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DIFFERENCES BETWEEN CANADIAN AND U.S. FEDERAL SYSTEMS – RESULTING EFFECTS ON THE ABILITY TO DEAL WITH CROSS-BORDER AND INTERNATIONAL ISSUES

*Daniel Farber**

I was asked to address the question of how U.S. Federalism impacts the implementation of border agreements. Just so I do not leave you in suspense, I will begin by giving you my answer. Ten years ago, I would have said the answer to the question of how federalism impacts the implementation of border agreements was “not at all,” that federalism presents no barrier to implementation of any conceivable agreement that might be reached with another country. Now my answer would be a little bit different than ten years ago. There are some (at this point, relatively confined) areas where federalism *could* be a problem, although I think, as a practical matter, not a severe one. We are in a state of transition in the U.S. in our thinking about federalism; and it is not clear where we are going. It is not clear whether the last ten years are the beginning of a massive shift, or merely a small blip.

The text of the U.S. Constitution, as it bears on federalism, has been essentially unchanged in the most important respects for two hundred years. The most significant changes were the Civil War amendments, which increased the federal government's authority in the area of civil liberties and civil rights. Although the text otherwise is now largely what it was 200 years ago, there have been dramatic changes in constitutional doctrine and in the scope of the federal government.¹ (Intriguingly, courts have played similarly fast and loose with the constitutional text in Canada, but in the opposite

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¹ Unlike the U.S. Constitution, the Canadian Constitution assigns only a few specific limited powers to the provinces, leaving the residuum of power to the federal government. In the wake of the American Civil War, the drafters of the Canadian Constitution intended to create a more centralized system than the United States's. See 1 Peter W. Hogg, *Constitutional Law of Canada* § 5.3 at 5-14 B 5-15. (loose-leaf ed.) For example, the federal government was given the power to appoint provincial judges and lieutenant governors (quite contrary to our own Supreme Court's anti-commandeering doctrine). Nevertheless, the courts were hostile to federal power, which they restricted sharply while aggressively expanding provincial powers. See Hogg, *supra*, at 5-16 — 5-18; L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 *Ariz. J. Int'l & Comp. L.* 93, 117-21 (1998).

digress direction, by creatively limiting the federal governments.) Given our time limitations this morning, I will not take you on a complete guided tour of U.S. Constitutional history. Instead, let me oversimplify by dividing history in half, with 1937 as the dividing point.

This division is a gross oversimplification, but it does seem clear that there was a historic change in 1937. Before 1937, the activities of the federal government were still relatively small, and the courts were relatively active in policing the boundaries of federalism. An extreme case from the 1890's, which epitomizes the era was *United States v. E.C. Knight*.² The issue was whether the Sherman Act, the U.S. anti-trust law, could be applied to a company that had acquired ninety-eight percent of the sugar manufacturing capacity in the United States. In essence, the Supreme Court said, "No, Congress has the ability to regulate interstate commerce, but manufacturing is not commerce. Manufacturing occurs before commerce takes place." Therefore, the existence of a nationwide monopoly was not a sufficient predicate for federal intervention. Thus, the courts in this time period tried to distinguish between commerce on the one hand, and manufacturing, agriculture, and mining, on the other hand. Labor relations tend to be put on the non-commerce side of that divide, so that congressional efforts to deal with minimum wages or labor unions or similar issues were subject to resistance by the courts.³

The result was a collision between the government and the Supreme Court over the New Deal. Franklin Roosevelt's efforts to pass major new federal legislation ran into a stubborn Supreme Court majority intent on maintaining traditional divisions of authority between the federal and state government. The outcome of this head-on collision was a retreat by the Supreme Court.⁴ (In Canada, there was apparently a similar collision between the federal legislature and the Privy Council, but the Privy Council stood its ground.)⁵ After 1937 we see much different views of federalism. For the next fifty or sixty years, the Supreme Court seemed relatively uninterested in limiting federal power. For example, by the 1960's we find the Supreme Court upholding the use of the commerce clause, as a basis for civil rights legislation dealing with discrimination against blacks in hotels

² 156 U.S. 1 (1895). For the parallel Canadian decisions, see Hogg, *supra* note 1, at § 20.2(a).

³ See *Railroad Retirement Board v. Alton Rd.*, 295 U.S. 330 (1935); *Hammer v. Dagehart* (The Child Labor Case), 247 U.S. 251 (1918).

⁴ For an overview of recent appraisals of this constitutional crisis by historians, see Daniel A. Farber, *Who Killed Lochner?*, ___ Geo. L.J. ___ (2002).

⁵ See Hogg, *supra* note 1, at § 17.4(a).

and restaurants and in employment.⁶ This nationwide anti-discrimination legislation based on the commerce clause was upheld by the Court with very little difficulty in a way that would have been utterly shocking to judges before 1937.

These dramatic changes in judicial doctrine have taken place without getting corresponding changes in the text. The text has, perhaps, set the contours of the debate, but it has not had a controlling influence on the outcomes. In the U.S. we have seen the Supreme Court, especially in the last fifty or sixty years, taking a Constitution that supposedly gave only limited powers to the federal government, and over time expanding its interpretation of those powers, until they nearly seemed to cover the universe of regulatory activity. Canadians should not be shocked by this: their courts have taken a constitution designed to create a more centralized government than ours, and turned it into a weaker one.⁷

With the remainder of my time, I would like first to tell you a little bit more about this post 1937 consensus, and its application to border agreements. Second, I want to talk about the cracks in the consensus that have recently appeared. Third, I want to speculate very briefly about the future.

In order to understand the post-World War II consensus and how it came about, you need to know more about the situation as of 1937. I told you about the division the courts made between manufacturing and agriculture on the one hand, which were considered to be state concerns, and interstate commerce—interstate trade and interstate sales on the other hand, which were federal concerns. The picture was not quite that simple. There were some exceptions in which the court had allowed the federal government to regulate what were essentially non-interstate transactions.

One exception involved what was called the stream of commerce. For example, a slaughterhouse in Chicago brought cattle in from the American west, slaughtered the animals, and shipped the meat out all over the country.⁸ The Supreme Court said the slaughterhouse was subject to federal regulation even though the slaughterhouse company itself did not engage in interstate transportation and its slaughtering activities were not themselves interstate.

⁶ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁷ The evolution of Canadian law is especially interesting given the broad powers seemingly bestowed on the federal government, such as the power “to make laws for the peace, order, and good government of Canada,” a power that has been construed very narrowly. See Hogg, *supra* note 1, chapter 17. Notably, some areas that the U.S. Supreme Court views as the core of state authority, such as criminal law, are exclusively federal in Canada. See Hogg, *supra* note 1, at 18.

⁸ *Swift & Co. v. United States*, 196 U.S. 375 (1905).

The local activities of the slaughterhouse were subject to federal regulation because of their role in the stream of commerce.

Another important exception related to the channels of commerce. Congress could regulate what passed through interstate commerce even though the effect of regulation was to control local activities. For example, Congress could ban interstate transportation of lottery tickets, in order to keep interstate commerce pure from these corrupting items.⁹ The only purpose of this ban was to affect people buying tickets at a local level. There was nothing wrong with the tickets themselves. There was no physical danger or even moral danger in the actual transportation of tickets. The goal of this ban was to protect popular morals, which is generally a state rather than federal concern.

A third exception was for events that “directly affected” commerce. Even if an activity by itself was not interstate, if it had an immediate or clear effect on interstate commerce, Congress might be able to act.¹⁰

Before 1937, there was enough resistance to keep these exceptions narrow. What happened after 1937 was that the exceptions swallowed up the rule. By the early 1940's, we had *Wickard v. Filburn*.¹¹ This is a case where a farmer grew wheat to feed livestock on his own farm. The question was whether congressional statutes regulating the wheat industry could be applied to him. This was purely a local activity—the farmer was not shipping anything in interstate commerce—but the Court said the effect of this kind of use of grain by all farmers was substantial enough that, taken altogether, it had an effect on interstate grain prices and on supply and demand for wheat. Therefore, Congress had the power to regulate the local activities of this wheat farmer. Using that kind of reasoning as a predicate the Court was able to in the 1960's to uphold the Civil Rights legislation that I mentioned earlier.¹²

I have been focusing on the commerce clause because that is the most important of congressional powers, but in the post-war period, other congressional powers were also very broadly construed. The spending clause—the power to spend money and to attach conditions to the funds—provides Congress with great leverage. The federal government can accomplish all kinds of things either by subsidizing activities or by attaching

⁹ See *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903).

¹⁰ See *Houston, E. & W. Tex. Ry. v. United States* (The Shreveport Rate Case), 234 U.S. 342 (1914).

¹¹ 317 U.S. 111 (1942).

¹² Similarly broad views of the commerce power were taken in other cases such as *Perez v. United States*, 402 U.S. 146 (1971), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

conditions to other kinds of financing. The Court has been very tolerant in terms of the object of the spending, in terms of what kinds of projects could be subsidized and in giving Congress a great deal of leeway to attach conditions to the money.¹³

In foreign affairs, the view was essentially that the federal government had complete control of foreign affairs.¹⁴ The states were largely excluded from anything relating to foreign affairs. States' rights were not a consideration when Congress and the President were dealing with international affairs. Similarly, in the area of Civil Rights, building on both the Commerce Clause and on the Civil War amendments, the U.S. Supreme Court also save Congress leeway to attack various kinds of discrimination and to protect individual rights.¹⁵

All of that is in the nature of a large historical introduction. Let me talk briefly about what has been happening recently, mostly since 1990 or so.

Academics fired the early shots in attacking the post-New Deal consensus. For example, Richard Epstein of the University of Chicago, a well-known libertarian scholar, has argued that the post-1937 laws are just wrong.¹⁶ He argues that the Court had it right before 1937, with those distinctions between manufacturing and agriculture on the one hand and commerce on the other hand. In Epstein's view, the Court should return to these distinctions. This means that a great deal of the federal labor legislation, anti-discrimination legislation and environmental legislation that we have seen for the past fifty or sixty years, would all be unconstitutional. There have also been attacks by other scholars on the breadth of the foreign affairs and treaty powers. Scholars have argued that the Congress and the President should not be able to use the treaty power as a way of overriding the autonomy of the individual states and that states rights should continue to play some role in that area.¹⁷

¹³ See *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁴ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (foreign affairs is inherent aspect of national power); *Missouri v. Holland*, 252 U.S. 416 (1920) (Tenth Amendment does not limit treaty power).

¹⁵ In addition to the cases cited in note 6 supra, see *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

¹⁶ Richard Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). See also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

¹⁷ For discussion of the revisionist states' rights view of the treaty power, see David Golove, *Treaty-Making and the Nation: The Historic Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 101 (2000); Curtis Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 391 (1998).

The first sign that the courts might be responsive to some of these arguments involved issues of state immunity. These issues arise when Congress regulates state governmental activities, requires state officials to assist in implementing federal law, or allows law suits against the states for damages.

In 1976, the Court recognized some degree of immunity of state activities from federal regulation when it struck down the application of the federal minimum wage law to state employees.¹⁸ Now, that particular innovation did not last. The U.S. Supreme Court pulled back and has not pursued that line of attack on federal power, but has been very active in two related areas.¹⁹

First, the Court has been active in the area of damage immunities for states. The Court has been very vigilant about protecting the states from liability for damages under federal law.²⁰ For example, a couple of years ago the Court held that states could not be sued for infringing patents or copyrights or other intellectual property rights.²¹ Although the states are not involved in a very major way in utilizing intellectual property, it is still a ruling that is of concern to other countries and to foreign firms.

Second, the Court has taken a very firm stand concerning the federal government's ability to use state officials for implementation purposes, something that the Court refers to as commandeering. The Court has said this is simply not permissible, even in cases where it seems to be quite innocuous.²² For example, the Brady Act required local sheriffs to do minimal background checks on individuals who were purchasing guns. The U.S. Supreme Court said this violated the sacred principle of state autonomy by essentially drafting state officials as if they were mere foot soldiers in the federal bureaucracy.²³

These cases could be considered exceptional because they involve direct action of the federal government against state governments. What was more

¹⁸ *National League of Cities v. Usery*, 426 U.S. 833 (1976).

¹⁹ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities*). Somewhat surprisingly, *Garcia* has survived unscathed and nearly unquestioned for fifteen years during which the conservative majority has been actively pursuing a states' rights agenda.

²⁰ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

²¹ *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, 527 U.S. 666 (1999).

²² See *New York v. United States*, 505 U.S. 144 (1992). So eager was the Court to emphasize this rule that it insisted that not even a compelling federal interest could justify commandeering. It is a little hard to take seriously, however, the notion that the Court would countenance a major threat to national security or public health if commandeering were the only feasible solution.

²³ *Printz v. United States*, 521 U.S. 98 (1997).

surprising was when the Court began reducing the federal government's power to regulate private individuals. For the first time since 1937, the U.S. Supreme Court has found in two recent cases that Congress went too far, exceeding the boundaries of its powers under the Interstate Commerce Clause. In both of these cases, the Court stressed the involvement of non-commercial activity.

The first case was *United States v. Lopez*.²⁴ *Lopez* struck down a federal law that prohibited carrying guns within one thousand feet of a school.²⁵ The second case involved the Violence Against Women Act.²⁶ The Violence Against Women Act created a federal remedy for gender-motivated violence against women. The Court said, essentially, that it was one thing to expand the Commerce Clause to cover the whole economy but they had to draw a line somewhere. They were going to draw a line short of this kind of legislation, which touched on issues of criminal law that are historically in the U.S. (unlike Canada) the concern of the state governments.²⁷

The big question then is how far is the Court going to go? Is the conservative majority just nibbling around the edges of federal power, or is this the beginning of a counter-revolution? The only honest answer is we do not know.

Justice Thomas has adopted large chunks of Richard Epstein's position. He would like, if not to undo the New Deal, at least to roll back twenty or thirty years of more recent federal legislation by construing federal powers narrowly. It is not clear whether he has any other real supporters. My impression is that the other conservative Justices who have been the majority in these cases do not see themselves as rolling back established federal authority. They see themselves as holding the line. They see that the federal government expanded greatly after 1937 and that a new kind of equilibrium was reached. Under the new equilibrium, they seem to think, the federal government had power over economic transactions, but only recently has Congress tried to push beyond regulating economic transactions into social areas. The U.S. Supreme Court is trying to resist this trend, but not to challenge federal control of the economy. That, at least, is my interpretation of the situation.²⁸

The future depends a great deal on judicial appointments. We do not know who is going to be appointed to the Court over the next several years or

²⁴ 514 U.S. 549 (1995).

²⁵ Gun Free School Zone Act 18 U.S.C. § 922 (q)(1)(A)(1990).

²⁶ Violence Against Women Act 42 U.S.C. § 13981 (1994).

²⁷ *United States v. Morrison* 529 U.S. 598 (2000).

²⁸ See Daniel A. Farber, *Pledging a New Alliance: An Essay on Sovereignty and the New Federalism*, 75 Notre Dame L. Rev. 1133 (2000).

how strongly they will feel about these issues. Nevertheless, I doubt we will go back to 1937 in this area of the law. The Humpty Dumpty of states' rights has fallen off the wall; and I doubt the Supreme Court can put it together again.

Let me just wrap up very quickly. As I said at the beginning, federalism is clearly not a major problem in border relations. Ten years ago, it was a very small problem. Now, within some limited areas where state government is directly involved, federalism is always a potential issue that could at least prompt litigation. For example, requiring the states to actively administer border agreements may be problematic under current law.

As to what the future will hold in the longer run, I think I will take refuge in probabilities, like the weather forecasters. In terms of the future of federal power, I would say that my forecast is sixty percent probability of scattered clouds, forty percent probability of some rain, and a slight chance of high winds, lightning and hail damage.