be exaggerated.

INTRODUCTION

There are many possibilities inherent in comparative constitutional law for the growth of American jurisprudence.¹ No extensive citation of articles and cases is needed to remind American readers that, in the wake of *U.S. v. Lopez*² and *U.S. v. Morrison*,³ the interpretation of the commerce clause⁴ is currently a matter of great interest in the United States. This Article contributes to the American discussion by showing how two other comparable federations, Canada and Australia, deal with the equivalent provisions in their constitutions and concludes that comparative constitutional law comes down decidedly

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³ 120 S. Ct. 1740 (2000). For a comment on the case before it reached the Supreme Court, see Recent Case, 113 Harv. L. Rev. 816 (2000).
⁴ U.S. Const. art. I, § 8, cl. 3.
on the side of the majorities in those two cases, that is, in favor of limiting the reach of the commerce power to some extent.

Space does not permit a comprehensive catalogue of all the cases decided in Canada and Australia under the powers in their constitutional documents which equate to the American commerce clause. It is, however, possible to point out that neither Canada nor Australia has adopted as sweeping an interpretation of the equivalent constitutional provisions as had the United States before *Lopez*. In neither country has it ever been accepted doctrine that judicial review on federalism grounds should be attenuated. By restricting the scope of the commerce clause in the manner suggested in *Lopez* and *Morrison*, the Supreme Court of the United States is, therefore, merely bringing American law closer to the law of comparable federations.

I. THE CONTROVERSY IN THE UNITED STATES

Modern American constitutional law on the commerce clause began in 1937 with the New Deal and the “switch in time” by the Court, and more specifically by Justice Roberts, in that year.\(^5\) The “switch in time” of 1937 together with case law of the 1940s—most notably, the celebrated\(^6\) case of *Wickard v. Filburn*\(^7\)—gave the commerce clause a potential for expansion that seemed unlimited. This expansion was confirmed by the civil-rights cases of the 1960s,\(^8\) which opened up vast new possibilities of congressional regulation of commerce in order to achieve non-commercial aims.

The seemingly limitless possibilities, however, now have been limited by the Supreme Court’s decisions in *Lopez* and *Morrison* which, over the strong dissents of four Justices, reveal that the reach of the


\(^7\) 317 U.S. 111 (1942).

commerce clause is not unbounded and, more broadly, that judicial review of federal statutes to ensure that they fall within Congress's enumerated powers is not dead, as some had thought it might be. These cases, of course, have touched off a great deal of discussion in the United States about the meaning and extent of the newly discovered limitations.10 Conspicuous by its absence, however, has been any mention of the comparable provisions of the Canadian and Australian Constitutions.

II. CANADA11

A. Distribution of Powers

Section 91 (2) of Canada's Constitution Act of 1867 appears to give the Canadian federal Parliament an even broader power than that contained in the U.S. commerce clause, for it confers on the Canadian Parliament "exclusive Legislative Authority" over "The Regulation of Trade and Commerce." The restriction to inter-state and overseas commerce found in the U.S. provision is not present, and the Canadian provision mentions trade as well as commerce. Nevertheless, the Canadian Supreme Court has conceded to the Canadian federal Parliament much narrower powers than has the U.S. Supreme Court to Congress.

To some extent, this difference must be understood as merely a consequence of the different scheme of distribution of powers which

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operates in Canada. The U.S. Constitution confers enumerated powers on the central government and leaves the residue with the states. The Canadian Constitution, in section 92, confers exclusive enumerated powers on the provinces and leaves the residue with the center. However, "for greater Certainty, but not so as to restrict the Generality of the" conferral of the residue, section 91 sets out a list of powers conferred exclusively on the center. As already mentioned, one of these is "The Regulation of Trade and Commerce." This scheme for the distribution of powers, which was drafted in the 1860s, was meant to establish strong central control in order to avoid the weaknesses thought to have caused the American Civil War. In practice, however, the Canadian scheme has resulted in much stronger provincial autonomy than exists in the United States. The Courts undoubtedly have been motivated by a concern to allow the provinces some degree of independent legislative authority having regard to the differences among them, especially the difference between English Canada and Quebec.\(^{12}\)

One consequence of this scheme is that recognizing a power as belonging to the center under section 91(2) withdraws it, at least if the logic of the system is followed,\(^{13}\) from the competence of the provinces, as the power under section 91(2) is exclusive.\(^{14}\) Therefore, a jurisprudence as generous to the federal government as the American jurisprudence would result in the virtually complete removal of all authority from the provinces. This consequence is avoided by a generous interpretation of sections 92(13) and (16), which confer exclusive power on the provinces in relation to "Property and Civil Rights in the Province"\(^ {15}\) and "Generally all Matters of a merely local or private Nature in the Province" respectively.\(^{16}\) It is necessary, under the Canadian "pith and substance" approach to determining the nature

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12 This consideration was expressly referred to by the Privy Council in Attorney-General (Canada) v. Attorney-General (Ontario) [1937] A.C. 326, 351.
14 For a commentary from an Australian perspective, see Huddart Parker Ltd. et al. v. Commonwealth (1931) 44 C.L.R. 492, 526.
15 For the origin of this phrase, see Peter W. Hogg, ConstitutionaL Law of Canada 36, 545-46 (4th ed., 1997).
16 On the choice between the two sub-sections, see Hogg, supra note 15, at 530 n.9.
of statutes,\textsuperscript{17} to decide which heading a particular statute in truth falls under.

**B. The Parsons Tests**

As early as 1881, the Privy Council (which, sitting in London, was the final Court of appeal for Canadian constitutional issues until 1949)\textsuperscript{18} held in \textit{Citizens Insurance of Canada v. Parsons}\textsuperscript{19} that section 91(2) was, despite the absence of an express limitation to this effect, limited to "regulation of trade in matters of inter-provincial concern" as well as international trade. Secondly, it was held that section 91(2) "may . . . include general regulation of trade affecting the whole"\textsuperscript{20} of Canada. These are the two branches of trade and commerce which the federal Parliament may regulate in Canada. All other forms of trade and commerce come within provincial authority.

Although a trend slightly more generous to the federal government can be detected in more recent cases, which allow control of intra-provincial transactions when the purpose of the legislation can be said to be extra-provincial,\textsuperscript{21} the distinctions made in \textit{Parsons}, in essence, still constitute good law.\textsuperscript{22} It is necessary to determine whether a statute's "pith and substance" is a matter of federal or provincial concern. Thus, the Supreme Court of Canada held in the late 1970s that the transformation of primary agricultural products into food, even for extra-provincial trade, was a matter for regulation by the provinces, as such activity did not come within either of the two \textit{Parsons} branches.\textsuperscript{23} However, it may be otherwise if production quotas


\textsuperscript{19} (1881) 7 App. Cas. 96, 113.

\textsuperscript{20} \textit{Id.}


are, in "pith and substance," an attempt to control inter-provincial or international prices, for those are matters for the federal government under the first limb of the Parsons test,24—a conclusion that would have delighted President Roosevelt.

C. The Canadian New Deal

One result of the Canadian jurisprudence is that the Canadian New Deal fared rather worse in the courts than did the American New Deal after 1937. Thus, the Privy Council struck down—in a series of three decisions handed down on January 28, 1937, just as President Roosevelt was preparing to reveal his "Court-packing" plan—attempts by the federal Parliament to regulate conditions of labor,25 to provide unemployment insurance,26 and to control the marketing of natural products generally.27 However, the reaction was muted, and there was no "Court-packing" plan. This result is partly due to the fact that the composition of the Privy Council was beyond the influence of the Canadian government. Furthermore, the government of R.B. Bennett, which had promoted the legislation concerned, had, by January 1937, been replaced by Mackenzie King’s Liberal government.28 Nor was there any immediate attempt to end appeals in constitutional issues to the Privy Council, as had happened for criminal cases in the 1930s.29 Rather, the Canadian authorities played the game by its rules and secured an amendment to what was then the British North America Act 1867 (Imp.)30 to grant to the federal government the power to provide unemployment insurance31 which the Privy Council had refused to recognize in 1937.

24 Central Canada Potash v. Saskatchewan [1979] 1 S.C.R. 42. Now, section 92A(2) of the Constitution, added in 1982, might permit provincial legislation in the circumstances considered in this case, see Hogg, supra note 15, at 566, but that has nothing to do with the meaning of the trade and commerce power.


30 Since the patriation of the Canadian Constitution under Pierre Trudeau in 1982, the Canadian Constitution of 1867 has been called the Constitution Act 1867 (Can.).

31 See section 91 (2A) of the Constitution Act 1867 (added in 1940).
The Privy Council, however, did not strike down all Canadian New Deal legislation. It held another three statutes valid on January 28, 1937. From a legal point of view, the three favorable decisions did not do much to extend federal power over trade and commerce. Even general moratorium legislation\(^{32}\) and statutes criminalizing restrictive trade practices\(^{33}\) were held valid only under the federal power over bankruptcy and insolvency (section 91(21)) and criminal laws (section 91(27)) respectively, not under the trade and commerce power. In relation to the moratorium legislation, it is worth recalling that, in Canada, there is no concept of “substantive due process.” Only legislation relating to trademarks and a “national trade mark” (the “Canada Standard”) was held to come within section 91(2).\(^{34}\)

D. The Current Tests

As a result, perhaps, both of a lack of occasion and of an opportunity to “pack” a court, Canadian law knows no dramatic caesura in the interpretation of the trade and commerce power such as occurred in the United States in 1937, and the Parsons approach has never been overruled. A selection of cases from the 1980s and 1990s confirms the limited nature of that power as vested in the Canadian federal legislature by holdings that would be inconceivable in the United States, even after Morrison. In Canada, there continues to be a distinction between inter-provincial trade and commerce and other sorts of trade and commerce, as well as between trade and commerce and things that are not trade and commerce.

Thus, a storage facility receiving liquefied natural gas in one province from another province is not within the federal Parliament's trade and commerce power even though the gas is sold to customers: by the time the gas has reached the storage facility, it is no longer part of inter-provincial trade but is part of a local network only.\(^{35}\) Nor is the operator of amusement rides who offers his services in Canada and the United States within the trade and commerce power.\(^{36}\)

\(^{32}\) See Attorney-General (British Columbia) v. Attorney-General (Canada) [1937] A.C. 391.

\(^{33}\) See Attorney-General (Canada) v. Attorney-General (British Columbia) [1937] A.C. 368.

\(^{34}\) See Attorney-General (Ontario) v. Attorney-General (Canada) [1937] A.C. 405, 417. Even this conclusion now seems to be in doubt as a result of later decisions of the Supreme Court of Canada. Hogg, supra note 15, at 539.


duction of pornographic videos for inter-provincial trade is not a matter for the Canadian government, but for the provinces. The first limb of the Parsons test will not be satisfied, in other words, if a statute deals not with matters of inter-provincial or international concern, but merely with isolated, local manifestations of trade that happen to occur in different provinces or countries. And, in principle, trade and commerce does not include production.

The second limb of the Parsons test—general regulation of trade affecting the whole of Canada—is even now, 120 years after Parsons, not fully explored territory, mostly due to the failure of the federal Parliament to exploit the possibilities inherent in it. However, the outlines of Canadian jurisprudence on this score have emerged relatively recently in cases such as MacDonald v. Vapor Canada Ltd. and General Motors of Canada Ltd. v. City Nationwide Leasing. Attempts to codify private law, such as tort law, will be looked upon unfavorably by the Court: in MacDonald, a federal statute prohibiting any act or business practice “contrary to honest industrial or commercial usage in Canada” was seen as an attempt to create a general federal action in tort law, which is a matter that comes under the jurisdiction of the provinces. The statute was therefore invalid. On the other hand, general regulatory schemes dealing not with provincial matters referred to in sections 92(13) and (16), but with well-defined public goods relevant to trade generally, such as fair competition, will be upheld, as in General Motors.

This even-handed and principled approach shows that fears—or hopes—that, once the federal Parliament began to exploit the second limb of Parsons, no logical limit could be found to its powers have not been realized. The Court has expressly held that the mere fact that an industry may extend across the whole country does not make it a matter affecting the whole country; as long as this jurisprudence is maintained, there is no prospect of a disappearance of the distinction between inter- and intra-provincial trade and commerce, let

38 See supra, II.A.
39 General Motors of Canada, 1 S.C.R. 657.
40 See Weiler, supra note 21, at 362.
41 2 S.C.R. 134.
42 1 S.C.R. 641.
43 See MacDonald, 2 S.C.R. 141–42, 149.
44 See Weiler, supra note 21, at 332.
45 Labatt Breweries, 1 S.C.R. 914 (product standards regulation for beer invalid).
alone the distinction between trade and commerce and everything else.

The Supreme Court of Canada, in its unanimous judgment in *General Motors*, recognized that its job is to balance, as best it can, the competing claims of federal and provincial legislatures, and developed quite an involved method of doing so.\(^{46}\) The judgment is very closely reasoned, a first-class example of the judicial craft, and repays study by those who would abandon judicial review of commerce clauses because it is allegedly too difficult to draw boundaries in this area. The case concerned a federal anti-trust statute and the associated right to damages for breach. The right to damages was attacked, and it was vulnerable to attack because rights to damages are generally part of tort law, and thus, as in *Vapor Canada*, generally fall under provincial control.

In *General Motors*, the Court assessed, first, the extent to which the damages section intruded on provincial powers, second, the validity of the statute as a whole, and third, the extent to which the damages section was connected to the rest of the statute, to the extent that the statute was valid.\(^ {47}\) In the first step, the Court held that the damages section did indeed encroach on provincial powers, but noted that it was a remedial provision and an adjunct to the rest of the statute rather than a free-standing right to damages. The encroachment, therefore, did not mean that the right to damages was invalid if the rest of the statute was valid and the damages section was sufficiently well integrated into its scheme.\(^ {48}\)

The second step was to assess the validity of the statute. In so doing, a list of five criteria, developed in *MacDonald* and further elaborated in *General Motors*, was relevant. It must be stressed, however, that this is not a list of mandatory requirements that a statute must meet in order to be valid under the second limb of *Parsons*, but merely a helpful list of criteria that the Court will take into account. The list of criteria is as follows: (1) the existence of a general regulatory scheme; (2) the oversight of a regulatory agency; (3) a concern with trade as a whole rather than with a particular trade; (4) the constitutional inability of the provinces, jointly or severally, to enact the scheme concerned; and (5) the need for national rather than provincial regulation if a scheme is to be effective.\(^ {49}\)

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\(^ {46}\) See 1 S.C.R. at 659, 666.

\(^ {47}\) See id. at 663–72.

\(^ {48}\) See id. at 672–74.

\(^ {49}\) See *MacDonald*, 2 S.C.R. at 158, 165; *General Motors*, 1 S.C.R. at 662.
Although some do not understand the need for the first two criteria, the reason is apparent: public regulation indicates that the matter concerned is of general importance and shows that the federal statute does not merely deal with private grievances or tort laws, which are subjects reserved for the provinces. The last three criteria are, of course, indications that the problem is one which goes beyond intra-provincial trade.

The regulatory scheme at issue in *General Motors* met all five criteria, and the statute as a whole was therefore valid. The only remaining question was whether the damages section was sufficiently related to the statute as a whole. The "correct approach," the Court indicated, was "to ask whether the provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme," or whether it had been "tacked on." The Court had little difficulty concluding that the award of damages for breach of a valid anti-trust statute was "functionally related" to that statute.

The intrusion into provincial jurisdiction identified in the first stage therefore could be justified by the fact that it was associated in a sufficiently close way with a scheme that, as a whole, was valid. The intrusion was different from that involved in the federal statute invalidated in *Vapor Canada* in a number of respects, chiefly its close connection with a general regulatory scheme and its less broad and undefined nature.

Further guidance from the Supreme Court of Canada may be forthcoming. The Court of Appeal for Newfoundland held in *Ward v. Canada* that a federal prohibition on selling a type of seal is invalid. The Supreme Court of Canada granted leave to appeal in this case on June 29, 2000. It is of interest that the Court of Appeal did not consider whether the prohibition could be supported under section 91(2). Rather, it directed its "entire attention" to section 91(12) ("Sea Coast and Inland Fisheries") as the only possible source of validity under section 91. In the United States, there would be few problems in upholding a statute of this nature under the commerce

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51 See *id*.
52 See 1 S.C.R. at 677–83.
53 *Id.* at 683.
54 See *id.* at 683–93.
55 *Id.* at 690–92.
58 182 D.L.R.4th at 176.
clause. It will be interesting to see whether the Supreme Court of Canada says anything about the trade and commerce power when it considers the appeal.

E. Summary

In summary, then, Canada not only refuses to follow pre-Lopez American jurisprudence in considering virtually everything as trade and commerce; it also continues to make a distinction between inter- and intra-provincial trade and commerce, only the former coming within federal power. This is so even though such a distinction is not expressly made in its Constitution, unlike in the U.S. commerce clause. While no one could claim that the Canadian Court has answered in advance all questions that might arise concerning the reach of the trade and commerce clause, Canadian experience disproves the assertion by the dissenting Justices in Lopez and Morrison that it is not possible to make a distinction between commerce and things merely affecting commerce incidentally, or between intra-state and inter-state commerce.

III. Australia

A. Distribution of Powers

The Australian Constitution, in its general approach to the division of powers, is much more like the American than the Canadian Constitution. Enumerated powers are conferred on the federal legislature, and the residue is left with the states. Australia is also like the United States, and unlike Canada, in another respect: although there are differences among the Australian states, they are not nearly as large as the legal and cultural differences between Quebec and the rest of Canada, which are responsible, to a great extent, for the relatively strong position of the provinces in Canada.

Section 51 (i) of the Australian federal Constitution confers power on the federal legislature to legislate “with respect to . . . Trade

and commerce with other countries, and among the States."60 In this context, it is of interest that the High Court of Australia61 has refused, in the interpretation of section 51 (i) of the Australian Constitution, to follow not only the post-New-Deal American jurisprudence, but some aspects of the pre-New-Deal jurisprudence as well. This is despite the fact that, on their face, the words used in the Australian Constitution are broader than those in the U.S. Constitution: the Australian power, as in Canada, includes trade as well as commerce, but, unlike the equivalent power in Canada, is not restricted to a power of "regulation."62

B. Explicit Rejection of U.S. Law

The High Court of Australia has "always"63 refused to accept the "commingling" doctrine accepted by the Supreme Court of the United States in cases such as the Shreveport Rates Case,64 holding that the distinction which is drawn between inter-State trade and the domestic trade of a State ... may well be considered artificial and unsuited to modern times. But it is a distinction adopted by the Constitution and it must be observed however much inter-dependence may now exist between the two

60 By section 98 of the Constitution, this power includes power over navigation, shipping, and state railways. This section is not an independent head of power; its effect is merely to confirm that navigation, etc., if inter-state or international, come within section 51 (i): see Owners of the "S.S. Kalibia" v. Wilson (1910) 11 C.L.R. 689, 697, 707, 713; Newcastle & Hunter River Steamship v. Attorney-General (Commonwealth) (1921) 29 C.L.R. 357, 368. The Canadian equivalent of section 98 is section 91 (10); cf. also section 92 (10) in conjunction with section 91 (29).

61 This court is the highest court in Australia. In combining general appellate functions with the functions of a constitutional tribunal, the High Court of Australia has functions very much like that of the Supreme Court of Canada (except that the Australian Court has no advisory jurisdiction).

62 This difference was pointed out early on in Australia: cf. Attorney-General (New S. Wales) v. Brewery Employees' Union of New S. Wales (1908) 6 C.L.R. 469, 614. Intriguingly, the Australian Constitution, until the final drafting changes, did provide only for power with respect to "the regulation of trade and commerce with other countries and among the several States" (emphasis added). This was amended to the present form without discussion in the Convention: J. A. La Nauze, THE MAKING OF THE AUSTRALIAN CONSTITUTION 236 n.* (1974). La Nauze asks whether the original version of the federal power could have been interpreted as more restrictive.

63 R v. Burgess; ex parte Henry (1936) 55 C.L.R. 608, 628; see also id. at 677. For a comprehensive list of the statements in the High Court of Australia on this topic, see Nygh, supra note 59, at 394.

64 Houston, E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914).
divisions of trade and commerce which the Constitution thus distinguishes.\textsuperscript{65}

Still less will the Court permit all imaginable activities to be subsumed under the heading of "commerce," as appeared to be the direction of U.S. case law before *Lopez*. There is no trace in Australia of a doctrine that any activity that affects commerce may be regulated under the trade and commerce power.

Therefore, while the power granted by section 51(i) can be used to prohibit export entirely, or subject to conditions determined by the federal Parliament (whether otherwise relevant to trade and commerce or not),\textsuperscript{66} a definition of "trade and commerce" is adopted which, while not identical to American jurisprudence of the late nineteenth century, would have been entirely recognizable to the Justices of the Supreme Court of the United States who were sitting when the Australian Constitution was being drafted in the 1890s.\textsuperscript{67}

In Australian constitutional law, for example, production is not itself trade or commerce.\textsuperscript{68} In relation to overseas commerce, it has admittedly been suggested that the federal Parliament's powers under section 51(i) may, in certain circumstances, be extended by use of the incidental power—the equivalent of the "necessary and proper" clause—to cover production in the "factory or the field or the mine."\textsuperscript{69} However, this suggestion has not been extended to inter-state as distinct from overseas trade in order that the constitutional distinction between inter-state and intra-state trade may be maintained.\textsuperscript{70}

Moreover, this suggestion is an expression not of the core meaning of the trade and commerce power, but of the incidental power

\textsuperscript{65} See Wragg v. New South Wales (1953) 88 C.L.R. 353, 385. For similar statements, see R v. Burgess; *ex parte Henry*, 55 C.L.R. at 672; Airlines of New S. Wales v. New S. Wales (No. 2) (1965) 113 C.L.R. 54, 115.


\textsuperscript{67} Nygh, *supra* note 59, at 360–63.

\textsuperscript{68} See Grannall v. Marrickville Margarine Ltd. (1955) 93 C.L.R. 55, 77; see also Beal v. Marrickville Margarine Ltd. (1966) 114 C.L.R. 283. For further discussion on the definition of "trade and commerce" and of "inter-State trade and commerce," see Zines, *supra* note 59, at 548. The equivalent U.S. doctrine from the late 1890s is, of course, to be found in United States v. E.C. Knight, 156 U.S. 1, 12 (1895).

\textsuperscript{69} O'Sullivan, 92 C.L.R. at 598.

\textsuperscript{70} This difference is referred to expressly by Justice Stephen in Attorney-General (Western Australia) (ex rel. Ansett Transport Industries (Operations)) v. Australian Nat'l Airlines Comm'n (1976) 138 C.L.R. 492, 509; see also Zines, *supra* note 59, at 66.
attached to it. Thus, there must be a significant relationship between production and trade and commerce if production is to be regulated under section 51(i). It has been held that a merely economic connection with trade and commerce will not suffice. Therefore, the federal legislature cannot confer power on an airline owned by the federal government to fly within one state merely in order to make the airline’s inter-state operations more profitable; only if the safety of inter-state air travel is involved can the federal legislature regulate intra-state air travel. As in the U.S. before Wickard, the connection must be direct, not indirect. Accordingly, the employment of workers generally, as distinct from workers actually engaged in inter-state or overseas trade or commerce, also does not come under section 51(i).

The contrast between the Australian and the pre-Lopez U.S. positions could not be more striking: the Australian courts refuse to consider all commerce as inter-state and refuse to use economic criteria to determine whether a particular activity has the required connection with inter-state commerce. Australian Courts, like the Canadian courts, would not dream of calling everything commerce just because everything affects commerce.

C. Other Powers

It must be admitted that, despite the similarity in the broad scheme for the distribution of powers between the United States and Australia, there is one major difference relevant to the area under consideration here: the Australian Constitution, unlike the American, confers on the federal legislature power over “foreign corporations, and trading or financial corporations formed within the limits of” Australia (section 51(xx)). Much of what must be subsumed under the American commerce clause can be dealt with in Australia under section 51(xx) (a fact which also explains the relatively small number of cases under the Australian trade and commerce power compared to the American commerce clause or, for that matter, the Canadian trade and commerce power). However, the Australian corporations’ power is not interpreted with anything near the generosity of the pre-Lopez American jurisprudence. Thus, in Re Dingjan; ex parte Wagner, a

71 Australian Nat’l Airlines Comm’n, 138 C.L.R. 492.
72 R v. Burgess; ex parte Henry, 55 C.L.R. at 627; Airlines of New S. Wales Ltd., 113 C.L.R. at 54.
73 See Huddart Parker, 44 C.L.R. at 492.
statute permitting the setting aside of contracts "relating to the business of" a corporation referred to in section 51(xx) was held invalid. Section 51(xx), in other words, is nothing like a power over anything that might affect the business of a corporation.

Space does not permit here any further examination of the evolving Australian case law on section 51(xx), nor of the view expressed in some quarters that the interpretation of a federal power totally unrelated to trade and commerce—that over external affairs (section 51(xxix)—might, with the growth in the number and coverage of international agreements, eventually have the potential to confer unrestricted, or insufficiently restricted, authority on the federal Parliament.75 It is sufficient to note that the dissenters in Lopez and Morrison can claim no support for their view from constitutional interpretation in Australia.

CONCLUSION

Admittedly, one of the assertions of the minorities in Lopez and Morrison76 is confirmed by a consideration of the Canadian and Australian law: in neither of those two countries is the law completely certain. But in what area is the law completely certain? Canadian and Australian courts show a distinct preference for drawing lines beyond which their respective federal legislatures may not go, even though this leads to some uncertainty, in borderline cases, about whether or not a particular statute is invalid.

The experience of both countries, and especially of Canada, shows that it is possible to develop over time a reasonably well-rounded and predictable series of criteria to assist in the judgments that must be made in connection with judicial review on federal grounds. Drawing such lines will not always be easy; it will not involve criteria that can be automatically applied without further thought. But judges are not paid to carry out tasks that are easy and require no thought. With a degree of effort that is well within their capacity, judges can enforce a distinction between things that are, and things


76 Lopez, 514 U.S. at 630; Morrison, 120 S.Ct. at 1759-60. Thomas, J. aptly commented that "the one advantage of the dissent's standard is certainty: it is certain that under its analysis everything may be regulated under the guise of the commerce clause." Lopez, 514 U.S. at 600.
that are not, inter-state and overseas commerce, and they can do so in a way that is tolerably certain and predictable.

It is, of course, a grave error to attempt to draw conclusions from comparative law without taking into account the differences that exist between countries. The differences between Canada and the United States, in particular, are quite significant having regard to the different schemes for the federal distribution of powers and, more broadly, the existence of a separate civil-law system in Quebec and the cultural differences between English Canada and Quebec. Nevertheless, the Canadian experience is valuable not because the United States should draw the line in the same place as the Canadians—given the differences, such an argument could not possibly be sustained—but because it shows that the enterprise of line-drawing is not a hopeless or pointless one. The Australian jurisprudence, on the other hand, shows that, in a system which divides powers between the center and the regions in much the same way as the United States (enumerated federal powers, residue to the states), lines can be drawn between inter-state commerce and everything else. It is not just the peculiar setup of the Canadian scheme for the distribution of powers that enables such a thing to happen.

More broadly, there is, in both Canada and Australia, not a trace of the skepticism about judicial review which motivates and lies behind much of the debate in and around *Lopez* and *Morrison*. Neither the Canadian nor the Australian Constitution contains any more compelling indication than exists in the United States Constitution that the Courts are authorized to practice judicial review on federalism grounds. Nevertheless, judicial review is considered, in both countries, as "axiomatic" in a federal system, in part because of the example of the United States. Despite all the doubts in the United States about the legitimacy of judicial review, it was clearly being practiced there when both the Canadian and Australian Constitutions were written. The drafters of each of those documents, therefore, considered that it was a natural part of federalism which would also exist in the systems which they were setting up. Furthermore, judicial review of colonial legislation had existed even before the federations themselves.

Even so, the lack of a judicial anti-judicial-review lobby in both Canada and Australia is quite striking. The legitimacy of judicial review is simply a non-issue. In contrast to the United States, no judge in

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77 See Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 262.
Canada or Australia advocates "that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy." If asked about the legitimacy of judicial review, the overwhelming majority of Canadian or Australian constitutionalists would doubtless say that a scheme committing the enforcement of federalism to politicians would be bound to be ineffective owing to "the absence of structural mechanisms to require [legislatures] to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so."

Comparative constitutional law cannot promise to the Justices of the Supreme Court of the United States any absolutely certain means of determining whether a statute is valid under the commerce clause. But it can say that, by enforcing the commerce clause and saying that at least some things do not come within it, the Supreme Court is on the right road, or at least on the same road as Canada and Australia. It also can say that the drawing of boundaries is a difficult task, but by no means impossible. By making these points, it lends support to the view that the over-reaction of the Supreme Court of the United States to its own errors in the 1930s and to the pressure that was placed on it as a result should be corrected, and that the United States should move back into the mainstream of modern federalism by re-introducing effective judicial review of Congress's compliance with the commerce clause.

78 *Morrison*, 120 S. Ct. 1769 (Souter, J., dissenting).
79 See the discussion in Hogg, *supra* note 15, at 124–32.