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RECASTING SOCIAL CANADA:  
A RECONSIDERATION OF FEDERAL  
JURISDICTION OVER SOCIAL POLICY†

1 *Introduction: The constitutional framework of the politics of social policy*

Who speaks for Canada? For the past fifty years, during both the expansion and the retraction of the Canadian welfare state, the politics of social policy has revolved around this single question. At issue, though, have been not only the respective roles of the federal and provincial governments but, more fundamentally, the very nature of the Canadian political community. On the one hand, there are those who claim that we are a community of communities, or a union of founding nations, bound together for the limited purpose of cooperating on matters of mutual advantage. For them, social policy is the quintessential provincial area of responsibility, and federal attempts to direct the growth of Social Canada, except to facilitate and enable provincial decision making, run against the grain of the division of powers. On the other hand, there are those who assert the existence of a truly Canadian political identity, one that both encompasses and transcends our linguistic and regional diversity. Social Canada is the cement of that political identity, both acknowledging the existence of and giving effect to obligations of distributive justice between the citizens of the constituent units of the federation, bound together in a community of fate. For those who hold this view, the federal government, as the single government that represents all Canadians, has not only a legitimate but also a central role to play. The provinces' growing resistance to federal involvement in the social policy arena thus represents a worrisome turn in the evolution of the federation.

In this article, I step back from the politics of social policy to reflect on the constitutional framework within which that politics occurs. My focus is the scope of the federal government's jurisdiction over social policy. A distinctive feature of Canadian social policy since World War II has been the central role played by the federal government in the development of

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the Canadian welfare state, now commonly referred to as the social union. The federal government has played this role through a variety of policy instruments, centred on conditional and unconditional grants to the provinces (shared-cost grants, block grants, and equalization payments), as well as income support to individuals, both in the form of direct benefits (*e.g.*, Old Age Security) and through the personal income tax system. The conventional wisdom is that the federal role has been so central that the Canadian welfare state would be far less extensive than it is today in the absence of federal activity.<sup>1</sup>

The federal role has been all the more remarkable in light of the constitutional limits on federal jurisdiction over social policy. Although jurisdiction over social policy has long been and continues to be disputed by both levels of government, I argue that underlying the politics of social policy lies a set of legal assumptions. These assumptions hold that the Constitution draws a sharp distinction between jurisdiction over the financing of contributory social insurance and social services, and jurisdiction over their design and delivery. Short of explicit constitutional amendment (as occurred in the case of unemployment insurance and pensions), federal jurisdiction is thought to be confined to the former realm, largely exercised through the use of the so-called federal spending power, whereas provincial jurisdiction encompasses both the former and the latter areas.<sup>2</sup>

In this article, I question this assumption. I begin, in Part II, by exploring the foundations of the limited view of federal jurisdiction over social policy. The origin of the standard view lies in a pair of decisions handed down by the Supreme Court of Canada and the Judicial Committee of the Privy Council in 1936 and 1937 that narrowly construed the scope of federal legislative power over social policy.<sup>3</sup> In brief, these decisions held that the federal government was incompetent to enact the impugned national unemployment insurance scheme, other forms of contributory social insurance (*e.g.*, health insurance), or laws that regulated or even provided social services. However, the judgments gave the federal government an entrée into the social policy arena by recognizing

1 K. Banting, *The Welfare State and Canadian Federalism* (Montreal: McGill-Queen's University Press, 1987) at 47–58 [hereinafter *Welfare State*].

2 In this article, I will not be examining the income tax system, another key instrument for the federal government in the social policy arena.

3 *Canada (A.G.) v. Ontario (A.G.)*, [1936] S.C.R. 427, 3 D.L.R. 673 (*Reference re The Employment and Social Insurance Act*) [hereinafter *UI Reference (SCC)* cited to S.C.R.]; *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 355, 1 D.L.R. 684 (P.C.) (*Reference re The Employment and Social Insurance Act, 1935*) [hereinafter *UI Reference (PC)* cited to A.C.]. Although the Privy Council's judgment was handed down in the same case as the Supreme Court of Canada's reasons, I refer to these judgments collectively as the *UI Reference* decisions, in order to emphasize that, although the two judgments were handed down in the same appeal, each must be considered on its own.

the existence of the federal spending power, whereby the federal government can make grants in areas of provincial jurisdiction and attach conditions thereto. Critics of these decisions argue that the spending power allows the federal government to circumvent the division of powers, noting that the distinction drawn between program financing and delivery rests on a weak doctrinal foundation and runs counter to important constitutional values. I am sympathetic to these arguments, but, in my view, constitutional scholars have ignored a logically prior question – why social policy falls under *exclusive* provincial jurisdiction at all. Upon closer examination, the legal foundations of this proposition are weak. This fact throws into question a generation of scholarship on the division of powers and social policy.

In Part III, I explore the extent to which this legal assumption, though problematic, has framed the politics of social policy for the past fifty years. Despite rhetoric to the contrary – especially the disagreement between the federal government and Quebec over the scope of the spending power – the assumption that the Constitution draws a sharp distinction between the financing and the design and delivery of contributory social insurance and social services, with federal jurisdiction confined to the former, has secured widespread acceptance among political actors.

In Part IV, in light of the conclusions of Part II, I return to first principles. The most promising source of insight is the economic literature on the allocation of responsibilities among levels of governments within federations. What is striking is the prevailing consensus that federal governments have a crucial role to play in redistribution, to prevent races to the bottom through inter-jurisdictional competition for mobile capital and high-income labour.

In Part V, I argue that the rationales offered for a federal role with respect to social policy require that we reassess the assumption that, short of explicit constitutional amendment, the federal government's jurisdiction over social policy is limited to finance and does not extend to program design and delivery. My claim is that the economists' arguments canvassed in Part IV can count as reasons in *legal* argument for federal jurisdiction over social policy. I focus on the federal government's power to legislate for the peace, order, and good government of Canada (the POGG power), although I also touch on the federal government's jurisdiction over trade and commerce.<sup>4</sup> The contemporary Supreme Court has

4 Andrew Coyne, a noted political commentator, has recently made a similar suggestion:

It is true that as federal transfers diminish, so does federal leverage. But rather than simply wash our hands of national standards altogether, I think it is time that we looked at equipping the federal government with other means of enforcement. If it can no longer buy its way into provincial jurisdiction, what about the legislative route? I do not think you would need a constitutional amendment. It seems to me that so far as there

significantly expanded the scope of federal legislative reach under these heads of jurisdiction in the areas of economic and environmental policy. At the heart of both heads of jurisdiction lies the so-called provincial inability test. My central point is that, properly understood, the provincial inability test allows for federal jurisdiction over subject-matters where there is the risk of races to the bottom, which is exactly the rationale that economists have offered for a federal role in redistribution.<sup>5</sup>

In Part VI, I suggest the practical importance of my legal analysis, in light of some current and looming issues on the national social policy agenda.

## II *The constitutional foundations of the Canadian welfare state*

### A. INTRODUCTION

The constitutional foundations of the Canadian welfare state can be traced to the decisions handed down by the Supreme Court of Canada

are national dimensions to these programs, the federal government would be well within its rights to invoke the Peace, Order, and Good Government power in defence of the social union ...

A. Coyne, 'The Case for Strengthening Federal Powers' *Policy Options* (April 1997) 19 at 23. For another argument along these lines, see B. Strayer, 'The Flexibility of the *BNA Act*' in T. Lloyd & J. McLeod, eds., *Agenda 1970: Proposals for a Creative Politics* (Toronto: University of Toronto Press, 1968) 197 at 211-2.

By contrast, Andrew Petter's recent suggestion that it may be time to vest the federal government with primary responsibility for health care presumably relies on constitutional amendment, not judicial interpretation. A. Petter, 'The Search for an Effective Canadian State: A Constitutional Conversation for the New Millennium' (Address to Conference on New Approaches to Constitutional Law, Faculty of Law, University of Toronto, 26 October 2000) [unpublished].

<sup>5</sup> This article fills a gap in the legal literature. Legal scholars writing on the division of powers and social policy have largely focused on the sources and limits of the federal spending power (see, e.g., the articles cited in note 66 *infra*). That debate has not taken seriously the view that federal jurisdiction extends beyond program financing to design and delivery. As well, some attention has been given to the interaction between the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule 8 to the *Canada Act 1982* (U.K.), 1982, c. 11) and federal and provincial social programs, including the compatibility of the arrangements of fiscal federalism with the Charter. (E.g., S. Choudhry, *Challenging the Repeal of the Canada Assistance Plan by Bill C-76: A Case Development Report prepared for the Charter Committee on Poverty Issues* (1995)). This scholarship proceeds on the assumptions regarding the division of powers I identified earlier. Some scholars have examined the constitutional and administrative law issues surrounding the enforcement of the *Canada Health Act*, R.S.C. 1985, c. C-6, and the (now repealed) *Canada Assistance Plan*, S.C. 1966-1967, c. 45, as rep. by S.C. 1995, c. 17, s. 32 (e.g., S. Choudhry, 'The Enforcement of the *Canada Health Act*' (1996) 41 McGill L.J. 461 [hereinafter 'Enforcement']), as well as the actual record of federal enforcement of the conditions laid down therein (e.g., S. Choudhry, 'Bill 11, The *Canada Health Act* and the Social Union: The Need for Institutions' (2000) 38 O.H.L.J. 39). This writing, however, also takes the current understanding of the division of powers as a given.

and the Privy Council in 1936 and 1937, in the *UI Reference*. The issue in that case was the constitutionality of the Employment and Social Insurance Act, 1935, one of the six statutes enacted by Parliament in 1935 as part of R.B. Bennett's New Deal.<sup>6</sup> The decisions are usually invoked, without much detailed discussion, for their five core holdings: (1) that contributory unemployment insurance, at the time, lay outside federal jurisdiction; (2) that contributory social insurance more generally, for example, health insurance, lies outside federal jurisdiction; (3) that the regulation of social services lies outside federal jurisdiction; (4) that the federal government cannot provide social services directly; but (5) that the federal government may spend monies in areas *outside its jurisdiction* (*i.e.*, in provincial jurisdiction) by making grants to individuals, institutions, and provinces, either unconditionally or by attaching conditions thereto.

The *UI Reference* decisions warrant close scrutiny, because they rest on controversial propositions of law that lacked firm constitutional support in the 1930s. Moreover, those aspects of the decisions that were in keeping with the Privy Council's stance on the division of powers must now be reconsidered in light of the revolution wrought by the Supreme Court of Canada with respect to the federal government's jurisdiction over economic and environmental policy. Indeed, it is surprising that the strong link between the Privy Council's economic and its social policy jurisprudence, and the need to revisit the latter in light of the rejection of the former, has been ignored in the vast literature on the division of powers and social and economic policy.

What did the Employment and Social Insurance Act do? It is important to be clear on these details because the breadth or narrowness of the holding turns, to a considerable extent, on the specifics of the impugned regulatory scheme. The focus of the litigation was on the part of the Act that created national unemployment insurance. The key provisions governed the manner in which the scheme was funded. The Act created the Unemployment Insurance (UI) Fund.<sup>7</sup> Monies for this fund came from three sources: monies allocated for this purpose by Parliament and the contributions of both employed persons covered by the Act and their employers. The Act thus established a contributory insurance scheme,

6 The *Limitation of Hours of Work Act*, S.C. 1935, c. 63 (establishing maximum hours of work); the *Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 4 (establishing a weekly day of rest); the *Minimum Wages Act*, S.C. 1935, c. 44 (establishing administrative arrangements for specifying the minimum wage); the *Employment and Social Insurance Act*, S.C. 1935, c. 38 (establishing unemployment insurance for industrial workers); an amendment to the *Criminal Code*, S.C. 1935, c. 56 (prohibiting specified commercial practices); and the *Dominion Trade and Industry Commission Act*, S.C. 1935, c. 59 (establishing a commission to regulate competition and a federal trademark, the Canada Standard).

7 *Employment and Social Insurance Act*, *ibid.* at s. 17(1).

although, since the Fund included public monies from general tax revenues, the scheme was not funded solely through contributions. The Act placed employees who fell within its scope, and their employers, under a legal duty to pay contributions, making their participation mandatory.<sup>8</sup> Moreover, employers were made liable for both their own contributions and the contributions of their employees and were given the right to deduct contributions paid on behalf of their employees from wages.<sup>9</sup>

In addition to establishing the UI Fund, the Act also defined its beneficiaries. These persons would be insured against unemployment if they were engaged in 'insurable employment.'<sup>10</sup> Insurable employment was defined in a schedule to the Act, rather generously, as '[e]mployment in Canada under any contract of service or apprenticeship,' but was made subject to a variety of important exceptions that excluded, among others, agricultural workers, workers in the fishery and forestry industries, and teachers.<sup>11</sup> The Act created a right for beneficiaries, when unemployed, to receive payments,<sup>12</sup> subject to the satisfaction of certain eligibility criteria laid out in the Act (*e.g.*, having paid forty weeks of contributions in the two years immediately preceding the application for benefits).<sup>13</sup> The central point, for our purposes, is that because of the contributory nature of the scheme, only unemployed persons who had paid into the scheme, as opposed to the unemployed generally, had a right to benefits.

Both the Supreme Court of Canada and the Privy Council found those parts of the Act creating the UI Fund to be unconstitutional and, because these provisions were integral to the Act as a whole and consequently could not be severed, struck the Act down in its entirety. But what was the basis for this holding? The Privy Council's judgment offers meagre guidance. The bulk of the judgment was directed at the federal spending power, asserting that it exists and trying to impose some constitutional limits on its exercise. Academic commentary has focused on this part of the holding. But even here, properly interpreting the portion of the judgment dealing with the spending power is impossible without reference to the prior issue of jurisdiction. Inasmuch as the Privy Council sought to constrain the spending power to prevent the federal government from achieving through spending what it could not achieve through direct regulation, these limitations cannot be understood

8 Ibid. at s. 17(2).

9 Ibid. at s. 17(3).

10 Ibid. at s. 15(1).

11 Ibid. at Sched. I, pt. I(a).

12 Ibid. at s. 19.

13 Ibid. at s. 20(1)(i).

without reference to the scope of provincial and federal jurisdiction in the social policy arena.

The heart of the Privy Council's reasoning as to why the scheme fell outside federal jurisdiction is remarkably terse:

There can be no doubt that, *prima facie*, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature.<sup>14</sup>

There seem to be two arguments at work here: first, that the Act was unconstitutional because 'insurance of this kind' lay within provincial jurisdiction; and, second, that the scheme was unconstitutional because it affected 'the contract of employment,' the regulation of which also lay within provincial jurisdiction. This bifurcated approach to the interpretation of the Privy Council's holding finds support in the majority reasons of the Supreme Court of Canada. In the absence of any sustained analysis in the Privy Council's holding, it is to that judgment that we must turn. Although five of seven judges hearing the appeal ruled the federal government's scheme unconstitutional, there were not one but two sets of majority reasons in the Supreme Court of Canada. Rinfret J. received concurrences from three of the seven justices hearing the appeal (Cannon, Kerwin, and Crocket JJ.). In addition to concurring with Rinfret J., Kerwin J. wrote his own reasons, and he received two concurrences (one from Cannon J., who had also concurred with Rinfret J., and one from Rinfret J. himself). Although there are important differences between the two judgments – most centrally, Kerwin J. provides the first judicial recognition of the federal spending power, whereas Rinfret J. does not refer to it at all – in their analysis of the unconstitutionality of the federal scheme, the two decisions are nearly identical and, accordingly, can be considered together.

#### B. REGULATION OF EMPLOYMENT

The arguments under the 'regulation of employment' limb of the judgment are given more prominence by the Supreme Court, and so I turn to these first. The Court characterized the legislation as purporting to modify contracts of employment for persons falling within the scope of the Act. The Privy Council had previously held in *Toronto Electric Commissioners v. Snider* that contracts of employment fell within provincial jurisdiction under s. 92(13) of the Constitution Act, 1867,<sup>15</sup> since those

<sup>14</sup> *UI Reference (PC)*, *supra* note 3 at 365.

<sup>15</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5.

contracts amounted to a species of civil right.<sup>16</sup> Assuming the correctness of *Snider*, how exactly did the legislation regulate the employment relationship? The thrust of the Court's argument was that the Act was an act in relation to employment because it inserted statutory terms into contracts of employment. Thus, Rinfret J. stated that the Act imposed 'contractual duties as between employers and employees,' or, in other words, created 'civil rights as between the former and the latter.'<sup>17</sup> Kerwin J., likewise, stated that the Act dealt 'with contracts of employment and attache[d] thereto a statutory condition.'<sup>18</sup> But to which contractual terms was the Court referring? The judgments are rather unclear on this point, but they do list a number of features of the unemployment scheme that apparently modified the contractual rights of the parties:

The payment of contributions both by employer and the employee is compulsory.<sup>19</sup>

All conditions prescribed for the payment of these contributions including the right of the employer to recover from the employed person the amount of any contributions paid by him on behalf of the employed person are made essential and necessary conditions of the contract of engagement between the employer and the employee.<sup>20</sup>

[T]he benefits conferred on the employees by the Act are not gifts with conditions attached, which the employees are free to accept or not; the conditions attached to the benefits are made compulsory terms of all contracts in the specified employments.<sup>21</sup>

[I]ndividuals covered by this Part [*i.e.*, Part III] are obliged to become insured by means of a statutory condition attached to the contract of employment ...<sup>22</sup>

Sorting through these points, we find that the candidate contractual terms were (a) a term requiring employees falling within the scope of the Act, along with their employers, to participate in the plan; (b) a term making contributions to the Unemployment Insurance Fund by covered employees and their employers mandatory; (c) a term conferring on employers the right to recover contributions they paid on behalf of their employees.

16 [1925] A.C. 396, 2 D.L.R. 5 (P.C.) [hereinafter *Snider* cited to A.C.]. Curiously, *Snider* was cited by neither the Supreme Court of Canada nor the Privy Council in the *UI Reference*.

17 *UI Reference (SCC)*, supra note 3 at 454.

18 *Ibid.* at 458.

19 *Ibid.* at 450, *per* Rinfret J.

20 *Ibid.*, *per* Rinfret J.

21 *Ibid.* at 454–5, *per* Rinfret J.

22 *Ibid.* at 458, *per* Kerwin J.

Let us consider the last term first. Here the Court's argument that the legislation regulated contracts of employment is strongest. Recall Rinfret J.'s characterization of contracts as creating 'civil rights as between' employees and employers. Contractual rights are rights against parties to the contract. To the extent that the Act gave employers a right to recover contributions they paid on behalf of their employees from those employees, the Act did alter their respective contractual rights. However, if this is the basis of the holding, it is quite narrow. Parliament could have re-enacted the scheme without conferring on employers the duty to contribute on behalf of their employees and the right to recover those contributions, for example, by folding the calculation and payment of employee premiums into the annual income tax return. In fact, this is how contributions to the Canada Pension Plan and Employment Insurance are made for self-employed individuals today.<sup>23</sup>

However, the objections of the Supreme Court also related to two other features of the plan – (a) and (b) – which made participation in and contributions to the Plan mandatory for covered employees and their employers. Thus, quite aside from how monies were collected, the mandatory and contributory nature of the scheme figured centrally in the Supreme Court's reasoning. The Court's concern may have been that the Act provided employees with a benefit that they could have contracted for with their employers and, in this sense, amounted to a statutory employment benefit along the lines of employment standards legislation. The statutory unemployment insurance scheme could be analogized, for example, to the replacement of a contributory, employer-sponsored pension plan with a publicly administered plan that was also contributory, or to the substitution of contributory, employer-sponsored health insurance with a publicly operated arrangement that imposed premiums as well.

To put it another way, what was likely dispositive for the Court was that the entitlement to participate in and benefit from the scheme flowed from a beneficiary's former *status as an employee*. But could the legislation have been framed differently so as to avoid this characterization? Any unemployment insurance scheme, of course, conditions the entitlement to benefits on past employment and, as a consequence, would run afoul

23 This characterization of legislative modifications of rights under contracts of employment also fits with the jurisprudence on interjurisdictional immunity, which has held provincial employment standards legislation (*e.g.*, minimum wage laws) to be inapplicable to federal undertakings because it creates new rights for employees against employers (*Québec (Commission du Salaire Minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145 [hereinafter *Bell (1)* cited to S.C.R.]), but has held provincial workers' compensation legislation to be applicable because it creates rights against the *state*, not against employers (*Workmen's Compensation Board v. Canadian Pacific Railway Company*, [1920] A.C. 184 (P.C.) [hereinafter *BC Workmen's Compensation*]).

of *Snider*. However, it is possible to design a publicly administered scheme of contributory insurance that does not fold those contributions into the nexus of employer–employee economic relations. There are a number of interesting possibilities here (all of which presuppose an expansive reinterpretation of the scope of federal jurisdiction over economic policy). One could imagine a contributory scheme of publicly administered health insurance, participation in which was conditioned not on the basis of past or present employment status but on some non-employment-related criterion, such as Canadian citizenship or permanent residency. Moreover, on the ‘regulation of employment’ limb of the *UI Reference*, participation could be mandatory, since it would not alter employer–employee economic relations. Another possibility would be a contributory scheme of publicly administered disability insurance whereby persons were required to make contributions to a fund to insure themselves against the risk of serious disability. Again, participation could be based on non-employment-related criteria. Indeed, one could envision an income security scheme in contributory terms as well, whereby persons were required to pay benefits in order to insure themselves against the risk of low income. Although different in important respects from unemployment insurance, this last possibility illustrates how narrow the ‘regulation of employment’ portion of the judgment really is.

#### C. ‘INSURANCE OF THIS KIND’

The second limb of the Supreme Court’s judgment in the *UI Reference*, though, would appear to foreclose enacting federal legislation along these lines. Recall that the Privy Council held the legislation *ultra vires* because, *inter alia*, ‘insurance of this kind’ lay in provincial jurisdiction. What did the Privy Council mean by ‘insurance of this kind’? Unfortunately, the judgment does not say. Perhaps, however, by examining the impugned scheme, we can shed some light on the Privy Council’s reasoning. One prominent feature of the scheme, as noted above, was that it was *contributory* in nature – that is, only employed persons who contributed financially to the scheme through the payment of what amounted to insurance premiums were able to receive benefits when unemployed. Accordingly, the Privy Council may have been referring to insurance in its strictly technical sense, whereby benefits are paid out from a fund consisting of premiums paid, less operating expenses (and, in the case of for-profit insurers, a profit).<sup>24</sup> Rinfret J.’s judgment supports this interpretation. Consider the following passage:

Insurance of all sorts, including insurance against unemployment and health insurances, have always been recognized as being exclusively provincial matters

<sup>24</sup> This is Keith Banting’s interpretation of this portion of Rinfret J.’s reasons. *Welfare State*, *supra* note 1 at 49.

under the head 'Property and Civil Rights,' or under the head 'Matters of a merely local or private nature in the Province.'<sup>25</sup>

This language suggests that publicly operated, contributory schemes that seek to insure persons against the risk not only of unemployment but also of other misfortunes, such as illness, lie outside federal jurisdiction.

But does this mean that it is beyond federal jurisdiction to create *any* contributory insurance scheme, or only to create ones in which participation is *mandatory*? Suppose, for example, that the federal government enacted legislation creating a scheme of health insurance to which individuals could subscribe on a voluntary basis. One argument that the federal government could invoke in defence of the constitutionality of this sort of scheme would be that it does not intrude on provincial jurisdiction over property and civil rights, since it does not in any way abridge freedom of contract, in this case the freedom to purchase health insurance in the private market, either by prohibiting or regulating private insurance contracts. The salient feature of the scheme at issue in the *UI Reference*, on this reasoning, must have been that participation was mandatory, not simply that it was contributory. Contractual freedom was impaired because beneficiaries lacked the freedom *not* to contract with the state. Indeed, in later litigation concerning the constitutionality of a precursor to the Canada Pension Plan, the scheme was upheld because individuals purchased government annuities for their retirement on a voluntary basis.<sup>26</sup> This interpretation of the Privy Council's reasoning is supported by Kerwin J.'s concurrence, which referred to decisions of the Privy Council in *Re Insurance Act of Canada*<sup>27</sup> and the *Insurance Reference*<sup>28</sup> in support of his conclusion that the legislation was *ultra vires*.<sup>29</sup> In both

<sup>25</sup> *UI Reference (SCC)*, supra note 3 at 451.

<sup>26</sup> *Porter v. Canada*, [1965] 1 Ex.C.R. 200 [hereinafter *Porter*]. An interesting feature of *Porter* that has escaped academic commentary is that purchasers of the federal government annuities established by the *Government Annuities Act*, R.S.C. 1927, c. 7, entered into *contracts* with the federal Crown whereby they undertook to make monthly payments in exchange for the right to an income stream upon retirement. Given that contractual obligations are enforceable in courts of law in much the same way that obligations arising under legislation are, the scheme in *Porter* demonstrates how the use of the spending power can shade into 'coercive' or direct regulation of provincial subject-matters. The significant difference between contractual and legislative obligations, of course, is that the former arise voluntarily, whereas the latter do not. For another example of the use of contracts by a legislative scheme upheld as an exercise of the spending power, see *Central Mortgage and Housing Corp. v. Co-op College Residences* (1975), 13 O.R. (2d) 384 (C.A.) [hereinafter *CMHC*] (legislation authorizing the federal Crown to provide mortgages in furtherance of federal housing policy upheld as exercise of spending power).

<sup>27</sup> [1932] A.C. 41 [hereinafter *Insurance Act of Canada*].

<sup>28</sup> *Canada (A.G.) v. Alberta (A.G.) (The Insurance Reference)*, [1916] 1 A.C. 589 [hereinafter *Insurance Reference*].

<sup>29</sup> The contrast between Kerwin J.'s and Rinfret J.'s reasons is worth remarking on. Given Rinfret J.'s rather sweeping statements, and their dramatic implications for social policy,

those cases, the federal legislation was found to be unconstitutional because it established a compulsory licensing scheme for insurance companies and thus effectively regulated the formation of intra-provincial insurance contracts.

But why would federal laws that impaired contractual freedom be *ultra vires* on federalism grounds? As David Schneiderman has persuasively argued, the Privy Council had by this time articulated a rather expansive conception of provincial jurisdiction centred on s. 92(13), which, it held, conferred on provinces 'quasi-sovereign' authority.<sup>30</sup> Accordingly, in the absence of provincial laws, individuals enjoyed a rather expansive freedom with respect to dealings with property and the creation of civil rights, including contractual freedom. Any kind of coercive federal law that restricted individual freedom would be constitutionally suspect, unless it could be anchored in a specifically enumerated head of federal jurisdiction. Thus, federal laws could interfere with contractual freedom, but only in circumstances specifically authorized by a federal head of jurisdiction. The absence of unemployment insurance as an enumerated head of jurisdiction at the time of the judgment accordingly rendered the scheme unconstitutional. Indeed, a constitutional amendment was eventually enacted to confer jurisdiction on Parliament to enact the scheme.<sup>31</sup> What this suggests, though, is that if a federal head of jurisdiction could have been found, the scheme might have been upheld as constitutional.

So were there heads of jurisdiction that could have performed this task? In its submissions to both the Supreme Court and the Privy Council, the federal government sought to justify the legislation, *inter alia*, pursuant to the POGG and the trade and commerce powers.<sup>32</sup> Both the Supreme Court and the Privy Council rejected these arguments summarily. The background here is that the Privy Council's preference for provincial autonomy over federal legislative authority manifested itself not only in an expansive interpretation of s. 92(13) but also in a narrow interpretation of federal heads of jurisdiction, particularly the POGG and trade and commerce powers. Indeed, given the conception of the division of powers relied on by the Privy Council – one of mutually exclusive spheres

one would have expected him to back up his assertions with citations to the relevant jurisprudence. Remarkably, though, Rinfret J. cited no cases in support of the proposition that social insurance lies outside federal jurisdiction.

30 D. Schneiderman, 'Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the Local Prohibition Case' (1996) 41 McGill L.J. 411; *Reference Re Board of Commerce Act, 1919 (Canada)*, [1922] 1 A.C. 191, 60 D.L.R. 513 at 197 [hereinafter *Board of Commerce* cited to A.C.].

31 S. 91(2A), added by the *Constitution Act, 1940* (U.K.), 3–4 Geo. VI, c. 36.

32 For a summary of the federal government's submissions before the Privy Council, see *UI Reference (PC)*, supra note 3 at 356–60.

of jurisdiction, or ‘watertight compartments,’<sup>33</sup> with little overlap – a broad reading of provincial legislative authority *necessitated* a narrow reading of the scope of federal power.

There is a familiar story here. Consider the POGG power. Although the language of s. 91 is open to the interpretation that the POGG power is a broad, general grant of jurisdiction to the federal government, and the specific heads of jurisdiction enumerated in s. 91 merely illustrations of what POGG means in specific contexts, the courts quickly took the view that POGG was a residuary power that conferred on the federal Parliament jurisdiction to enact laws not falling within the scope of the subject-matters expressly referred to in ss. 91 and 92.<sup>34</sup> Moreover, laws enacted pursuant to POGG could not incidentally affect provincial subject-matters, a fact that limited the scope of the POGG power even further.<sup>35</sup> This, coupled with a broad interpretation of s. 92(13), gave POGG a fairly limited scope. These limitations on POGG were compounded by the Privy Council’s next move, which was to declare that the POGG power was strictly limited in scope to exceptional circumstances or emergencies.<sup>36</sup> Thus, in the *UI Reference* decisions, both courts held that the social and economic upheaval caused by the Depression was insufficiently grave to constitute an emergency for constitutional purposes.<sup>37</sup> This line of cases, though, ignored and implicitly overruled earlier decisions of the Privy Council itself, which had held that the POGG power could be invoked with respect to matters that attained ‘such dimensions as to affect the body politic of the Dominion,’ a definition that clearly encompasses non-

33 *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326, 1 D.L.R. 673 (P.C.) at 354 [hereinafter *Labour Conventions* cited to A.C.].

34 P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) at 443–4 [hereinafter *Constitutional Law*].

35 *Ontario (A.G.) v. Dominion (A.G.)*, [1896] A.C. 348 at 360 (P.C.) [hereinafter *Local Prohibitions Reference*]; *Manitoba (A.G.) v. Manitoba Licence Holders’ Association*, [1902] A.C. 73 at 78 (P.C.) [hereinafter *Manitoba License Holders*]; *Montreal (City) v. Montreal Street Railway*, [1912] A.C. 333 at 343 (P.C.); *Canada (A.G.) v. British Columbia (A.G.)*, [1930] A.C. 111 (P.C.); *Insurance Reference*, supra note 28 at 595; *Snider*, supra note 16 at 406. For commentary, see B. Laskin, “Peace Order and Good Government” Re-examined’ (1947) 25 Can.Bar Rev. 1054 [hereinafter ‘POGG Re-examined’]; E.R. Richard, ‘Peace, Order and Good Government’ (1940) 18 Can.Bar Rev. 243; R. Tuck, ‘Canada and the Judicial Committee of the Privy Council’ (1941) 4 U.T.L.J. 33; W.I. Jennings, ‘Constitutional Interpretation: The Experience of Canada’ (1937) 51 Harv.L.Rev. 1 [hereinafter ‘Constitutional Interpretation’].

36 *Board of Commerce*, supra note 30 at 200; *Fort Frances Pulp and Paper Company v. Manitoba Free Press*, [1923] A.C. 695, 3 D.L.R. 629 (P.C.) at 704 [hereinafter *Fort Frances* cited to A.C.]; *Snider*, supra note 16 at 412–6. For commentary, see Laskin, ‘POGG Re-examined,’ supra note 35; Richard, ‘Peace, Order, and Good Government,’ supra note 35; Jennings, ‘Constitutional Interpretation,’ supra note 35.

37 *UI Reference (SCC)*, supra note 3 at 451; *UI Reference (PC)*, supra note 3 at 366.

emergency situations,<sup>38</sup> and had read POGG to encompass jurisdiction over the 'new' subject-matters of radio and, arguably, of treaty implementation.<sup>39</sup>

A similar story can be told about the trade and commerce power. Early on, the Privy Council held in *Citizens' Insurance Co. v. Parsons* that s. 91(2) conferred on Parliament jurisdiction to regulate international and inter-provincial trade, as well as the 'general regulation of trade affecting the whole dominion.'<sup>40</sup> Although s. 91(2) was potentially broad in scope, particularly given that the Commerce Clause in the US Constitution only confers on the federal government jurisdiction over interstate and international trade,<sup>41</sup> the Privy Council proceeded to narrow the scope of federal jurisdiction. With respect to the international and inter-provincial trade branch of s. 91(2), the Privy Council held in *Parsons* itself that the federal government lacked jurisdiction over commercial transactions concluded entirely within a province. The question that then arose was whether the federal government could assert jurisdiction over intra-provincial transactions that had important economic effects both inter-provincially and internationally. In *King v. Eastern Terminal*,<sup>42</sup> the Supreme Court answered this question in the negative. Furthermore, the Privy Council consistently refused to apply the general regulation of trade branch of s. 91(2). In the *Insurance Reference*,<sup>43</sup> the Privy Council held that the general regulation of trade branch of s. 91(2) did not empower the federal government to regulate a particular industry. In other decisions (*Board of Commerce, Snider*), the Privy Council went even further, suggesting that s. 91(2) could be invoked only in connection

38 *Local Prohibition Reference*, supra note 35.

39 *Reference re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304. In *Labour Conventions*, supra note 33 at 353, the Privy Council went so far as to state that the *Local Prohibition Reference* stood for no proposition of law:

It is interesting to notice how often the words used by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion* have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define.

40 (1881), 7 A.C. 96 (P.C.) at 113 [hereinafter *Parsons*].

41 U.S. Const. art. I, §. 8, cl. 3).

42 [1925] S.C.R. 434, 3 D.L.R. 1 [hereinafter *Eastern Terminal* cited to S.C.R.]. Also see *British Columbia (A.G.) v. Canada (A.G.) (The Natural Products Marketing Act)*, [1937] A.C. 377, 1 D.L.R. 691 (P.C.) [hereinafter *Natural Products Marketing Reference* cited to A.C.]; *Reference re Validity of Section 5(1) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1, 1 D.L.R. 433 [hereinafter *Margarine Reference* cited to S.C.R.].

43 Supra note 28; see also *Board of Commerce*, supra note 30; *Snider*, supra note 16; *Eastern Terminal*, supra note 42; *Natural Products Marketing Reference*, supra note 42; *Margarine Reference*, supra note 42.

with other heads of federal jurisdiction and lacked any independent content.<sup>44</sup>

Two lessons can be drawn from this brief excursus into the Privy Council's jurisprudence on the POGG power and s. 91(2). First, the *UI Reference* decisions were in keeping with the established case law on the division of powers and economic policy. That is, the asserted basis of federal jurisdiction in those decisions, s. 91(2) and the POGG power, had been narrowed in scope by the Privy Council in a series of prior decisions involving the scope of federal jurisdiction over the national economy, such that they could not ground the constitutionality of the impugned unemployment insurance scheme. The Privy Council's social policy decisions, therefore, follow from its economic policy jurisprudence, in a way that most academic commentators have failed to recognize.<sup>45</sup> Second, as I explain in Part V, the modern Supreme Court has significantly expanded the federal government's jurisdiction over economic policy (as well as environmental policy) by transforming the jurisprudence under both the POGG and the trade and commerce powers. The question is whether these changes on the economic policy side translate into a rethinking of federal jurisdiction on the social policy side. In particular, we must now ask whether federal jurisdiction has been expanded sufficiently to allow for the direct federal regulation of intra-provincial markets for insurance, including the enactment of publicly funded and administered arrangements with mandatory participation.

But could the Privy Council have distinguished the old insurance cases? W.H. McConnell argues, for example, that at most, these cases stand for the proposition that jurisdiction over what he calls 'ordinary classes of commercial insurance' is a provincial, not a federal, subject-matter and falls within the ambit of s. 92(13).<sup>46</sup> But, according to McConnell, these cases say nothing about the establishment of new forms of *social insurance*, such as health insurance or unemployment insurance.<sup>47</sup>

44 *Board of Commerce*, supra note 30; *Snider*, supra note 16. But compare *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310, 2 D.L.R. 1 (P.C.) [hereinafter *PATA* cited to A.C.]: s. 91(2) must be given independent content by courts.

45 There are exceptions. See F.R. Scott, 'The Privy Council and Mr. Bennett's "New Deal" Legislation' in F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 90 at 91; J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 51, 55.

46 W.H. McConnell, 'The Judicial Review of Prime Minister Bennett's "New Deal"' (1968) 6 O.H.L.J. 39 at 67.

47 Here is McConnell's argument in full (*ibid.*):

Ordinary commercial insurance, whether it guarded against fire, theft, loss of life or property was essentially a contract of indemnity protecting contracting individuals against stipulated risks upon the voluntary payment of a premium. Unemployment

How would the Privy Council have responded to this argument? It would likely have argued that the distinction between commercial insurance and social insurance was not constitutionally significant. The dominant concern in the cases on commercial insurance was the regulation of certain types of market activity that had the effect of abridging rights of contract and property in connection with intra-provincial transactions. The scheme at issue in the *UI Reference* amounted to a more extreme form of regulation that also abridged freedom of contract, by requiring beneficiaries to contract with a state-administered scheme. It is worth noting, in this regard, that prior to the decisions of the Supreme Court and the Privy Council, a number of commentators who advocated federal jurisdiction over social insurance had argued that the Privy Council's case law was fatal to the constitutionality of the Employment and Social Insurance Act.<sup>48</sup>

But do the *UI Reference* decisions preclude the enactment by the federal government of any and every social insurance scheme? Recall that the constitutional defect in the Unemployment Insurance Act was that it effectively compelled beneficiaries to enter into contracts with the federal Crown, whereby they were obliged to make contributions in exchange for insurance against the risk of unemployment. It was the simultaneous mandatory and contributory nature of the scheme that raised constitutional concerns. But it is possible to design social insurance schemes that lack either or both characteristics. As I have already

insurance, on the other hand, was designed to protect a large segment of the entire labouring force from a social evil which had faced them with increasing severity since 1929, by compulsorily levying a tax which everyone within the specified class had to pay. There was a comprehensiveness and a broad social purpose in employment insurance which ordinary commercial insurance lacked.

48 H.C. Goldenberg, 'Social and Economic Problems of Canadian Federalism' (1934) 12 *Can.Bar Rev.* 422 at 423 ('The whole field of social legislation, for example, such as old age pensions ... [and] unemployment insurance ... and the like, is considered to fall within property and civil rights'); N.M. Rogers, 'Government by the Dead' (1931) 12 *Can.Forum* 46 at 47 ('almost the entire region of social service ... belongs to or is claimed by the provinces'); B. Claxton, 'Social Reform and the Constitution' (1935) 1 *Can.J.Econ.& Pol.Sci.* 409 at 410 (referring to the provinces' 'exclusive jurisdiction over legislation dealing with social problems such as old-age pensions, [and] unemployment and social insurance').

By contrast, the Cooperative Commonwealth Federation (CCF) was much more optimistic regarding the prospects of a constitutional challenge to the Employment and Social Insurance Act: 'the traditional attitude of the Privy Council, the final court of appeal, viz., favourable to provincial rights, seems likely to have reached its limit. English judges are probably more advanced in their social philosophy than Canadian judges, having had a longer experience with state control, and it would be reasonable to expect greater liberalism from them than from our own Supreme Court ...' Research Committee of the League for Social Reconstruction, *Social Planning for Canada* (Toronto: Thomas Nelson & Sons, 1935) at 504.

suggested, contributory but non-mandatory federally enacted social insurance, on the Privy Council's reasoning, is entirely constitutional. Similarly, social insurance that is *neither* mandatory *nor* contributory should also be immune from constitutional difficulties.

For example, imagine a federal social assistance program that provides cash payments to individuals on the basis of a means test that would assess their needs and the availability of other sources of income and assets to meet those needs. Payments would come from general tax revenues. A social assistance program could be characterized as a form of social insurance, in that it is publicly created and administered (social) and pays benefits in the event that a risk of misfortune materializes (insurance), in this case the misfortune of poverty. Such a program would be neither contributory nor mandatory, since the beneficiaries of the scheme would neither be required to pay premiums into a fund out of which benefits are provided, nor even be required to accept those payments. Rather, because it would provide payments to individuals, the legislation creating this sort of social insurance program is a spending statute, which could presumably be enacted and operated pursuant to the spending power. Granted, such a statute would impose conditions – for example, meeting a means test – that beneficiaries would have to satisfy in order to qualify for assistance. However, both the *UI Reference* decisions clearly indicated that the federal government could attach conditions to payments made under the spending power without intruding on provincial jurisdiction, since these conditions do not compel the recipients to accept those payments. Along these lines, in *Angers v. M.N.R.*,<sup>49</sup> the Exchequer Court of Canada upheld the Family Allowances Act<sup>50</sup> under the spending power, holding that the payment of monies to individuals, even with rather detailed conditions attached, did not intrude on provincial jurisdiction over family law or education.<sup>51</sup>

A more complex example would be a federal health insurance program. Unlike a social assistance program, which provides payments directly to beneficiaries, a health insurance program would involve a tripartite relationship between the federal government, health care providers, and beneficiaries. The federal government would provide payments to physicians and hospitals for medical treatment that is provided to beneficiaries. These payments would cover only treatments deemed to be

49 [1957] Ex.C.R. 83 [hereinafter *Angers*].

50 S.C. 1944–45, c. 40, as am. by S.C. 1946, c. 50.

51 For example, the Act required that the child be registered with the federal government (s. 4(1)), that the payments be applied exclusively toward the 'maintenance, care, training, education and advancement of the child' (s. 5), and that the allowance would 'cease to be payable if the child does not regularly attend school as required by the laws of the province in which he resides, or does not receive training that ... is training equivalent to that which he would receive if he attended school' (s. 4(2)(a)).

medically necessary by the federal government, as spelled out in a schedule to the enabling legislation. The enabling legislation could also provide that the benefits be universal and available throughout Canada and that the federal scheme be administered either by the federal government or by other entities operating on a non-profit basis. Moreover, these payments would come from general tax revenues. A federal health insurance scheme would clearly be a form of social insurance, in this instance, insuring against the risk of illness. But once again, it would be neither contributory nor mandatory (because beneficiaries would not be required to enrol, and third parties would not be compelled to accept federal payments). Federal health insurance that is structured in this way could be enacted under the federal spending power, which authorizes not only payments to individuals but also payments to institutions. The fact that the payments are for the benefit of a non-recipient are immaterial; if they were not, then transfer payments under shared cost programs to the provinces would fall outside the spending power, since they are made not for the benefit of provincial governments but for the benefit of the residents of those provinces.

The principal limitation of enacting a federal health insurance scheme under the spending power, though, is that the legislation could not prohibit or proscribe private conduct. For example, the legislation could not prohibit extra billing or the imposition of user fees, that is, direct charges to patients of additional amounts above and beyond the amounts paid by the federal government. Moreover, the legislation could not prohibit markets for private health insurance, for example, by making it illegal for insurance companies to offer health insurance products or for providers to enter into contractual arrangements with such entities. However, conditions can go a long way to achieving these regulatory objectives, particularly given that they will be bolstered by the federal government's market power. Thus, the legislation could make it a condition for the receipt of federal monies that providers neither extra-bill nor impose user charges. Moreover, the legislation could even make it a condition that providers that accept federal payments not accept payments from private insurers. It would appear from *Angers* that the intrusiveness or detail of the conditions would not defeat the constitutionality of the scheme.

Several commentators have argued that the federal government lacks not only jurisdiction to enact contributory social insurance (such as the impugned scheme in the *UI Reference* decisions) but all manner of social insurance. A few years after the handing down of the *UI Reference* decisions, for example, in testimony before the House of Commons Special Committee on Social Security, I.A. Mackenzie, Minister of Pensions and National Health, stated that health insurance lay within provincial

jurisdiction, citing those decisions in support of that proposition.<sup>52</sup> Indeed, no less a figure than Peter Hogg, for example, has argued that it would be unconstitutional for the federal government to operate a national health insurance scheme funded through the tax system.<sup>53</sup>

However, I believe that these commentators are wrong. As my examples show, conditional grants made by the federal government to individuals or institutions can allow the federal government to create national social assistance or health insurance programs if it wishes to do so, as long as those programs are neither mandatory nor contributory. The direct implication is that the *UI Reference* decisions are rather narrow, because almost any kind of social insurance program can be designed in non-contributory and non-mandatory terms. Most provincial health insurance plans, for example, are funded by general tax revenues, not by contributions.<sup>54</sup> The impediment to the enactment of truly national social insurance schemes is largely political, not constitutional. The one serious objection might be the widespread view that social assistance and health are provincial subject-matters and that federal legislation of this sort would be legislation in relation to matters covered by s. 92 and hence *ultra vires*. But, as we will see in the next section, the spending power clearly contemplates federal spending in relation to provincial areas of responsibility, notwithstanding the obvious problem this poses for the division of powers.

#### D. SOCIAL SERVICE DELIVERY

Thus far, we have examined the implications of the *UI Reference* decisions for jurisdiction over social insurance. But the judgments also spoke to the question of jurisdiction over social service delivery. There are two issues here. The first is the regulation of services delivered by non-governmental entities, through the enactment of legislation that commits providers to meeting national standards. As an example, the federal government could conceivably mandate that day care centres meet a variety of national standards that would regulate the delivery of day care services without delving into financing issues. The second issue is whether the federal government can go into the business of social service delivery itself. For example, the federal government could establish hospitals and clinics, then employ health care providers to provide medical treatment. Elmer Driedger, for instance, has argued that ‘there is no reason why the

<sup>52</sup> Canada, House of Commons, Special Committee on Social Security, ‘Minutes of Proceedings and Evidence No.1’ (Ottawa: King’s Printer, 1943) at 19.

<sup>53</sup> Hogg, *Constitutional Law*, supra note 34 at 157.

<sup>54</sup> National Forum on Health, *Health and Healthcare Issues* (Ottawa: Minister of Public Works and Government Services, 1997) at 17–8.

Government of Canada may not establish and operate a hospital.<sup>55</sup> The O'Connor report made a similar suggestion.<sup>56</sup> The key point is that as the provider of these services, the federal government would be free to commit itself to meeting national standards that it would otherwise attach as conditions to transfer payments to the provinces, or which it would legislate as mandates for non-governmental entities. This approach could be applied across a number of different areas outside the health care context.

As it turns out, the *UI Reference* decisions spoke to these issues as well. In the Supreme Court, Rinfret J. appeared to suggest that assistance to persons in need lies exclusively within provincial jurisdiction. His exact words were that 'security' was one of the 'subject-matters falling within the legislative authority of the provinces.'<sup>57</sup> By 'security,' I understand Rinfret J. to mean physical and psychological well-being, analogous to the interests protected by 'security of the person' in s. 7 of the Charter.<sup>58</sup> Because the reasoning is so terse, Rinfret J. did not parse out the two potential regulatory options available to the federal government that I have described. The following year, however, the Supreme Court, in a case involving the constitutionality of spousal support and child maintenance legislation, did state that the direct provision of social services lies squarely within provincial jurisdiction:

It is pertinent also to observe that *the subject of relief, relief of persons in which the aid of the State is required to supplement private charity in order to provide the necessities of life, has become one of enormous importance; and that, primarily, responsibility for this rests upon the provinces; the direct interventions of the Dominion in such matters being exceedingly difficult, by reason of constitutional restrictions. The responsibility of the state for the care of people in distress (including neglected children and deserted wives) ... rests upon the province ...*<sup>59</sup>

At best, this passage can be read as presuming that the regulation of the provision of these services by non-state entities (*e.g.*, the non-profit sector) also lies outside federal jurisdiction, although the point is far from clear.

55 E. Driedger, 'The Spending Power' (1981) 7 Queen's L.J. 124 at 125.

56 *Report of the Parliamentary Counsel Relating to the B.N.A. Act, 1867* (Senate of Canada, 1939) at 151-5.

57 *UI Reference (SCC)*, supra note 3 at 454.

58 See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler (1)* cited to S.C.R.]; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

59 *Reference re: Adoption Act (Ontario)*, [1938] S.C.R. 398 at 402-3 [hereinafter *Adoption Reference*] [emphasis added]. Oddly enough, that judgment did not cite the *UI Reference* decisions.

What is the constitutional foundation for these conclusions? Let us first consider regulatory jurisdiction over social services provided by non-state entities. Neither Rinfret J.'s judgment in the *UI Reference* nor the *Adoption Reference* cites any case law in support of the proposition that the federal government lacks regulatory jurisdiction over the provision of social services. The case law cited by Kerwin J. in the *UI Reference* only supports the conclusion that the federal government lacks jurisdiction over insurance. What about s. 92(16), which confers on provinces jurisdiction over '[g]enerally all Matters of a merely local or private Nature in the Province'? Despite the initial suggestion by the Privy Council in the *Local Prohibition Reference* that s. 92(16) functioned as a general grant of jurisdiction to the provinces, analogous to the POGG clause in s. 91,<sup>60</sup> it is s. 92(13), not s. 92(16), that became the Privy Council's subsection of choice to ground its expansive conception of provincial legislative power. As a consequence, very few cases had been decided under s. 92(16). And those cases neither spoke to the proposition asserted nor articulated a theory of s. 92(16) that Rinfret J. might have implicitly relied on.<sup>61</sup>

What about the academic literature? The works of constitutional scholars available to the Supreme Court and the Privy Council at the time of the hearing would not have been of any assistance, because none of these authors spoke to the issues before the Court.<sup>62</sup> Commentaries on

60 *Local Prohibition Reference*, supra note 35 at 365: 'In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.'

61 Before it handed down the *UI Reference*, the Privy Council had relied on s. 92(16) on only three occasions: twice to uphold the constitutionality of a provincial law prohibiting the sale of alcohol (*Manitoba Licence Holders*, supra note 35; *Canadian Pacific Wine Co. Ltd. v. Tuley* (1912), 60 D.L.R. 520 (P.C.)) and once to uphold the constitutionality of provincial Sunday observance legislation (*Lord's Day Alliance of Canada v. Manitoba (A.G.)*, [1925] 1 D.L.R. 561 (P.C.)).

62 These works included J.G. Bourniot, *A Manual of the Constitutional History of Canada* (Toronto: Copp Clark, 1901); E.R. Cameron, *The Canadian Constitution*, vol. 1 (Winnipeg: Butterworths, 1915) and *The Canadian Constitution*, vol. 2 (Toronto: Carswell, 1930); W.H.P. Clement, *The Law of the Canadian Constitution*, 2d ed. (Toronto: Carswell, 1904) and 3d ed. (Toronto: Carswell, 1916); Joseph Doutre, *Constitution of Canada* (Montreal: J. Lovell & Son, 1880); W.P.M. Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (Humphrey Milford: Oxford University Press, 1922); A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book, 1897-1898), *Canada's Federal System* (Toronto: Carswell, 1913), and *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918); D.A. O'Sullivan, *Government in Canada*, 2d ed. (Toronto: Carswell, 1887); and W.S. Scott, *The Canadian Constitution Historically Explained* (Toronto: Carswell, 1918).

the division of powers and social policy published since the decisions in the *UI Reference* are not helpful either. What is remarkable is that the vast majority of those commentaries have accepted the validity of the proposition that the federal government lacks direct regulatory jurisdiction over social service delivery, without providing much in the way of a doctrinal or textual support for that argument. Consider the following selection of quotations:

Regardless of their political allegiance, all Quebec governments without exception have expressed their commitment to defend the integrity of Quebec's legislative jurisdiction and its capacity to determine policies in its best interest, particularly in matters of ... health, and social services.<sup>63</sup>

One by one, the federal government established conditional grant programs dealing with highways, education, health and other social services – all matters falling within provincial legislative jurisdiction.<sup>64</sup>

The purpose of the [Canada Health] Act is to influence provincial policy with respect to the provision of public health insurance. The extent to which it achieves this purpose is the extent to which decisions assigned under the Constitution to regional political communities have been effectively transferred to the national political community.<sup>65</sup>

It is worth reflecting for a moment on the state of the critical literature. The decisions in the *UI Reference* have generated a substantial body

63 Secrétariat aux Affaires intergouvernementales canadiennes, 'Québec's Historical Position on the Federal Spending Power 1944–1998' (July 1998) at 27, online: Secrétariat aux Affaires intergouvernementales canadiennes <<http://www.mce.gouv.qc.ca/v/objets/positionEng.pdf>> (date accessed: 21 May 2001). This document provides an extremely useful historical compilation of public statements made by Quebec Premiers and Cabinet Ministers of Quebec's position on both the existence and the exercise of the spending power.

64 A. Petter, 'Federalism and the Myth of the Federal Spending Power' (1989) 68 Can.Bar Rev. 448 at 452 [hereinafter 'Federalism and the Myth'].

65 *Ibid.* at 466. Non-legal commentators have expressed similar views. See, e.g., R. Boadway, 'Fiscal Federalism and Social Policy Reform' (1995) 18 Can.J. Regional Science 199 at 202 [hereinafter 'Fiscal Federalism']:

The provinces enjoy exclusive responsibility for programmes in areas such as health, education and welfare services (Section 92, Constitution Act). Indeed, by virtue of provincial responsibility for civil and property rights, the provinces can be taken to be legislatively responsible for almost any public service to be provided to individuals. Thus, to take a current example, day care services are a provincial responsibility, as would be others that might become relevant in the future. Moreover, those that were not covered under the rubric of civil and property rights would be provincial as 'residual powers.' This means that almost all public services whose objective is redistributive equity, and which, therefore, are part of social policy, are the exclusive legislative responsibility of the provinces.

of scholarship.<sup>66</sup> Almost without exception, though, commentators have focused on the part of the holding that deals with the spending power. There is a familiar set of issues here. Some commentators have focused their attention on identifying a legal basis for the federal spending power, producing a variety of suggestions: ss. 91(1A) (public property and debt) and 91(3) (taxation) of the Constitution Act, 1867, and the royal prerogative.<sup>67</sup> Others have probed the textual basis and the coherence of the distinction between spending and 'coercive' forms of regulation, given that the Constitution allocates jurisdiction not on the basis of policy instruments but, rather, on the basis of subject-matter.<sup>68</sup> Still

- 66 Petter, 'Federalism and the Myth,' supra note 64; D. Coyne, 'The Meech Lake Accord and the Spending Power Proposals: Fundamentally Flawed' in M.D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 245 at 245 [hereinafter 'Meech Lake Accord']; Driedger, 'The Spending Power,' supra note 55; K. Hanssen, 'The Constitutionality of Conditional Grant Legislation' (1966-1967) 2 Man.L.J. 191 [hereinafter 'Constitutionality']; Hogg, *Constitutional Law*, supra note 34 at 157-61; G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2d ed. (Toronto: Canadian Tax Foundation, 1981) [hereinafter *Allocation of Taxing*]; A. Lajoie, 'The Federal Spending Power and Meech Lake' in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 175 [hereinafter 'Federal Spending Power']; B. Laskin, 'Provincial Marketing Levies: Indirect Taxation and Federal Power' (1959) 13 U.T.L.J. 1; W.R. Lederman, 'Some Forms and Limitations of Co-operative Federalism' (1967) 45 Can.Bar Rev. 409 [hereinafter 'Forms and Limitations']; J.E. Magnet, 'The Constitutional Distribution of Taxation Powers in Canada' (1978) 10 Ottawa L.Rev. 473 [hereinafter 'Constitutional Distribution']; Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems*, vol. 2 (Quebec: Royal Commission of Inquiry on Constitutional Problems, 1956) [hereinafter *Tremblay Report*]; F.R. Scott, 'The Constitutional Background of Taxation Agreements' (1955) 2 McGill L.J. 1 [hereinafter 'Constitutional Background']; D.V. Smiley, *Conditional Grants and Canadian Federalism* (Toronto: Canadian Tax Foundation, 1963); P.E. Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968) and *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Queen's Printer, 1969) [hereinafter *Federal-Provincial Grants*].
- 67 Trudeau, *Federal-Provincial Grants*, supra note 66 at 12: ss. 91(3) and 91(1A); Hanssen, 'Constitutionality,' supra note 66 at 195: s. 91(1A); Scott, 'Constitutional Background,' supra note 66 at 6: the royal prerogative; Driedger, 'The Spending Power,' supra note 55 at 130-2: the royal prerogative; La Forest, *Allocation of Taxing*, supra note 66 at 46: s. 91(1A); N. Finkelstein, *Laskin's Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 1985) at 783 [hereinafter *Laskin's Constitutional Law*]: s. 91(1A); Magnet, 'Constitutional Distribution,' supra note 66 at 480: s. 91(1A); Hogg, *Constitutional Law*, supra note 34 at 158: ss. 91(3), 91(1A).
- 68 The distinction between spending and coercive forms of regulation is made by Kerwin J., who, in discussing the spending power, took pains to note that the recipient of a conditional grant made by Parliament could 'decline the gift or ... accept it subject to such conditions' (*UI Reference (SCC)*, supra note 3 at 457) and that, as a consequence, Parliament was not asserting regulatory jurisdiction over the subject-matter of the grant. For academic reaction, compare Scott, 'Constitutional Background,' supra note 66 at 7, and Hogg, *Constitutional Law*, supra note 34 at 159-60 (distinction conceptually coherent) with Petter, 'Federalism and the Myth,' supra note 64 at 456-8, and Quebec,

others have explored whether the spending power is unlimited or subject to justiciable limits, for example, in cases where legislation authorizing a conditional grant is enacted with the *purpose* of regulating an area of socio-economic activity lying within provincial regulatory jurisdiction, or where the degree of *impact* upon provincial jurisdiction is enough to take a federal spending statute outside federal jurisdiction.<sup>69</sup> Finally, Andrew

*Tremblay Report*, supra note 66 at 219–21. (distinction textually unsupported and conceptually incoherent).

- 69 With respect to this issue, there are interesting inconsistencies in the judgments of the Supreme Court and the Privy Council. Kerwin J. articulated a broad conception of the federal spending power. He stated that the spending power could be used by Parliament 'in any manner that it sees fit,' which suggests that federal legislation authorizing the spending of monies could be enacted for the purpose of regulating a provincial subject-matter. Moreover, he did not indicate that effects of federal spending in areas of provincial jurisdiction would ever be relevant to the constitutionality of the federal statute authorizing that spending, implicitly suggesting that even if those effects were extremely significant (*e.g.*, because they substantially altered provincial policy priorities), they would not raise any constitutional concerns. The Privy Council (*per* Atkin J.), by contrast, clearly attempted to impose limits on the exercise of the federal spending power. Thus, it clarified that a federal spending statute that was 'a colourable device, or a pretence' would clearly be *ultra vires*; this passage suggests that federal spending statutes enacted for the purpose of regulating a provincial subject-matter would, for that reason, be unconstitutional. Moreover, it went on to argue that federal spending statutes 'may still be legislation *affecting* the classes of subjects enumerated in s. 92' [emphasis added] and, if so, would be *ultra vires*. The focus here is on the effects of the federal law; thus, the Privy Council suggests that a law that is not colourable, but which '*invades* civil rights within the Province or in respect of other classes of subjects otherwise *encroaches* upon the provincial field of competence' [emphasis added], would be unconstitutional.

Constitutional commentators have sharply divided on the question of whether there are any limits on the purposes to which the spending power can be used. The overwhelming consensus among English Canadian scholars is that the federal government can enact spending statutes directed at provincial purposes: Hogg, *Constitutional Law*, supra note 34 at 160–1; L. St. Laurent in *House of Commons Debates* (29 January 1957) at 754; Hanssen, 'Constitutionality,' supra note 66 at 193; Lederman, 'Forms and Limitations,' supra note 66 at 431; Trudeau, *Federal-Provincial Grants*, supra note 66 at 15; Scott, 'Constitutional Background,' supra note 66 at 6–7; Laskin in Finkelstein, *Laskin's Constitutional Law*, supra note 67 at 783–4; La Forest, *Allocation of Taxing*, supra note 66 at 51; Driedger, 'The Spending Power,' supra note 54 at 133–4; Coyne, 'Meech Lake Accord,' supra note 66 at 251–3. By contrast, commentators from Quebec, as well as some others, have argued that the federal government can spend only with respect to areas of federal jurisdiction: *Tremblay Report*, supra note 66 at 216–7; Lajoie, 'Federal Spending Power,' supra note 66 at 175; Magnet, 'Constitutional Distribution,' supra note 66 at 480; Petter, 'Federalism and the Myth,' supra note 64 at 455–62.

The case law on the spending power does not offer any clear guidance on these questions. The focus has been on whether *conditions* attached to grants amount to a federal attempt to legislate in relation to provincial subject-matters. In *Winterhaven Stables v. Canada* (1988), 53 D.L.R. (4th) 413, [1989] 1 W.W.R. 193 (Alta. C.A.) [hereinafter *Winterhaven* cited to D.L.R.], for example, the court conceded (at 433) that 'the consequence [of legislation authorizing conditional grants to the provinces] is to

Petter has argued that the spending power runs counter to important constitutional values because it allows national majorities to determine policy in areas of provincial jurisdiction and because it weakens the lines of political accountability by divorcing jurisdiction over policy areas from control over policy outcomes.<sup>70</sup>

I do not take sides in this debate, although there is considerable force to the argument that the spending power allows the federal government to indirectly regulate areas outside its jurisdiction. Rather, I underline that what drives the debate is the assumption that the regulation of social services lies within provincial jurisdiction. Indeed, this assumption is shared both by those who argue for an expansive conception of the federal spending power and by those who argue that that power should be subject to control by the courts, or is unconstitutional. Critics of the spending power assume the correctness of the Privy Council's and the Supreme Court's holdings on jurisdiction and argue, in essence, that the federal spending power makes a mockery of it. Defenders of the spending power also accept the Privy Council's and the Supreme Court's holdings on jurisdiction, but they argue that the spending power does not contradict it. Given the structure of this debate, it is truly remarkable that a generation of constitutional scholars has not identified the textual or doctrinal basis for their shared prior assumption.

Even worse, the failure of the defenders of the spending power to address the logically prior question of why regulatory jurisdiction over social services goes to the provinces has been ineffectual, and could be perceived by some as somewhat disingenuous. It is ineffectual because these scholars have shied away from launching a frontal challenge on the jurisdictional assumption from which their opponents draw strength.

impose considerable pressure on the provinces to pass complementary legislation or otherwise comply with the conditions of the allocation,' and stated that conditions could be attached to grants 'so long as the conditions do not amount in fact to a regulation or control of a matter outside of federal authority' (at 433), thereby suggesting that the effects of some conditions on provincial areas of responsibility could be so significant as to take the federal law outside its jurisdiction. But the court also stated, in the same breath, that 'questions of constitutional validity under ss. 91 and 92 are not resolved by looking at the ultimate probable effect' (at 433). The issue was commented on by the Supreme Court in *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 [hereinafter *CAP Reference* cited to S.C.R.]. In that case, the Supreme Court held that the simple fact that a federal spending statute 'impacts upon [a] constitutional interest' outside federal jurisdiction was 'not enough to find that a statute encroaches upon the jurisdiction of the other level of government' (at 567), which appears to suggest that the effects of federal spending statutes are constitutionally irrelevant. If this is true, then the *CAP Reference* implicitly overrules *UI Reference (PC)*. However, neither of the *UI Reference* decisions was referred to by the Court, leaving the matter shrouded in uncertainty.

<sup>70</sup> Petter, 'Federalism and the Myth,' supra note 64.

Surely, a stronger response to the argument that the spending power allows the federal government to regulate areas outside its jurisdiction, or that the spending power confuses the lines of political accountability, is to interrogate the cogency of that jurisdictional assumption itself. It could be perceived as somewhat disingenuous because of their refusal to openly recognize that the spending power *does* stand in tension with the conventional wisdom on the allocation of jurisdiction over social services under the Constitution. A more transparent line of argument would be to acknowledge that tension, to put to one side the constitutionality of the spending power, and to focus instead on the implicit target – the question of jurisdiction itself.

If we were to interrogate this assumption, where would we start? Of all of the different sorts of programs falling under the rubric of social services, the question of which level of government has jurisdiction over 'health' or 'public health' has attracted a fair amount of academic attention in recent years.<sup>71</sup> My particular interest is the question of jurisdiction over the design, delivery, and financing of health care systems, which the academic literature refers to, somewhat misleadingly, as 'public health.'<sup>72</sup> Health is not listed as a subject-matter under the division of powers and, accordingly, is not specifically allocated to one level of government. However, two provisions in the Constitution Act, 1867, do speak to the issue: s. 92(7) confers on provinces jurisdiction, *inter alia*, over 'hospitals' and 'asylums,' whereas s. 91(11) confers on the federal government jurisdiction over 'quarantine' and 'marine hospitals.' As the *Rowell-Sirois Report* noted over sixty years ago, the absence of any reference to health in the Constitution Act, 1867, reflects a simple historical fact: 'that health was a private matter and state assistance to protect or im-

71 M. Jackman, 'The Constitution and the Regulation of New Reproductive Technologies' in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: Supply and Services Canada, 1994) 1 [hereinafter *Jackman Report*] at 3–18; M. Jackman, 'The Regulation of Private Health Care under the Canada Health Act and the Canadian Charter' (1995) 6 Const.Forum 54 at 56; Hogg, *Constitutional Law*, supra note 34 at 157–61, 485–6; D. Gibson, 'The Canada Health Act and the Constitution' (1996) 4 Health L.J. 1 [hereinafter 'Canada Health Act']; A. Lajoie & P. Molinari, 'Partage constitutionnel des compétences en matière de santé au Canada' (1978) 56 Can.Bar Rev. 579 [hereinafter 'Partage constitutionnel']; R.T. McKall, 'Constitutional Jurisdiction over Public Health' (1975) 6 Man.L.J. 317 [hereinafter 'Constitutional Jurisdiction']. See also A.M. Maslove, 'National Goals and the Federal Role in Health Care' in National Forum on Health, *Canada Health Action: Building on the Legacy*, vol. 4 (Ottawa: Editions MultiMondes, 1998) 367 at 379.

72 The term 'public health' is typically used by health professionals to describe measures aimed at maintaining and improving population health, such as public sanitation, vaccinations, and the like (see, e.g., R. Neugebauer, 'Minding the World's Health' (2001) 91 Am.J.Public Health 551).

prove the health of the citizen was highly exceptional and tolerable only in emergencies such as epidemics, or for the purposes of ensuring elementary sanitation in urban communities.<sup>73</sup> Despite the absence of any express constitutional allocation of jurisdiction over health, though, the *Rowell-Sirois Report* opined that jurisdiction over 'social welfare functions,' including 'public health,' fell to the provinces under s. 92(16).<sup>74</sup> This view has attracted considerable academic support.<sup>75</sup> However, s. 92(16) is not viewed as the only basis of provincial jurisdiction. The 'regulation of the medical profession, [and the] provision or supervision of medical insurance'<sup>76</sup> are thought to fall within the scope of s. 92(13), and s. 92(7) has been invoked as the basis of provincial jurisdiction over hospital-based medical treatment.<sup>77</sup>

This consensus in the literature, however, stands at odds with the case law, which is rather equivocal. The leading case here is *Schneider v. The Queen*,<sup>78</sup> which involved a constitutional challenge to a provincial law that provided, *inter alia*, for the involuntary medical treatment of heroin addicts. The constitutional challenge was unanimously rejected. All members of the Court agreed that the pith and substance of the legislation was medical treatment and that legislation of this sort fell within provincial jurisdiction over health. Where the Court divided was on the relative scope of provincial jurisdiction and federal jurisdiction (if any) over health more generally. Dickson J., speaking for seven members of the Court, stated that 'historically, at least, the general jurisdiction over public health was seen to lie with the provinces,' and that 'this view ... has

73 Canada, Royal Commission on Dominion-Provincial Relations, *The Rowell-Sirois Report* (Canada: Queen's Printer, 1937) at 32-3.

74 *Ibid.* at 15; also see *ibid.* at 33.

75 Its strongest proponents are Andrée Lajoie and Patrick Molinari, who have argued that the provinces possess 'a fairly general power in matters of health' centred on s. 92(16) (Lajoie & Molinari, 'Partage constitutionnel,' *supra* note 71 at 598). Similarly, Martha Jackman (a strong proponent of a federal role in the design of the health care system) has described the Canada Health Act as an intrusion into an area of provincial jurisdiction and has written that the provinces have a 'general jurisdiction over public-health matters' (*Jackman Report*, *supra* note 71 at 14).

76 Gibson, 'Canada Health Act,' *supra* note 71 at 2; McKall, 'Constitutional Jurisdiction,' *supra* note 71 at 321. For cases on provincial jurisdiction to regulate the medical profession, see *In Re Shelly* (1913), 10 D.L.R. 666, 4 W.W.R. 741 (Alta. S.C.); *Ex parte Fairbairn* (1877), 18 N.B.R. 4 (C.A.); *Re Stinson and College of Physicians and Surgeons of Ontario* (1910), 22 O.L.R. 627 (C.A.); *In Re Heyward*, [1934] O.R. 133 (H.C.J.).

77 For other statements of the view that the provinces possess regulatory jurisdiction over health care, see L.B.Z. Davis, *Canadian Constitutional Law Handbook: Leading Statements, Principles and Precedents* (Aurora: Canada Law Book, 1985) at 291-2; P.J.T. O'Hearn, *Peace, Order and Good Government: A New Constitution for Canada* (Toronto: MacMillan, 1964) at 148; and W.H. McConnell, *Commentary on the British North America Act* (Toronto: MacMillan, 1977) at 257.

78 [1982] 2 S.C.R. 112 [hereinafter *Schneider*].

prevailed and is now not seriously questioned.<sup>79</sup> Federal jurisdiction was extremely limited and was confined to the emergency branch of POGG, or matters ‘ancillary to the express heads of power in s. 91.’<sup>80</sup> This rather expansive conception of provincial jurisdiction over health care was approved by Beetz J. in *Bell Canada v. Quebec*, in the context of constitutional litigation surrounding the application of provincial workplace health and safety legislation to a federal undertaking.<sup>81</sup> Sopinka J. elaborated upon Dickson J.’s approach in *R. v. Morgentaler*,<sup>82</sup> where he stated that the general jurisdiction possessed by provinces over health care extended to hospitals, the medical professions, the ‘safety and security’ of patients, ‘matters of cost and efficiency, the nature of the health care delivery system, and the privatization of the provision of medical services.’<sup>83</sup>

Set against Dickson J.’s judgment, though, is the separate concurrence of Estey J. in *Schneider*. In contrast to Dickson J., who found that provinces had a general jurisdiction over health care and that federal jurisdiction was both exceptional and narrow, Estey J., faced with the silence of ss. 91 and 92 on health care, instead concluded that jurisdiction over health was not exclusive and could ‘be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature of scope of the health problem in question.’<sup>84</sup> This statement anticipates the Court’s approach to jurisdiction over the environment, which it has held

79 *Ibid.* at 137. In support of this proposition, Dickson J. cited the decision of the Quebec Court of Appeal in *Rinfret v. Pope* (1886), 12 Q.L.R. 303 (C.A.). That decision turned on the question of which level of government had the jurisdiction to create and appoint a local board of health to deal with an epidemic of a contagious disease. The Quebec Court of Appeal stated, without referring to any particular provision of the Constitution Act, 1867, that ‘toute législation sur la santé publique dans chaque Province, à l’exception des établissements de quarantaine et des hopitaux de marine, tombe dans les attributions législatives de chaque province.’ Dickson J. also cited *Re George Bowack* (1892), 2 B.C.R. 216 at 224 (S.C.), which made the same statement in *obiter* (‘as the subject of public health falls within the class of legislative matters assigned to the Province by section 92 of the *BNA Act*’).

80 Lajoie & Molinari, ‘Partage constitutionnel,’ *supra* note 71 at 599, go even further, arguing that the general provincial power over health is subject to ‘les exceptions spécifiées à l’article 91 du B.N.A. Act,’ and that ‘[c]es exceptions ne doivent pas comprendre le paragraphe introductif et ses diverses interprétations de la clause “paix, ordre et bon gouvernement,” mais uniquement les énoncés sur “la quarantaine, l’établissement et le maintien des hôpitaux de marine.”’

81 [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161 at 761 [hereinafter *Bell (2)* cited to S.C.R.]; ‘General legislative jurisdiction over health belongs to the provinces, subject to the limited jurisdiction of Parliament ancillary to the powers expressly conferred by s. 91 of the *Constitution Act, 1867*, or the emergency power relating to the peace, order, and good government of Canada.’

82 [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537 [hereinafter *Morgentaler (2)* cited to S.C.R.].

83 *Ibid.* at 491.

84 *Schneider*, *supra* note 78 at 142.

straddles the division of powers and does not fall exclusively within the jurisdiction of either level of government because of its breadth.<sup>85</sup> The provinces had jurisdiction over health matters that spoke 'to an aspect of health, local in nature.' As illustrations of the scope of provincial jurisdiction, Estey J. cited two decisions that had upheld the constitutionality of provincial statutes providing for the involuntary committal of persons under mental health legislation<sup>86</sup> and a third decision upholding a provincial law that provided for the involuntary committal of intoxicated persons.<sup>87</sup> Federal jurisdiction was based, *inter alia*, on the national dimensions branch of POGG, 'where the dimension of the problem is national rather than local in nature,' and 'perhaps' even on the federal trade and commerce power.<sup>88</sup> What is significant here is that the heads of federal jurisdiction Estey J. refers to have been given a rather expansive interpretation by the modern Supreme Court and thus, in contrast to Dickson J.'s assessment, suggest the potential for significant federal jurisdiction in the design and delivery of health care. Estey J.'s view has been adopted by majorities of the Supreme Court as well.<sup>89</sup>

In sum, the case law paints a rather ambiguous picture of the division of powers and regulatory jurisdiction over health care, one that is at odds with the consensus in the academic literature. This ambiguity, coupled with Estey J.'s explicit references to the national dimensions branch of POGG and s. 91(2) as possible sources of federal jurisdiction, suggests a need to return to first principles. Moreover, I would argue that the same uncertainty that surrounds health care also surrounds the firm assumption of provincial jurisdiction over other social services, such as day care

85 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 [hereinafter *Oldman River* cited to S.C.R.].

86 *Fawcett v. Ontario (A.G.)*, [1964] S.C.R. 625; *Green v. Livermore et al.*, [1940] O.R. 381 (H.C.J.).

87 *Reference re Intoxicated Persons Act*, [1981] 1 W.W.R. 333 (Man. C.A.).

88 *Schneider*, supra note 78 at 141–2.

89 Thus, in *R. v. Swain*, [1991] 1 S.C.R. 933 at 1004, Lamer C.J. took pains to emphasize that 'in *Schneider*, this Court unanimously emphasized that subjects related to "health" do not exclusively come within either federal or provincial competence' and specifically cited Estey J.'s reasons. Likewise, in *RJR-MacDonald v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at 246 [hereinafter *RJR-MacDonald* cited to S.C.R.], La Forest J. (in dissent, but not on this point), in holding that the federal Parliament could legislate in relation to health under its criminal law power (s. 91(27)), cited Estey J.'s judgment in *Schneider* and emphasized that 'Parliament and the provincial legislatures may both validly legislate in this area.' La Forest J. again made the same point in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at 646 [hereinafter *Eldridge* cited to S.C.R.]. However, La Forest J. did add that '[I]t is generally agreed, however, that the hospital insurance and medicare programs in force in this country come within the exclusive jurisdiction of the provinces under ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature)' (at 577).

and public housing. For instance, the *Rowell-Sirois Report* opined that 'it has been assumed that social welfare functions fall to the provinces.'<sup>90</sup> According to the *Report*, the constitutional bases for provincial jurisdiction were ss. 92(16), 92(13), and 92(7) – the latter provision referring to 'Charities, and Eleemosynary Institutions.' In contrast to health, the Supreme Court has not interpreted these provisions in light of jurisdiction over social welfare. Estey J.'s point in *Schneider* applies with equal force here – that neither the various sorts of government programs we identify with social welfare (day care, public housing) nor social welfare itself are enumerated in ss. 91 and 92. It is arguable, then, that as with health care, there are both federal and provincial aspects to this subject-matter, and that both levels of government have some degree of regulatory jurisdiction. From the standpoint of federal jurisdiction, the question to be asked is whether the POGG power and s. 91(2) can encompass some sort of jurisdiction over these areas as well.

But how about the proposition that the federal government is constitutionally precluded from direct social service provision? Stated baldly, the legal issue here is whether the federal Crown can provide services that Parliament lacks jurisdiction to regulate through legislation. My starting point is the assumption, widely accepted in the Anglo-Canadian constitutional tradition, that the Crown is a legal person who possesses all the powers and privileges of a private individual. The Crown can, for example, acquire, hold, and dispose of property and can enter into contracts. The source of these powers is the common law. But how do Canada's federal arrangements interact with these principles of the British Constitution? Do ss. 91 and 92 operate to limit the Crown's contractual or proprietary activities, so that the Crown must comply with the division of powers? The prevailing view among academic commentators is no – that is, that the division of powers applies to the *legislative* but not to the *contractual* or *proprietary* activities of the Crown.<sup>91</sup>

90 *Supra* note 73 at 15; also see at 30 ('It is fundamental to our recommendations that the residual responsibility for social welfare functions should remain with the provinces, and that Dominion functions should be deemed exceptions to the general rule of provincial responsibility').

91 *E.g.*, G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 143 [hereinafter *Natural Resources*] (the federal Crown 'has the same rights respecting its property as any other property owner') and 167 (the provincial Crown may 'exercise in respect of its property the same rights as a private owner'); Hogg, *Constitutional Law*, *supra* note 34 at 707–9; K. Swinton, 'Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union' (1995) 25 C.B.L.J. 280 at 296 [hereinafter 'Courting Our Way']; Finkelstein, *Laskin's Constitutional Law*, *supra* note 67 at 667. Even commentators somewhat critical of this proposition accept it as the conventional wisdom: I. Bushnell, 'Comment: Constitutional Law – Proprietary Rights and the Control of Natural Resources' (1980) 58 Can.Bar Rev. 157 at 158; D.E. Thring, 'Alberta, Oil, and the

This position has a number of interesting implications. It allows the Crown as proprietor to use its *own* property for purposes or with effects that are beyond its legislative competence. A provincial Crown as proprietor could, for example, set the price of Crown-owned natural resources heading into export markets, an option not open to it through legislation.<sup>92</sup> Provincial governments have long relied on the limited reach of s. 91 to discriminate against out-of-province suppliers of goods with respect to government procurement. Moreover, the discrimination extends to the commercial activities of provincial governments, most prominently with respect to the purchasing and sale of alcohol.<sup>93</sup> As contractor, the government can insist upon contract terms that it would be constitutionally precluded from imposing upon contracting parties through legislation.<sup>94</sup> But it also suggests that governments can direct the uses to which *private* property can be put through the mechanism of contract. As William Moull and David Thring explain, this appears to be the way in which Alberta has regulated oil extracted from public property, which, after extraction, becomes private property.<sup>95</sup>

What is the doctrinal basis of this view? The case law, unfortunately, is quite sparse. Some of the decided cases turn on the interpretation of s. 92(5), which confers on the provinces jurisdiction to legislate with respect to the management and sale of public lands. These decisions stand for the proposition that pursuant to s. 92(5), provinces enact laws that deal with their lands in a manner that would be unconstitutional if applied to private property.<sup>96</sup>

Constitution' (1979) 17 Alta.L.Rev. 69 at 73 [hereinafter 'Alberta, Oil']; D. Lemieux, 'Legal Issues Arising from Protectionist Government Procurement Policies in Canada and the United States' (1988) 29 C.de D. 369 at 385; W.D. Moull, 'Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution' (1983) 21 Alta.L.Rev. 472 at 480 [hereinafter 'Natural Resources'].

92 *Central Canada Potash Co. v. Government of Saskatchewan* (1978), [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 [hereinafter *Central Canada Potash* cited to S.C.R.].

93 Swinton, 'Courting Our Way,' supra note 91 at 296; K.C. Wasson, *Non-Tariff Barriers to Trade within Canada* (LL. M. Thesis, University of Toronto 1990) [unpublished] at 96-152.

94 Hogg, *Constitutional Law*, supra note 34 at 708.

95 Moull, 'Natural Resource,' supra note 91 at 481-2; Thring, 'Alberta, Oil,' supra note 91 at 78-81.

96 The cases here have involved statutory conditions inserted into licences to harvest timber on provincial Crown land. Thus, in *Smylie v. the Queen* (1900), 27 O.A.R. 172 [hereinafter *Smylie*], the Ontario Court of Appeal upheld a condition that required all timber from Crown lands to be processed in Canada, and in *Brooks-Bidlake and Whittall v. British Columbia (A.G.)*, [1923] 2 D.L.R. 189 (P.C.) [hereinafter *Brooks-Bidlake*], the Privy Council upheld legislation that prohibited the employment of Chinese or Japanese labour to harvest provincial timber. It would have been unconstitutional for provincial laws to regulate the use of timber from privately owned lands in this way.

The Supreme Court of Canada appears to have squarely addressed the issue of provincial proprietary and contractual authority on one occasion, again in the context of the *provincial* Crown.<sup>97</sup> The key point is that the courts premised their expansive interpretations of s. 92(5) on the assumption that s. 92(5) was co-extensive with the power of the provincial Crown as proprietor to deal with its lands as it saw fit, unconstrained by the division of powers. This assumption also seems to have been implicit in two other decisions of the Supreme Court. In a constitutional challenge to a Saskatchewan scheme that set the price of potash in the export market, Laskin C.J. (concurring) seemed to assume that had the province been acting in its proprietary activity, it need not have complied with the division of powers.<sup>98</sup> He echoed this view, somewhat more explicitly, in a later judgment.<sup>99</sup>

because they would have intruded into federal jurisdiction over international trade (*Smylie*) or naturalization and aliens (*Brooks-Bidlake*).

It must be acknowledged that this broad interpretation of the scope of s. 92(5) has come under criticism from Moull ('Natural Resource,' supra note 91) and Thring ('Alberta, Oil,' supra note 91), as well as from the Saskatchewan Court of Appeal in *Saskatchewan Power Corp. v. TransCanada Pipelines* (1988), 73 Sask.R. 247 (C.A.), precisely because it allows provinces to legislate with respect to their own property in a manner that severely intrudes on federal jurisdiction.

97 *British Columbia (A.G.) v. Deeks Sand & Gravel*, [1956] S.C.R. 336, involved a constitutional challenge to a term in a lease for BC Crown land requiring the lessee to pay royalties to the provincial Crown. At the time the lands were leased, they were owned by the federal Crown; however, while the lease was still in force, the lands were transferred to the provincial Crown pursuant to the *Railway Belt Re-transfer Agreement Act*, S.B.C. 1930, c. 60, S.C. 1930, c. 37. The original lease did not impose a royalty requirement and contained a right of renewal on the same terms. Nevertheless, when the lessee exercised the right of renewal, the Crown insisted on, and the lessee agreed to, the inclusion of a term requiring the payment of royalties. The lessee argued that the term was unconstitutional because it contravened s. 3 of the Act, which obliged the province to perform Canada's legal obligations under the lease, including the right to renewal without modification. Although successful in the lower courts, [1954] 3 D.L.R. 185 (B.C.S.C.), [1955] 2 D.L.R. 17 (B.C.C.A.), the constitutional challenge was rejected by the Supreme Court of Canada. The Court rejected the constitutional argument, stating that the case fell to be decided on contractual principles alone, 'the test not differing in the case at bar from that which applies as between individuals' (at 343). Curiously, the Court did not cite either *Smylie* or *Brooks-Bidlake*.

98 *Central Canada Potash*, supra note 92 at 73.

99 *Reference re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004 at 1032, 136 D.L.R. (3d) 385 [hereinafter *Natural Gas Reference* cited to S.C.R.]. Laskin C.J. was in dissent, but not on this point.

The proposition that the Crown in its private activities is unshackled by ss. 91 and 92, although widely accepted, has come under criticism. One such criticism is that ss. 91 and 92 divide not only legislative but also executive or prerogative powers among the federal government and the provinces and, that inasmuch as a government's proprietary and contractual activities can be understood as exercises of the prerogative, they too must conform to ss. 91 and 92. Although it is correct that ss. 91 and 92

No doubt this proposition applies with equal force to *federal* proprietary and contractual activities, which can operate free from the strictures of the division of powers. What this means is that the federal government, using its contractual and proprietary powers, could conceivably provide social services that it may lack the legislative jurisdiction to regulate. Using these powers, for example, the federal government could establish, build, and operate hospitals and clinics.<sup>100</sup> Those clinics could employ health care providers, who would be paid on a salaried basis. Alternatively, the federal government could even enter into fee-for-service contracts with some providers (*e.g.*, physicians), making their reimbursement akin to that of physicians currently participating in provincial health insurance plans. Presumably, through similar mechanisms, the federal government could also enter the field of public housing and day care. If this is true, then the holdings in the *UI Reference (SCC)* and the *Adoption Reference* on the question of direct social service delivery by governments are clearly in error.<sup>101</sup>

distributed the prerogative powers among the federal government and the provinces (see here *Maritime Bank v. New Brunswick (Receiver General)*, [1892] A.C. 437 (P.C.), and *Bonanza Creek Gold Mining v. The King*, [1916] 1 A.C. 566 (P.C.)), the difficulty with this argument is that the proprietary and contractual powers of the Crown have long been thought to reside *outside* the prerogative. The leading authority here is Blackstone (*Commentaries* 1.123: 'it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects'), although see also A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 11th ed. (Avon: Longman, 1993) at 263; H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 7th ed. (Oxford: Oxford University Press, 1994) at 248; Hogg, *Constitutional Law*, supra note 34 at 707–9. The leading authority for the contrary view is A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 425; see also Finkelstein, *Laskin's Constitutional Law*, supra note 67 at 664.

A second criticism is that the exemption of the Crown's private face from the division of powers creates perverse incentives for the Crown to circumvent the division of powers by relying on its powers of property and contract, as opposed to legislative means. Arguably, this shift in the form of public policy threatens important democratic values, since legislatures rarely exercise any oversight over 'private' governmental activity. For this reason, the 'circumvention' argument has been relied on by the Supreme Court to ensure that governmental contractual activity is subject to Charter scrutiny, in the context of cases involving a collective agreement (*Lavigne v. OPSEU*, [1991] S.C.R. 211) and a contract of employment for a public employee (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844).

100 But cf. Trudeau, *Federal-Provincial Grants*, supra note 66 at 4: 'Parliament does not have the power under the Constitution to establish general hospitals.'

101 Were the federal government to go this route, an additional issue to examine is whether federal social service agencies would be subject to provincial regulation. As I discuss in the next paragraph, federal hospitals or day care centres are species of federal property and fall within the ambit of s. 91(1A), which confers on the federal government jurisdiction over 'the public debt and property.' Let us assume that Parliament has not enacted laws under s. 91(1A) to comprehensively regulate all aspects of its social

Moreover, s. 91 would appear to allow the federal government to enact legislation in relation to these sorts of facilities. The key provision is s. 91(1A) of the Constitution Act, 1867, which confers on the federal government jurisdiction over 'the public debt and property.' Property has been understood quite broadly, to encompass 'every type of asset,' a

services. There is little doubt that s. 91(1A) operates defensively to protect federal property from the application of provincial laws (or particular decisions taken pursuant to general provincial laws) that are pith and substance *in relation to* that property: see *Spooner Oils v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 634–4 [hereinafter *Spooner*]. But what is far less clear is whether federally owned property is immune from the application of provincial laws of *general application* that squarely fall within provincial jurisdiction under s. 92(13).

The case law is divided. On the one hand, a series of lower and appeal court decisions have held that provincial and municipal land use and property development laws do not apply to federal property on land used for airports (e.g., *Mississauga (City) v. Greater Toronto Airports Authority*, [2000] O.J. 4086 (C.A.)). Interestingly, these cases cite *Spooner* as authority. Finkelstein reads *Spooner* broadly as well, stating that '[f]ederal legislative authority in relation to federal public property clearly operates defensively to preclude [the application of] provincial legislation against such property' (*Laskin's Constitutional Law*, supra note 67 at 666). On the other hand, the Supreme Court of Canada upheld the application of a provincial minimum wage law – a law of general application – to a company that had contracted with the federal government with respect to the construction of Mirabel airport: *Construction Montcalm v. Minimum Wage Commission*, [1979] 1 S.C.R. 754. The Court explicitly rejected the argument that the provincial minimum wage law did not apply on federal government lands; *Spooner* was reread as a case on paramountcy, as standing for the proposition that leases issued pursuant to federal law could not be interfered with by provincial property laws. Citing *Montcalm*, Hogg argues that exercises of federal proprietary authority are subject to provincial laws of general application: *Constitutional Law*, supra note 34 at 706–7. Even Finkelstein concedes that 'there is a case to be made for the proposition that when the Dominion acts as a private citizen, e.g. engages in business, it may be required to act according to applicable provincial legislation (subject, of course, to any express constitutional immunity).' *Laskin's Constitutional Law*, supra note 67 at 668.

In my view, the proposition that federal property is subject to provincial laws of general application is correct, if only for the reason that under the modern approach to the division of powers, subject-matters lying within the jurisdiction of one level of government are not immune from laws enacted by the other level of government. The watertight compartments of classical federalism no longer exist. However, there are two caveats. First, the doctrine of inter-jurisdictional immunity operates to shield the 'core' or 'vital aspects,' *inter alia*, of federal undertakings from provincial laws of general application. Given that airports are a federal undertaking (*Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 at 303 [hereinafter *Johannesson*], *per* Rinfret C.J.: 'the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament'), this explains the immunity of airports from provincial and municipal land use and property development laws. Second, should Parliament exercise its jurisdiction under s. 91(1A) to regulate federal property, in the event that those laws conflict with provincial laws, the federal law prevails under the doctrine of paramountcy. Interestingly, the doctrine of paramountcy creates the incentives for the federal government to protect its jurisdiction through the use of legislation.

definition broad enough to encompass buildings and corporations.<sup>102</sup> A federal hospital or a federal child care centre would both count as 'property' for the purposes of s. 91(1A).

In a manner parallel to s. 92(5), s. 91(1A) empowers the federal government to legislate with respect to its own property in ways that would be unconstitutional for it to do with respect to private property (assuming that direct federal regulation of non-governmental social service agencies lies outside its jurisdiction). The significance of the existence of federal legislative jurisdiction is that federal social service programs could be established and regulated by legislation. As a consequence, it would be legally possible to involve Parliament in defining the structure of federal social programs.

#### E. CONCLUSION

So where do things stand? My goal in this section has been to scrutinize critically the propositions for which the *UI Reference* decisions have been taken to stand by a generation of constitutional scholars, policy analysts, and political actors. My conclusion is that these propositions rest on a much weaker constitutional foundation than has been realized. To reiterate, these propositions are (1) that contributory unemployment insurance, at the time, lay outside federal jurisdiction; (2) that contributory social insurance more generally, for example, health insurance, lies outside federal jurisdiction; (3) that the regulation of social services lies outside federal jurisdiction; (4) that the federal government cannot provide social services directly; but (5) that the federal government may spend monies in areas *outside its jurisdiction* (*i.e.*, in provincial jurisdiction) by making grants to individuals, institutions, and provinces, either unconditionally or with conditions attached thereto. In this section, I have demonstrated that (1) has been overruled by specific constitutional amendment; that (2) is parasitic on a narrow conception of federal jurisdiction over economic policy and must be revisited in light of the modern Supreme Court's expansion of s. 91(2) and the POGG power; that (3) is far from clear and, again, must be revisited in light of the modern Supreme Court's jurisprudence, and that regardless, it does not preclude the enactment of non-contributory social insurance programs; and that (4) was incorrect at the time of *UI Reference* decisions. I have been willing to assume the correctness of (5), although I am sympathetic to the arguments made by critics of the spending power, and believe that the intellectually honest approach for defenders of the spending power is to attack (4).

<sup>102</sup> *Per* Duff C.J.C. in *UI Reference (SCC)*, *supra* note 3 at 431 (dissenting, but not on this point); see also La Forest, *Natural Resources*, *supra* note 91 at 134.

It would appear that the constitutional foundations of the Canadian welfare state are rather weak. It is far from clear that the current division of responsibilities among different levels of government – federal responsibility for financing, with provincial responsibility for financing, design, and delivery – is demanded by the Constitution. In this section, I have argued that the key source of doctrinal insight to renovate the jurisprudence on the division of powers and social policy is the case law on federalism and economic policy. But in making sense of and applying this case law, we must rely on a set of more fundamental concerns regarding the most functionally effective assignment of legislative jurisdiction within federations over questions of redistribution. In Part IV, I turn to those concerns. But before I do, in Part III, I will illustrate the extent to which the constitutional vision of the Privy Council shaped the politics of social policy in post-New Deal Canada.

### III *Social policy in the shadow of the Privy Council*

#### A. INTRODUCTION

In the years after the New Deal, the question of the division of powers in relation to social policy almost never came before the Supreme Court. Thus, although handed down over six decades ago, the *UI Reference* decisions are still the leading judgments in the area. The contrast with other areas of public policy is striking. In the post-war period, the Court pronounced on the division of powers in a broad variety of policy contexts – including agricultural marketing,<sup>103</sup> natural resources,<sup>104</sup> inflation controls,<sup>105</sup> the environment,<sup>106</sup> and broadcasting,<sup>107</sup> making social policy conspicuous by its absence from the Court's docket. The silence of the Court on social policy is all the more unusual because jurisdictional questions often ended up before the Supreme Court because of intense

103 *P.E.I. Potato Marketing Board v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392 [hereinafter *P.E.I. Potato*]; *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, 67 D.L.R. (2d) 1 [hereinafter *Carnation* cited to S.C.R.]; *Manitoba (A.G.) v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, 19 D.L.R. (3d) 169 [hereinafter *Manitoba Egg* cited to S.C.R.]; *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257 [hereinafter *Agricultural Products Marketing Reference* cited to S.C.R.].

104 *Central Canada Potash*, supra note 92; *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449 [hereinafter *Cigoil* cited to S.C.R.]; *Natural Gas Reference*, supra note 99.

105 *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference* cited to S.C.R.].

106 *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.]; *Oldman River*, supra note 85; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [hereinafter *Hydro-Québec* cited to S.C.R.].

107 *Capital Cities Communications v. CRTC*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191; *Quebec (A.G.) v. Kellogg's Co.*, [1978] 2 S.C.R. 211.

federal–provincial conflict. In the social policy arena, disputes over the source and scope of federal involvement have been the norm and have often been framed in jurisdictional terms, and yet the courts have rarely been given an opportunity to elaborate upon and clarify the Privy Council's holdings. By contrast, federal–provincial conflicts that raised fundamental questions about the Canadian constitutional order, such as the patriation of the Constitution<sup>108</sup> and the potential secession of Quebec,<sup>109</sup> have landed before the Court.

Why did social policy not give rise to litigation under the division of powers? Although federal–provincial relations in this area were often acrimonious, in the end, both the federal and provincial governments likely concluded that the potential costs of a litigation strategy outweighed the potential benefits.<sup>110</sup> The federal government, for example, has consistently asserted that the federal spending power is a plenary power that allows it to spend in areas of provincial jurisdiction without constitutional limitation. The risk of bringing the spending power before the courts, however, was that a ruling might have imposed some limits on that power, for example, by holding that extremely intrusive conditions might amount to an unconstitutional attempt to regulate matters in provincial jurisdiction. The provinces other than Quebec faced a similar dilemma. Given the existence of vertical fiscal imbalance, they did not oppose the federal spending power in principle, but they wanted federal transfers to be unconditional. A court pronouncement, though, might have had the effect of legitimizing intrusive federal conditions. Even Quebec, which opposed even unconditional federal transfers, opted not to litigate, likely because it seemed exceedingly unlikely that its consistent demand – a right to opt out with compensation – would not be granted by the Court. Not surprisingly, the cases in which the division of powers and social policy were litigated were brought by private parties.<sup>111</sup> The first social policy case brought by a government did not come before the Supreme Court until 1990.<sup>112</sup>

However, the lack of involvement by courts did not mean that the constitutional framework of Social Canada has lain dormant since the 1930s. On the contrary, over the past several decades, political actors

108 *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 [hereinafter *Patriation Reference*].

109 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference* cited to S.C.R.].

110 J.S. Dupré, 'Section 106A and Federal–Provincial Fiscal Relations' in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 203.

111 *Porter*, supra note 26; *CHMC*, supra note 26; *Winterhaven*, supra note 69; *YMHA Jewish Community Centre v. Brown*, [1989] 1 S.C.R. 1532.

112 *CAP Reference*, supra note 69 [S.C.C. hearing 11–12 December 1990].

frequently referred to the *UI Reference* decisions as they debated both the merits of specific federal social policy initiatives and proposals for constitutional amendment. In this section, I examine how the legal assumptions that emerged from the *UI Reference* decisions underpinned the politics of social policy and constitutional reform by examining a number of different episodes: the deliberations of the Joint Committee of the Senate and the House of Commons on Old Age Security, the enactment of the Medical Care Act, and the creation of the Canada Health and Social Transfer (CHST) and the proposals in the Meech Lake and Charlottetown Accords to amend the Constitution to impose constraints on the exercise of the spending power.

These episodes are important for two other reasons. First, some of them highlight tensions among the different components of the holdings of the *UI Reference* decisions. I discuss two pairs of tensions: (a) that the federal government can make conditional grants to individuals from general tax revenues that operate like social insurance schemes but, short of constitutional amendment, cannot enact schemes of contributory insurance that require the payment of premiums; and (b) that the federal government can make conditional grants to provinces but cannot regulate social services. Each of these tensions has been relied on by political actors to argue for or against the constitutionality of particular federal policy initiatives, in addition to policy-based arguments that turn on the substance of those proposals themselves. Second, these episodes furnish examples of what I call *doctrinal politics*, whereby political actors rely on pieces of constitutional doctrine in political argument in order to delimit the constitutional space within which political institutions can act.<sup>113</sup>

113 This is a break from the normal way in which political institutions are thought to engage with the constitutional restraints on their powers. I recently argued that in the Canadian constitutional tradition, the interpretation and application of constitutional doctrine has traditionally fallen to the courts, whose role has been regarded as both exclusive and supreme. On a strong version of this account, the constitutional restraints on political decision making play no role in the deliberations of legislatures and executives whatsoever; political institutions confine themselves to non-constitutional considerations. These episodes demonstrate this claim to be false, as is to be expected, given the reasonable assumption that public institutions in liberal democracies wish to conform with constitutional restraints. Moreover, to the extent that constitutional doctrine is unclear, political institutions that grapple with doctrine are engaged in a process of constitutional interpretation. The interpretation of constitutional doctrine by legislatures, for example, is what I term *legislative constitutional interpretation*. S. Choudhry & R. Howse, 'Constitutional Theory and the *Quebec Secession Reference*' (2000) 13 Can.J.L. Juris. 143.

Accepting that executives and legislatures deliberate upon the meaning and extent of constitutional constraints, though, is not to go one step further and adopt a theory of coordinate construction, whereby interpretative responsibility for the contextualization of constitutional norms in specific circumstances is shared by both judicial and

## B. UNIVERSAL BENEFIT SCHEMES VS. CONTRIBUTORY INSURANCE

In Part II, I suggested that while contributory insurance, short of explicit constitutional authorization, lies outside federal jurisdiction, social insurance schemes funded out of general tax revenues do not. While these two cases pose little constitutional difficulty, they stand at extreme ends of a spectrum of social insurance schemes funded by a mixture of tax revenues and contributions. Indeed, this was the case with the impugned scheme in the *UI Reference* decisions. Recall that the impugned scheme was funded not only by employer and employee contributions but also with public monies from the Consolidated Revenue Fund, in the amount of 20 per cent of those contributions. Indeed, the Privy Council explicitly acknowledged the mixed nature of the funding in its description of Part III of the Act.<sup>114</sup> The use of general revenues, however, did not save the scheme. It appears to follow, then, that whenever social insurance programs are funded through contributions, regardless of what percentage of total operating costs those contributions constitute, those programs lie outside federal jurisdiction.

A more challenging question, though, is to identify those circumstances in which social insurance programs will be considered to be funded on a contributory basis. The *UI Reference* decisions do not furnish criteria for identifying and distinguishing contributory from non-contributory schemes, in no small part, I think, because the contributory nature of the unemployment insurance there was so clear. The difficulties created by this lack of guidance figured prominently in the proceedings of the Joint Committee of the Senate and the House of Commons on Old Age Security. Created in 1950, the Committee was given an extremely wide mandate. The motion calling for its creation provided that it would examine and study the operation and effects of existing legislation of the parliament of Canada and of the several provincial legislatures with respect to old age security; similar legislation in other countries; possible alternative measures of old age security for Canada, with or without a means test for beneficiaries, including plans based on contributory insurance principles; the

non-judicial institutions. That is certainly the holding in the *Secession Reference*, supra note 109, but that judgment is a dramatic departure from the normal institutional division of labour in the Canadian constitutional system, with respect not only to constitutional interpretation but also to constitutional amendment. For further discussion, see Choudhry & Howse, *ibid.* In a work in progress (tentatively entitled 'Legislative Constitutional Interpretation: A Canadian Case-Study'), I argue that both the federal Clarity Act, Bill C-20, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26, and Quebec's *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, S.Q. 2000, c. 46, can be understood as examples of legislative constitutional interpretation in the mode of coordinate construction.

114 *UI Reference (PC)*, supra note 3 at 365.

probable cost thereof and possible methods of providing therefor; the constitutional and financial adjustments, if any, required for the effective operation of such plans and other related matters.<sup>115</sup>

The recommendations of the Committee were wide-ranging. For example, the Committee proposed, *inter alia*, that the Constitution be amended to confer concurrent jurisdiction on the federal and provincial governments with respect to old age pensions.<sup>116</sup> This recommendation was implemented in 1951, through the enactment of the British North America Act, 1951.<sup>117</sup> This provision, since amended,<sup>118</sup> serves as the constitutional foundation of the federal contributory pension programs. However, the Committee did not recommend the enactment of the Canada Pension Plan (CPP), instead opting for the creation of a universal benefit to persons seventy years of age or older,<sup>119</sup> a recommendation that was followed as well, through the enactment of the Old Age Security Act of 1951.<sup>120</sup> The CPP was created more than a decade later, in 1965.<sup>121</sup>

Notwithstanding the Committee's decision not to recommend the creation of a contributory pension plan, the division of powers over contributory insurance figured prominently in the Committee's deliberations. Jean Lesage (who went on to become Premier of Quebec) posed three questions to the Deputy Minister of Justice, F.P. Varcoe, 'relating to the authority of Parliament to enact legislation for the raising of moneys to pay old age pensions':

Question 1: Can the Federal Government impose a universal system of old age security derived from general revenue?

Question 2: Would an amendment to the *B.N.A. Act* be necessary to impose such a social security tax 'earmarked' for the payment of old age pensions?

Question 3: Can Parliament enact legislation to establish a contributory scheme of old age pensions similar to that under the *Unemployment Insurance Act*?<sup>122</sup>

Varcoe's answers to the first and third questions were a clear 'Yes' and 'No,' relying explicitly in his third answer on the judgment of the Privy

115 *House of Commons Debates* (10 March 1950) at 635.

116 Canada, *Report of the Joint Committee of the Senate and House of Commons on Old Age Security* (Ottawa: King's Printer, 1950) [hereinafter *Old Age Security Report*] at 111.

117 *British North America Act, 1951* (U.K.), 14 & 15 Geo. VI, c. 32.

118 *Constitution Act, 1964* (U.K.), 1964, c. 73.

119 *Old Age Security Report*, supra note 116 at 111.

120 *Old Age Security Act*, S.C. 1951 (2d Sess.), c. 18.

121 S.C. 1964-1965, c. 51.

122 Canada, Joint Committee of the Senate and the House of Commons on Old Age Security, *Minutes of Proceedings and Evidence*, No. 28 (31 May 1950) at 1161-2.

Council in the *UI Reference*.<sup>123</sup> His answer to the second question was much more equivocal and produced a lively exchange in the Committee. Here is his answer in full:

The revenue from such a tax would, according to my understanding, be accounted for in a special account in the Consolidated Revenue Fund. Payment of the pensions would be made out of this public account in whole or in part. The payment of pension in any year would be made out of the taxes collected for that year and pensions would not be related in any way to previous payments of tax made by the pensioner. In such a plan, there would be no complete disjunction of the compulsory taxation measure and the pension payments. Consequently, there would always be the possibility of the courts holding the plan to be a compulsory insurance act invalid for the reasons given by the Privy Council in connection with the *Employment and Social Security Act Reference [i.e., the UI Reference]* in 1937.<sup>124</sup>

What was Varcoe's line of analysis? Recall the two extremes: a contributory insurance scheme, where benefits are paid out of premiums received from beneficiaries less expenses, and which for that reason lies outside federal jurisdiction; and an income support program, where payments are made from general tax revenue, and which can be enacted pursuant to the spending power. The functional difference between the two is that in the former, there is a financial nexus between the beneficiaries and the plan, since benefits are paid from contributions and are paid only to those who have made contributions, whereas in the latter, this nexus is absent, since those who receive benefits need not have contributed and may never contribute financially to the program. An earmarked tax – for example, a special tax for old age pensions or for health insurance – poses difficulties of classification. On the one hand, beneficiaries need not have contributed to the plan, through the payment of special taxes, in order to receive payments. On the other hand, since the plan is financed through special taxes, for those beneficiaries who have paid those taxes before they receive payments, those taxes would be tantamount to contributions. Hence, Varcoe's opinion was that the constitutionality of such a program would be uncertain.

The different members of the committee explored the constitutional ambiguities surrounding earmarked taxes, frequently with reference to the judgment of the Privy Council in the *UI Reference*. Lesage, for example, pressed Varcoe to agree that 'it would be dangerous to undertake to impose a social security tax which would be related in a certain way, even if indirectly, to the payment of old age pensions.'<sup>125</sup> When Varcoe refused

123 Ibid. at 1162.

124 Ibid. at 1161–2.

125 Ibid. at 1164.

to answer, stating that it would be 'very difficult to discuss this sort of thing without having a concrete proposal before' him,<sup>126</sup> Lesage invoked the Privy Council's limit on the spending power – that is, Lord Atkin's statement that spending 'legislation affecting the classes of subjects enumerated in section 92' would be *ultra vires* – and asked Varcoe again if a federal pension program funded through a social security tax would be unconstitutional.<sup>127</sup> Confronted with Lord Atkin's statement, Varcoe was more obliging in his answer: 'Well, if you regard the old age pension, as you are bound to, as a form of insurance then it falls right within the Employment Insurance case.'<sup>128</sup>

Other members of the committee asked Varcoe if it would be possible to circumvent the Privy Council's ruling by framing earmarked taxes that lacked the financial nexus between duty to contribute and entitlement to benefit. Charles Cannon, for example, asked, '[S]upposing the bill set out very clearly [that] there was no such relation between the payment of the premium and payment of the benefit; in a case like that, would you be prepared to say it would not come under section 92?'<sup>129</sup> Varcoe's answer was the same he had given Lesage: 'I tried to think that through and I have not succeeded so far in envisaging any bill that would differentiate it from unemployment insurance.'<sup>130</sup> But when pushed on this point, Varcoe's answers changed: he suggested that a 'customs duty or some other indirect tax,' in which case there was 'a complete disjunction between the tax and the payment of the pension,' or 'a tax solely on corporations' might break the nexus.<sup>131</sup> Stanley Knowles, perhaps sensing movement on Varcoe's part, asked,

Is there any taxation method between the extremes of completely unearmarked general revenue and an earmarked social security tax? For example, supposing parliament in the same session was to enact an old age security measure, such as the one we have been talking about, and enacted changes in the income tax, without earmarking it to clearly provide the amount of money the Old Age Pension Act will ask for?<sup>132</sup>

Before Knowles could complete his question, and before Varcoe could answer, Lesage interrupted, stating, 'You have your answer in Lord

126 Ibid.

127 Ibid. at 1165.

128 Ibid.

129 Ibid. at 1165–6.

130 Ibid. at 1166.

131 Ibid. Along these lines, Karl Homuth asked Varcoe if a pension plan funded by general sales tax, which would be paid by many entities (*e.g.*, corporations) that would never draw a pension, would be unconstitutional. Varcoe's response was that '[t]hat is the very case that I cannot make up my mind about until I see the bill in writing.' Ibid.

132 Ibid. at 1170.

Atkin's judgment. I will quote: – "It is not necessary that it should be a colourable device or a pretence,"<sup>133</sup> suggesting that the impact or effect on provincial subject-matters, even without an illegitimate purpose, would be sufficient to take the legislation out of federal jurisdiction.

In its final report, the best the Committee could do was to bracket its disagreement. Discussing Varcoe's testimony, it stated that

[b]etween these two extremes of payments from general revenue and an insurance scheme, there is a range of possibilities. In the view of the witness, constitutionality cannot be determined until a specific proposal is set out in a bill. It is not clear, for example, whether it would be within the power of Parliament to pass an Act under which special taxes would be earmarked for paying old age pensions, even though the pensions might not be related in any way to previous payments of the tax. The validity of such a scheme would, according to the evidence presented, depend upon whether or not there was a complete disjunction of the compulsory taxation measure and the pension payments. Unless it were clearly evident that the taxes would not be borne directly and solely by those who would ultimately be pensioned, the necessary disjunction would not be complete and there would always be the possibility of the courts holding the plan to be a compulsory insurance act and, hence, invalid.<sup>134</sup>

The report also noted that Varcoe stated that 'he was influenced in large measure by the 1937 judgment of the Privy Council on the validity of the Employment and Social Insurance Act of 1935.'<sup>135</sup>

#### C. SHARED-COST PROGRAMS: SPENDING OR REGULATION?

The *UI Reference* decisions held that the federal government could not directly regulate social service delivery but that it could expend monies in areas of provincial jurisdiction by making grants to provincial governments and attaching conditions thereto. The latter proposition served as the foundation of the numerous shared-cost programs created by the federal government. In the income support area, a number of shared-cost statutes provided money to provinces that then provided financial support to individuals who qualified under a means test. In 1951, Parliament enacted the Old Age Assistance Act<sup>136</sup> and the Blind Persons Act,<sup>137</sup> which provided financial assistance to persons in need who were between the ages of sixty-five and seventy or who were visually impaired, respectively. In 1956, Parliament enacted the Unemployment Assistance Act,<sup>138</sup>

133 Ibid.

134 *Old Age Security Report*, supra note 116 at 93.

135 Ibid.

136 S.C. 1951 (1st Sess.), c. 55.

137 S.C. 1951 (1st Sess.), c. 38.

138 S.C. 1956, c. 26.

the first shared-cost statute for social assistance. In 1966, these statutes were consolidated and repealed by the Canada Assistance Plan (CAP).<sup>139</sup> Each of these acts imposed conditions for the receipt of federal monies. The CAP, for example, provided for fifty-fifty cost sharing with provinces that complied with a set of national standards, central among which was the requirement that provinces provide financial aid or other assistance to any person in need, in an amount that met the basic requirements of that person.<sup>140</sup>

Shared-cost statutes were also the instrument of choice in the area of health insurance. Parliament's first foray into this arena was the Hospital Insurance and Diagnostic Services Act,<sup>141</sup> enacted in 1957, which authorized the federal government to provide financial support to provincial health insurance schemes that covered both in-patient and outpatient hospital services. Prompted by the report of the Royal Commission on Health Services,<sup>142</sup> the federal government's next step was to extend the envelope of federal funding to non-hospital-based care, in 1966, through the enactment of the Medical Care Act.<sup>143</sup> Although it built upon the logic of the Hospital Insurance and Diagnostic Services Act, the Medical Care Act differed with respect to the manner in which it imposed conditions on the provinces. The former enumerated a detailed list of procedures that provincial plans were to cover in order to be eligible for federal funding and stipulated that insured services be made available 'to all residents of the province upon uniform terms and conditions,'<sup>144</sup> an ambiguous term that was thought to require universal coverage. The conditions in the Medical Care Act, on balance, were much more intrusive. Although the Act did not enumerate specific procedures to be insured, it laid down fairly specific eligibility criteria for provincial plans: operation on a non-profit basis by a public authority, reasonable access to persons across the province on uniform terms and conditions, coverage of no less than 95 per cent of a province's residents, and portability of coverage between the provinces. Thus, although strictly speaking a conditional spending statute, the Medical Care Act addressed the design of provincial health insurance systems in a manner akin to regulation.

The Medical Care Act provoked a spirited debate in the House of Commons. Allan MacEachen, the Minister of National Health and Welfare, addressed the jurisdictional issues immediately and squarely when he introduced the Act before the House. His argument was two-

139 *Supra* note 5.

140 *Ibid.* at s. 6(2)(a).

141 S.C. 1957, c. 28.

142 Canada, *Report of the Royal Commission on Health Services* (Ottawa: Queen's Printer, 1964).

143 S.C. 1966-1967, c. 64.

144 *Supra* note 141 at s. 5(2)(a).

fold: that the direct regulation of health insurance by the federal government was not an option, but that the expenditure of federal funds on health care through grants to provinces was. To be sure, though, he was explicit only with respect to the first of these propositions. Thus, early on in his speech, MacEachen emphasized that health care, including health insurance, fell within provincial jurisdiction and that direct federal regulation was constitutionally precluded:

The federal government's proposal, as hon. members know, is to offer the provinces a sizeable sum of money to support provincial medical care insurance programs which meet certain established standards. We have taken this approach because we recognized that under our constitution health is a provincial responsibility and, because of this, the federal initiative in this field is limited to encouraging provincial action. ... It would be much simpler and, to some, more attractive to shunt these considerations aside and promise broad and direct federal action in this field. But in practice, this amount to little more than an exercise in futility, for it would mean making federal promises that are not within the federal power to keep.<sup>145</sup>

MacEachen went on to reiterate these points.<sup>146</sup> His remarks addressed neither the general question of the constitutionality of federal spending in areas of provincial jurisdiction nor the specific issues of whether those expenditures could be conditional and whether the conditions imposed by the Medical Care Act were constitutional. In particular, MacEachen did not address the Privy Council's limitation on the federal spending power, that is, that it could neither be used to invade, encroach on, or affect matters lying within provincial jurisdiction nor to colourably regulate provincial subject-matters. One can reasonably assume that MacEachen and his legal advisers relied on the distinction between spending and regulation and, accordingly, regarded the Act as *intra vires*, regardless of the conditions it imposed, because it was strictly a spending statute.

Members of the Opposition did not attack the constitutionality of federal spending in areas of provincial jurisdiction in general, but they took issue with the conditions laid down by the Act. The attack was led by Gilles Grégoire, a Cr ditiste MP from Quebec. In his criticisms of the Act,

145 *House of Commons Debates* (12 July 1966) at 7545–6.

146 In describing the history of federal involvement in health care, MacEachen described grants made by the federal government to the provinces in 1948 for health care (*e.g.*, building hospitals) as 'respecting the constitutional position' and explained that federal contributions under the Hospital Insurance and Diagnostic Services Act were 'toward programs which clearly fell within provincial jurisdiction' (*ibid.* at 7546). The implication here was that federal regulation of health care would have been unconstitutional but that federal grants were not. Finally, he concluded by emphasizing the centrality of provincial jurisdiction, stating that 'there is no question at this time as to the role allocated to the provinces under our constitution in the health field' (*ibid.*)

Grégoire placed constitutional arguments front and centre, stating 'that health is a provincial matter, and that the provinces are the ones which, in the final analysis under the terms of the constitution, have jurisdiction in the field of health.'<sup>147</sup> As a consequence, the conditions in the Act were problematic: provinces should be allowed 'to take their own decisions on their own programs, since this is under their jurisdiction, under their responsibility in this area of health.'<sup>148</sup> Grégoire was joined by Maurice Allard, who denounced the Act as 'against the spirit and the letter of the Canadian constitution which allocates to the provinces, solely and exclusively, the fields of insurance and hygiene'<sup>149</sup> and as 'another centralizing, anticonstitutional measure, and those are areas and conditions which should be established by the provinces and not be imposed on them.'<sup>150</sup> Seeking to support Allard, J.-A. Mongrain framed his arguments by reference to the constitutional text:

For the hundredth time, perhaps, I have gone over the *British North America Act* to determine exactly what are the respective prerogatives of the federal and provincial governments and, after reading the act, it remains obvious that health matters are a provincial government responsibility. I see nothing, with regard to federal government prerogatives, which would enable it to take over health matters.<sup>151</sup>

These jurisdictional arguments were also made by opposition MPs from outside Quebec. For example, A.B. Patterson, an MP from British Columbia, stated that '[t]he plan presented by the government, while recognizing the principle of provincial autonomy ... in actual fact dictates the type and the scope of the plan which is acceptable to meet the eligibility conditions.'<sup>152</sup>

Significantly, opposition MPs attacked the spending/regulation distinction. For example, Patterson argued that although provinces were in

147 Ibid. at 7561.

148 Ibid. at 7562. Some months later, during the second reading of the Act, Grégoire repeated this criticism. Here are two of his statements, both invoking jurisdictional arguments against the Act: 'Ottawa is forever trying to interfere in fields of provincial jurisdiction. I think the time has come to tell Ottawa: That is enough. Mind your own business and leave to the provinces the fields which come under their jurisdictions. And health is one of them.' *House of Commons Debates* (20 October 1966) at 8930.

149 *House of Commons Debates* (13 October 1966) at 8646.

150 Ibid. at 8646-7.

151 *House of Commons Debates* (14 October 1966) at 8687. C.-A. Gauthier likewise stated that 'this bill is contrary to the rights of the province of Quebec and we may not, we cannot as French Canadians, accept something contrary to the constitution, something which undermines the powers, the rights of our province to the benefit of a central government which day after day, hour after hour, attempts to take over the rights of the provinces.' *House of Commons Debates* (20 October 1966) at 8931).

152 *Debates*, supra note 149 at 8630.

theory free 'to refrain from participation in this particular program,'<sup>153</sup> they were in fact 'coerced into compliance with'<sup>154</sup> national standards, since provinces that opted out would not receive the fiscal compensation from the federal government that would enable them to operate their own provincial schemes. Similarly, Allard stated that '[f]our conditions are laid down, then the provinces are told: accept that, launch your own medicare program, and we will pay so much provided you meet our four requirements. Well that is not co-operation; it is trespassing, coercion.'<sup>155</sup>

The response of the federal government was to reiterate the regulation/spending distinction. The Associate Minister of National Defence, Léo Cadieux, simply stated that '[t]he province of Quebec is not required to establish it [*i.e.*, a provincial health insurance system], but requested to do so and a compensation of 50 percent of the costs incurred is offered as a compensation.'<sup>156</sup>

The argument that conditional grants allow the federal government to indirectly regulate areas of provincial jurisdiction was also raised in the legislative debates surrounding the enactment of the Budget Implementation Act, 1995.<sup>157</sup> The Act had a number of different components. Its centrepiece was the creation of the CHST, a block grant consisting of a mixture of tax points and a cash transfer to the provinces for health, social assistance, and post-secondary education. The CHST amalgamated two pre-existing sets of federal transfers: transfers for social assistance under the CAP, which were funded on a fifty-fifty cost-sharing basis, and the block grants for health care and post-secondary education centred on the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act of 1977.<sup>158</sup> The significant difference between a block grant and a shared-cost program is that under the latter, provinces are obliged to expend monies at the level of the federal transfer, whereas under the former, provinces may expend monies at whatever level they wish.

In contrast to the situation under the CAP, the level of federal transfers under the CHST is now set by statute, as opposed to provincial expendi-

153 Ibid. at 8631.

154 Ibid. at 8630.

155 *Debates* (14 October 1966), supra note 151 at 8665. J.H. Horner, from Alberta, made the same point: "What part in co-operative federalism does this play when we say to the provinces 'You must bring in legislation that is operated on a non-profit basis; you must bring in insured services to cover 90 percent of the population immediately on the enactment of this act; these four criteria must be obeyed or you will received no money.' Is this not the heavy hand; is this not a bribe; is this not forcing the provinces into something? ... Mr. Speaker, we must remember that ... we are using the heavy hand of money to persuade the provinces to accept what we want them to accept." *Debates* (20 October 1966) at 8925.

156 *Debates* (20 October 1966) at 8934.

157 S.C. 1995, c. 17.

158 S.C. 1976-1977, c. 10.

tures. In the first year of its operation, cash transfers to the provinces under the CHST declined from \$18.5 billion to \$14.2 billion. Moreover, the Budget Implementation Act retained the enforcement mechanisms for the national standards under the Canada Health Act (CHA), but repealed those established by the CAP for social assistance, save for the prohibition on residency requirements (which is now subject to the discretionary enforcement track centred on the federal cabinet). Taken together, the various elements of the CHST placed medicare in a privileged position vis-à-vis social assistance and created the incentive for provinces to scale back on directed assistance to the poor.

The creation of the CHST was widely viewed as a decentralizing event in the evolution of Social Canada, because it eliminated conditions that had hitherto attached to federal monies (except in the area of health care) and adopted a block grant structure for all federal transfers. In particular, the abolition of national standards for social assistance was seen as a *quid pro quo* for reduced federal financial support and as a tacit acknowledgement of the force of the argument that national standards are intrusions into areas of provincial jurisdiction. Given the increased flexibility for provincial decision making, one would have expected this aspect of CHST to be greeted with enthusiasm by critics of conditional grants to the provinces. In fact, however, the CHST received a hostile reaction from Opposition MPs. Consider the following statement by Lucien Bouchard:

Now the federal government will not be content just to encroach on federal jurisdictions. It will not be satisfied with legal opinions from the Department of Justice. It will not be satisfied by merely appeasing its appetite for power. It is going to set up a legislative framework for itself to achieve this end. This framework is known as Bill C-76 [*i.e.*, the Budget Implementation Act, 1995], legislation that is a charade as well, because it is one of the ways the federal government is concealing the fact that is dumping its poor management onto the provinces.<sup>159</sup>

Likewise, Jean Landry denounced the Act as 'one of the worst incursions in the history of federalism into provincial jurisdiction.'<sup>160</sup>

What was the basis of their opposition? Upon closer examination, we find that Bouchard, and other MPs from the Bloc Québécois (BQ), advanced three lines of argument, all of which invoked constitutional concerns of a jurisdictional nature. The first was that despite the abolition of national standards for social assistance, the Act actually set the stage for new national standards. This claim turned on a provision in the Act that seemed to open the door to new national standards, including in

159 *House of Commons Debates* (2 May 1995) at 12032.

160 *House of Commons Debates* (5 June 1995) at 13244.

the area of post-secondary education, where no national standards have ever existed.<sup>161</sup> Thus, Francine Lalonde stated,

What is more distressing is that up to now, no conditions of any sort were ever attached to post-secondary education. It was so clearly a matter of provincial jurisdiction close to the heart of Quebec that there had been nothing like federal standards, which seemed out of the question, impossible. Yet, this so-called flexible bill provides that the federal government will encourage the provinces to establish common goals and principles in health care, post-secondary education, welfare, and social services.<sup>162</sup>

The BQ identified this as a particular concern because education is 'an area which ... has been under exclusive provincial jurisdiction since 1867.'<sup>163</sup>

The second line of argument was that the maintenance of the national standards for medicare perpetuated an unconstitutional intrusion into provincial jurisdiction. Jean-Paul Marchand stated, for example, that

[i]f the federal government really wanted to save money, it could take some very simple measures. First, it could withdraw completely from social programs and transfer its responsibilities, along with the tax points, to the provinces. This would only make sense, considering that health, education and social programs are under provincial jurisdiction. By insisting on remaining involved in these areas, the federal government violates its own constitution.<sup>164</sup>

Reform MPs advanced this argument as well. Jim Gouk, for example, argued with reference to the constitutional text that

[s]ections 91 and 92 of the Constitution lay out the federal and provincial responsibilities. In the Constitution, it is the provincial responsibility, not federal, to provide health care. It is the provincial responsibility, not the federal responsibility to provide welfare. ... The federal government recognizes it has absolutely no authority to interfere in the actual operation of the health care system, for example. In essence it is perverting the very acts contained in the Constitution of Canada creating many problems in our social services.<sup>165</sup>

161 Now s. 13(1)(d) of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, read in combination with s. 13(4).

162 *Debates*, supra note 160 at 13251.

163 Yves Rocheleau, *House of Commons Debates* (6 June 1995) at 13337.

164 *Debates*, supra note 160 at 13256. Similarly, Yves Rocheleau stated that 'in the spirit of the constitution, a jurisdiction like health falls strictly under the purview of the provinces. It is unconstitutional for the federal government to intervene in the way it does, exchanging assistance for adherence to standards.' *Debates*, supra note 163 at 13336.

165 *Debates*, supra note 160 at 13258. Likewise, Ken Epp stated that '[t]he federal government is intruding on these areas of provincial jurisdiction by [*sic*] our Constitution.' *Ibid.* at 13248.

The third line of argument was that the Act made the existing federal conditions for medicare more intrusive, since the reduction in federal financial support was not accompanied by a relaxation of those conditions. Provinces were being held to the same standards, even though the federal government had rendered provinces less able to comply with them. This somehow made the unconstitutional intrusion on provincial jurisdiction even worse. Pierre Brien of the BQ put this point most clearly:

Because of these cuts, the provinces are forced to choose. The federal government did leave them some leeway. This is what they call decentralized federalism: 'You must cut, but you get to choose where these cuts will be made.' This is easier said than done, because at the same time the government is telling us: 'You will [be] required to comply with a number of principles arising from the *Canada Health Act* ...'<sup>166</sup>

This point was also made by Reform MP Dick Harris:

I suppose this [*i.e.*, the reduction in federal transfer payments] would be all right if the provinces were allowed, as the funds were withdrawn or diminished, to have a say in how the health care systems within their provinces were to be run. That would include the provinces having some flexibility to come up with creative funding plans to make up for the moneys they will not be receiving from the federal government. In some provinces, particularly Alberta, private enterprises have gone into the health care business. ... Now the federal government looks at the private enterprise ... and says that it is against the *Canada Health Act*, that it cannot operate any more, and that if it does the government will cut back on funding. ... This is grossly unfair to the provinces.<sup>167</sup>

#### D. CONSTITUTIONAL REFORM AND THE SPENDING POWER

Amending the Constitution to constrain the exercise of the federal spending power has been a central preoccupation of constitutional reform since the Patriation Round. The reasons for concern are familiar. In addition to the basic criticism that the spending power allows the federal government to indirectly regulate areas outside its jurisdiction, it has been argued, most persuasively by Andrew Petter, that the spending

<sup>166</sup> *Ibid.* at 13245.

<sup>167</sup> *Ibid.* at 13252. Interestingly, government MPs did not respond to these constitutional arguments, except to dismiss them. Thus, Nick Descepolo called upon opposition MPs to 'stop this stupid business about jurisdiction of power' (*Debates*, *supra* note 159 at 12046) and asserted that '[i]t does not serve our constituents well in any part of Quebec or Canada to fiddle while Rome burns with petty jurisdictional concerns' (*ibid.* at 12047) because 'constituents do not care what logo is on the letterhead as long as efficient, quality service is provided' (*ibid.* at 12048).

power is in tension with important constitutional values.<sup>168</sup> For example, federalism is thought to promote democratic decision making, inasmuch as democracy is understood as the maximization of the fit between citizens' preferences for public policy and those policies themselves. When local political communities are allowed to adopt a set of public policies, the possibility of fit is higher than if those policies were adopted by national political institutions, which must be responsive to the policy preferences of the national majority. For that reason, by empowering national majorities to set provincial public policies through conditional grants, the spending power is alleged to exact costs in terms of democracy. The spending power also raises democratic concerns of a different sort because it makes it difficult for provincial electorates to hold provincial governments accountable for policy outcomes. Political accountability through the democratic process is effective only if provincial governments are in control of the policy agenda within their respective jurisdictions. But by allowing the federal government to make decisions regarding the substance of provincial public policies through conditional grants, the spending power divorces jurisdiction over policy areas from control over policy outcomes, thereby weakening the mechanisms of accountability. Against the response that the federal spending power merely shifts the locus of accountability to the federal level, critics of the spending power argue that the federal government cannot be held accountable for policy outcomes either, because of the lack of federal regulatory jurisdiction over social policy. The spending power accordingly creates an accountability gap in the heart of Social Canada.

Both the Meech Lake and the Charlottetown Accords attempted to respond to these concerns, through a proposed amendment that would have dramatically altered the legal framework surrounding the exercise of the federal spending power.<sup>169</sup> The proposed amendments would have added a new s. 106A to the Constitution Act, 1867. Although they differed slightly in terms of language, they were largely identical. Here is the language from the Charlottetown Accord:

106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

168 Petter, 'Federalism and the Myth,' *supra* note 64.

169 Canada, *Constitutional Accord 1987* (Ottawa: Queen's Printer, 1987) at cl. 7; Canada, *Charlottetown Accord: Draft Legal Text* (Ottawa: Queen's Printer, 1992) at s. 16.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

(3) For greater certainty, nothing in this section affects the commitments of the Parliament and government of Canada set out in section 36 of the *Constitution Act, 1982*.

The proposed amendment on the spending power in both Accords attracted considerable criticism. What is interesting about these criticisms is that they came from both extremes of the political spectrum. On the one hand, s. 106A was denounced as a sell-out by English Canadian nationalists, who feared that it would pave the way for the balkanization of Social Canada. On the other hand, s. 106A was attacked by Quebec nationalists and proponents of decentralization, who feared that it could precipitate a massive centralization in the social policy arena.

How could the same legal text have given rise to such divergent predictions regarding its potential impact? To some extent, underlying this disagreement over the potential impact of s. 106A was a legal dispute over its interpretation, with some arguing that it imposed too many constraints on the spending power and others that the constraints it imposed were insufficient. Petter, for example, argued that the limited scope of the provision – to programs established *after* the coming into force of s. 106A – left the major pieces of federal social policy legislation (the CHA, CAP) untouched.<sup>170</sup> In response, Deborah Coyne suggested that each and every amendment to existing programs might trigger the operation of s. 106A and, hence, a round of opt-outs with compensation.<sup>171</sup> Similarly, while it could be argued that s. 106A would have restricted provincial autonomy by permitting opt-outs only if provinces offered programs that were compatible with national objectives, one might reply that the use of ‘national objectives,’ as opposed to ‘national standards,’ and ‘compatible,’ as opposed to ‘consistent,’ meant that the restraint imposed by s. 106A would have been very weak indeed.

Yet it would be a mistake to conclude from this dispute over the interpretation of s. 106A that there was, in addition, disagreement over the constitutional framework that that amendment would have altered. With the exception of Quebec and a handful of scholars,<sup>172</sup> there was a broad consensus during both the Quebec and the Canada rounds that the spending power authorized the federal government to expend monies in areas of provincial jurisdiction. Consider the following statements, found in the reports issued by committees of both the federal Parliament

170 Petter, ‘Federalism and the Myth,’ *supra* note 64 at 475–7.

171 Coyne, ‘Meech Lake Accord,’ *supra* note 66 at 246–7.

172 Lajoie, ‘Federal Spending Power,’ *supra* note 66; Petter, ‘Federalism and the Myth,’ *supra* note 64.

and the provincial legislatures that examined the Meech Lake and Charlottetown Accords:

Although one level of government cannot legislate in respect of matters over which the other has exclusive legislative authority, the so-called spending power permits one level of government to expend its funds in respect of matters over which the other has exclusive legislative authority. It would seem that each level of government enjoys such a spending power ...<sup>173</sup>

... [T]he Parliament of Canada should be able to utilize fully its spending power to address national concerns. Furthermore, such expenditure may extend into areas of provincial jurisdiction. At present, health care and post-secondary education are primary examples of programs within provincial jurisdiction where funding is shared by the federal and provincial governments.<sup>174</sup>

In recent years, the federal 'spending power' has been developed, although this power is not expressly mentioned in the Constitution. It involves spending by the federal government, either directly or through shared-cost arrangements, in areas of exclusive provincial jurisdiction, such as health care, education and social services.<sup>175</sup>

However, this arrangement is also criticised [*i.e.*, conditional grants] as being intrusive, as health care, education and income security are matters within exclusive provincial jurisdiction. The federal government has no express authority to regulate these matters but has been able to shape these programs through its power to spend money raised through its taxing power, and as part of its control over 'the public debt and property.' This 'spending power' is not expressed in the Constitution but has been inferred.<sup>176</sup>

The federal spending power includes spending by the federal government in areas of exclusive provincial jurisdiction such as health care, education, or social services.<sup>177</sup>

It is important to acknowledge that these statements do not explicitly recognize the constitutionality of conditional grants. Indeed, the *Report of the Special Joint Committee on the 1987 Constitutional Accord* noted that Kerwin J. in the Supreme Court had discussed conditions only in connec-

173 Canada, *The 1987 Accord: Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: Queen's Printer, 1987) at 69 [hereinafter *Meech Lake Report*].

174 Manitoba, *Report of the Manitoba Constitutional Task Force* (Winnipeg: Queen's Printer, 28 October 1991) at 43.

175 Saskatchewan, *Report of the Task Force on Saskatchewan's Future in Confederation* (Regina: Queen's Printer, February 1992) at 16.

176 Ontario, *Final Report of the Select Committee on Ontario in Confederation* (Toronto: Queen's Printer, February 1992) at 47.

177 Saskatchewan, *The Charlottetown Agreement: A Saskatchewan Perspective* (Regina: Queen's Printer, 1992) at 17.

tion with grants to individuals and institutions, not to provinces, and suggested for that reason that it was 'not perfectly clear ... whether grants to provinces may be made conditional.'<sup>178</sup> However, given the history of strong provincial objections to conditions, particularly in the area of health care, statements regarding the constitutionality of conditions are conspicuous by their absence. One can infer from this silence an implicit acceptance of the constitutionality, albeit not of the legitimacy, of conditional grants.

This understanding of the stance of both federal and provincial governments makes sense of s. 106A(2), which provided that s. 106A would not alter the division of powers. This subsection is intelligible only if s. 106A would merely have recognized an existing legal state of affairs – that is, the ability of the federal government to expend monies in areas of provincial jurisdiction and to attach conditions thereto. Moreover, the fact that the spending power was accepted as so broad explains why the adoption of s. 106A was so important to the provinces during both the Quebec and the Canada rounds.

#### E. CONCLUSION

These vignettes illustrate the extent to which the legal assumptions that emerged from the *UI Reference* decisions have since underpinned the politics of social policy and constitutional reform. What is remarkable is that these assumptions have endured, despite the fact some of them were incorrect at the time they were handed down, while others have been overtaken by the jurisprudential developments of the last fifty years. In order to inform my legal analysis, I proposed, in Part II, to return to first principles and to consider what insights the literature on federalism and economic theory may offer. I now turn to this task.

### IV *Federalism and economic theory*

#### A. INTRODUCTION: ECONOMICS AND FEDERALISM

Alongside the extensive literature on the spending power generated by constitutional scholars, a vast body of scholarship produced by economists examines the possibilities and the appropriate institutional mechanisms for redistribution within federal states. These two bodies of work have an asymmetric relationship. On the one hand, economists have routinely relied on the standard legal assumptions that I identified and criticized in Part II in their discussion of the policy instruments available to a federal government intent on achieving redistributive goals.<sup>179</sup> On

<sup>178</sup> *Meech Lake Report*, supra note 173 at 72.

<sup>179</sup> Indeed, Robin Boadway frequently discusses the interpretation of ss. 36(1) and 36(2) of the Constitution Act, 1982, which, *inter alia*, entrench the commitment of the federal

the other hand, constitutional scholars have rarely relied on the economics literature to inform and sharpen their analysis of legal doctrine. This failure to engage with the insights of economics is all the more startling not only because of the widespread acceptance of the relevance of positive (as opposed to normative) economics in the study of legal doctrines and institutions but also because positive economics has long been a part of legal analyses of federalism and economic policy, in particular whether both the Constitutional text and the interpretation thereof have contributed to or detracted from the integration of the Canadian economy.<sup>180</sup> In this section and the next, I argue that constitutional scholars should heed what economists say about federalism and redistribution. My basic point in this section is that economists have long viewed the role of the federal government in redistribution as central, in particular to prevent so-called races to the bottom. In Part V, I argue that the prevention of races to the bottom counts as a reason under the 'provincial inability' test for the POGG power to find that the federal government possesses regulatory jurisdiction over social insurance and social services.

Those who are familiar with Canadian economists' work on federalism may find this conclusion surprising, because that literature has looked at the rationales for the federal role in redistribution in federations in the context of the policy instruments that are part of the landscape of fiscal federalism in Canada: equalization payments, conditional grants of various sorts, and the tax system. Indeed, in the Canadian context, the analysis and criticism of existing federal policies and proposals for reform have focused *exclusively* on fiscal arrangements. Federal regulatory jurisdiction has only rarely attracted academic attention. The exclusive focus on financial instruments is understandable, since, as Robin Boadway and Frank Flatters note, 'Canada has one of the most highly developed systems of federal-provincial fiscal arrangements in the world.'<sup>181</sup> At first glance, economics would appear to be an unpromising source of arguments for why the federal government's regulatory jurisdiction over social policy should be understood in much broader terms than it currently is.

and provincial governments to the principle of equalization. *E.g.*, R.W. Boadway, 'The Economics of Equalization: An Overview' in R.W. Boadway & P.A.R. Hobson, eds., *Equalization: Its Contribution to Canada's Economic and Fiscal Progress* (Kingston, ON: John Deutsch Institute for the Study of Economic Policy, 1998) 27 at 35-8 [hereinafter 'Economics of Equalization'].

180 For a recent example, see M.J. Trebilcock, 'The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy' (2001) 80 *Can.Bar Rev.* 542.

181 R. Boadway & F. Flatters, 'Fiscal Federalism: Is the System in Crisis?' in K.G. Banting, D.M. Brown, & T.J. Courchene, eds., *The Future of Fiscal Federalism* (Kingston: School of Policy Studies, Queen's University, 1994) 25 at 25 [hereinafter 'System in Crisis'].

However, it is important to be aware that analytically, it is possible to divorce the *economic rationales* for the federal role in redistribution from the *policy instruments* that have historically been relied on to implement the federal role. In other words, the economic and legal assumptions underlying the economics literature are distinct. Because they are analytically separate, we can probe the economics literature for justifications for the federal role in redistribution while reserving judgment on the legal question of which instruments are available to the federal government to vindicate these ends. This distinction is of fundamental importance because policy instruments other than those that are conventionally thought to lie within federal jurisdiction, such as social insurance schemes and the direct provision of goods and services, also have redistributive aspects. The only reason that economists like Boadway have argued in favour of the tax system and transfer payments as mechanisms of redistribution is their assumption that other measures are constitutionally inaccessible to the federal government. But if we bracket that legal assumption, the positive economic analysis of redistribution in federations suggests that, as a matter of principle, a wide variety of policy instruments can, in theory, vindicate a redistributive agenda.<sup>182</sup>

182 To appreciate the distinction between economic and legal assumptions, consider the writings of Canadian economists on equalization. The economic assumption underlying their work is the proposition that the federal government collects more revenue than it requires for its own expenditures and that the provincial governments collect less revenue than they require for their own expenditures (Boadway & Flatters, 'System in Crisis,' supra note 181 at 31). Technically, this is known as a *vertical fiscal gap*, or a *vertical fiscal imbalance*. There is a broad consensus among Canadian economists that vertical fiscal imbalance, if left unaddressed, is potentially a serious problem for a federation. There are a number of concerns here, but the chief problem is that vertical fiscal imbalance means that sub-national governments, taken together (as opposed to individually), lack the requisite means to deliver public policies to their citizens. In this vein, for example, the Rowell-Sirois Commission argued that federalism would be a dead letter were the provinces not given revenues commensurate with their responsibilities. In theory, there are two possible policy responses: (a) to eliminate vertical fiscal imbalance by realigning responsibility for expenditures and revenue-raising powers and (b) to offset vertical fiscal imbalance through transfer payments from the federal government to the provinces. The point for our discussion is that in assessing these policy options, economists have faithfully relied on the legal assumptions supplied to them by constitutional scholars – that is, that the federal government lacks regulatory jurisdiction over social insurance and social service delivery and that the only way the federal government can influence the social policy agenda under the constitution as it stands is through the spending power.

Consider the first option – to realign expenditures and revenues. One way of ensuring correspondence between expenditures and revenues would be to transfer responsibility for expenditures *upward* to the federal government to match its revenue-raising capacity. Along these lines, the Rowell-Sirois Commission, for example, proposed that jurisdiction over unemployment insurance and pensions be transferred to the federal government. Both of these proposals were accepted by Ottawa and the

## B. FEDERALISM AND DISTRIBUTIVE JUSTICE

1. *Vertical equity*

To fully grasp the difficulties that the pursuit of redistributive goals poses for a federal state, we must define what those redistributive goals actually are. The goal I focus on here is *vertical equity*.<sup>183</sup> The term 'vertical equity' refers to the appropriate stance of governments towards interpersonal economic inequality (however measured) prior to and independent of redistributive policies. In the taxation context, for example, vertical equity refers to the manner in which government policy addresses differences in pre-tax incomes. In general, a concern for vertical equity is synonymous with proposals to reduce income inequality.<sup>184</sup> For the purposes of this discussion, though, I will assume that 'vertical equity' is synonymous with the attitude of welfare-state capitalism towards income

provinces. Assuming that the provinces possess exclusive jurisdiction over social insurance and social services, further transfers of expenditure responsibilities with respect to social insurance and social policy would also require recourse to constitutional amendment. But, in part because of the difficulties surrounding constitutional amendment, economists have ruled out this policy option. Tom Courchene argues, for example, that an upward transfer of jurisdiction is not on a realistic option. T.J. Courchene, *Renegotiating Equalization: National Polity, Federal State, International Economy* (Toronto: C.D. Howe Institute, 1998) at 10. The reason for Courchene's scepticism is that constitutional amendments are notoriously difficult to achieve. Transferring jurisdiction for social insurance and social services to Ottawa, for example, would require the approval of at least seven provinces constituting at least 50 per cent of Canada's population (*Constitution Act, 1982*, s. 38). Given the strong opposition to this sort of proposal, it would be difficult to satisfy this decision rule.

The second option is the establishment of intergovernmental transfers from the federal government to the provinces. In the Canadian context, the dominant instrument for the redress of vertical fiscal imbalance has been equalization, although conditional grants provided on a needs basis (*e.g.*, shared-cost grants for health care and social assistance) have also served this purpose. My point is that economists overwhelmingly prefer this option to the first one, in part because it does not require constitutional change. Boadway and Flatters, for example, openly acknowledge that their defence of transfer payments is shaped by the legal framework governing the division of powers, not by economic considerations, and, as a consequence, is limited to spending. As they say, 'the spending power is the only federal policy instrument available for achieving national objectives in areas of exclusive provincial jurisdiction.' 'System in Crisis,' *supra* note 181 at 201.

In sum, economists' preference for certain policy instruments should not be understood as driven by economic rationales. Rather, legal assumptions – regarding the existing division of powers and the relative ease of constitutional change – are important considerations in this body of literature.

183 Boadway, 'Economics of Equalization,' *supra* note 179 at 60.

184 However, inasmuch as vertical equity is premised upon an underlying theory of the just distribution of the benefits and burdens of social cooperation, it is a rather empty formulation that is compatible with a wide variety of income distributions. The conception of vertical equity that emerges from a libertarian stance to economic inequality, for example, would differ radically from the conception that flows from an egalitarian theory.

inequality – that fairly extensive schemes of interpersonal redistribution are an important goal of public policy.

In a unitary state, the implications of vertical equity are fairly straightforward. Vertical equity in welfare-state capitalist societies demands that governments act to reduce economic inequality. Boadway identifies three different mechanisms whereby governments can achieve this goal. The most familiar is the *tax and transfer system*, whereby income taxes are used to redistribute income from persons with higher incomes to those with lower incomes – directly, through the tax system, and/or through direct transfers to individuals. But redistribution is also possible through two other mechanisms. The first such mechanism is the direct provision of *quasi-private goods and services* (i.e., goods and services whose consumption is exclusive and rivalrous) by the public sector.<sup>185</sup> Common examples are education, health care, and housing. In order to be redistributive, goods and services must be made available on a basis other than that of persons paying the marginal cost of producing an additional unit of a good or service, as they would on the private market under perfectly competitive conditions. The most fully redistributive way of financing the delivery of goods and services would be to make them available on the basis of ability to pay, and the most convenient mechanism for financing goods and services on the basis of the ability to pay would be through the income tax system. Goods and services made available on this basis are often referred to as *in-kind* transfers, as opposed to the cash transfers of the tax and transfer system.

The second alternative mechanism is *social insurance*. Such schemes insure against the risk of certain misfortunes by providing benefits in the event that those risks materialize. Unemployment, disability, and health insurances, for example, provide direct cash payments to beneficiaries (unemployment, disability) and/or payments to third-party providers of goods and services (disability, health). Funding arrangements for social insurance vary. The unemployment insurance scheme created by the federal government during the Great Depression was largely funded through employer and employee contributions. By contrast, the majority of provincial health insurance plans are funded through general tax revenues. To be sure, social insurance programs serve important non-redistributive functions. Publicly administered health insurance, for example, offsets the problem of adverse selection that frustrates the operation of markets for private health insurance.<sup>186</sup> But social insurance schemes do redistribute resources from high-income to low-income individuals if two conditions hold, either individually or in combination. First, they are redistributive if the incidence of risk is regressive, that is, if

185 Boadway, 'Fiscal Federalism,' supra note 65 at 199.

186 H. Varian, *Microeconomic Analysis*, 2d ed. (New York: Norton, 1984) at 293.

those who are less well off economically are at a higher risk (of illness, unemployment, etc.) than those who are better off. Second, even if risk is evenly distributed across income levels, such that consumption is income-independent, those schemes are redistributive if the level of benefits is not proportionate to income. The extreme case is provincial health insurance, under which individuals receive identical coverage regardless of income level.

## 2. *Vertical equity in federations*

How does vertical equity operate in a federal state? In federations like Canada, the picture becomes more complex. Vertical equity would appear to require that the fact of province of residence should not affect government policy toward economic inequality. If economic inequality happens to be distributed unequally among the provinces, then interpersonal redistribution might also amount to inter-provincial distribution. However, inter-provincial redistribution would not be a goal of public policy in itself but, rather, a by-product of a more fundamental commitment to reducing interpersonal equality. As we shall now see, the concern raised by economists is that this goal is quite difficult to achieve.

The seminal work here is Wallace Oates's *Fiscal Federalism*, and I shall follow his argument closely.<sup>187</sup> Oates begins by considering how redistribution would work in a highly decentralized federation, in which the federal government did not exercise any of the traditional functions of the public sector, including redistribution. For the purposes of his analysis, he makes a key assumption – 'an absence of restrictions on the movements of goods and services' within the federation, that is, extensive inter-provincial economic mobility.<sup>188</sup> Oates's central claim is that in a decentralized federation, vertical equity, understood as interpersonal redistribution in order to reduce economic inequality, is very difficult to achieve. To understand why, Oates outlines the normative justification for federalism that emerges from the public choice literature, particularly the work of Charles Tiebout.<sup>189</sup>

Tiebout relies on an economic conception of citizenship that gives principal importance to the satisfaction of citizens' preferences. Tie-

187 W. Oates, *Fiscal Federalism* (New York: Harcourt Brace Jovanovich, 1972).

188 *Ibid.* at 4.

189 C. Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *J.Pol.Econ.* 416; for recent commentary, see also R.P. Inman & D.L. Rubinfeld, 'Rethinking Federalism' (1997) 11 *J.Econ.Persp.* 43, and J.D. Donahue, 'Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate' (1997) 11 *J.Econ.Persp.* 73. The description of Tiebout's theory in this paragraph draws from S. Choudhry, 'Citizenship and Federations: Some Preliminary Reflections' in K. Nicolaidis & R. Howse, eds., *The Federal Vision: Legitimacy and Governance in the U.S. and the E.U.* (Oxford: Oxford University Press, 2001) 377 at 396–401 [hereinafter 'Citizenship and Federations'].

bout's focus is on citizens' preferences for goods and services provided by governments, and he argues that systems of government can be compared with one another and assessed by their ability to maximize preference satisfaction. His central point is that federalism can be expected to produce a higher degree of preference satisfaction than would a unitary state, in the following way. Suppose that each province provides a package of goods and services that varies along a number of different dimensions. As a simplifying device, assume that the two dimensions that matter most are the level or quantity of those goods and services and the cost of those services. Each province can be uniquely characterized by where it lies on these two dimensions. One province may offer larger quantities per capita of goods and services (*e.g.*, comprehensive health insurance, publicly funded education through to the post-secondary level) and will charge accordingly. Another province may offer a slightly lower quantity of goods and services (*e.g.*, health insurance covering minimal health needs, no publicly operated higher education system), but will charge less. Tiebout assumes that citizens are mobile and that they will migrate to the province that offers them the basket of policies that suits them best. Federalism, then, creates a market for mobile citizens, a market in which federal sub-units compete with one another through the packages of goods and services they offer their citizens in exchange for fees to finance those services.

Public choice theorists like Tiebout posit that such an arrangement has advantages in terms of preference satisfaction for two reasons. First, the mere existence of federal arrangements allows a territorially concentrated minority to become a local majority, allowing it to vote for policies with respect to which it would be out-voted at the federal level. Second, citizens will sort themselves through migration into provincial populations that are much more homogeneous than the population as a whole. By contrast, unitary states are less sensitive to varying preferences for publicly provided goods and services. Though these preferences may vary, unitary states would only be able to provide a single package, a 'one size fits all' solution.

A complication arises, however, when one considers how provincial governments charge their residents for publicly provided goods and services. Oates sketches two different pricing options: benefit pricing and pricing on the basis of ability to pay. Under benefit pricing, each provincial resident, regardless of income level, would be charged an identical fee to cover the additional costs of offering goods and services to an additional resident of a province. From the vantage point of vertical equity, the principal problem with a flat benefit tax is that it disproportionately burdens the poor. The obvious solution, then, is to price publicly provided goods and services on the basis of ability to pay, so that those with relatively higher incomes pay more for the same goods and

services than those with relatively lower incomes. A provincial income tax system would be the simplest mechanism for this sort of pricing.

Oates argues, though, that provincial governments are limited in their ability to redistribute interpersonally. The difficulty is the prospect of inter-provincial migration, both of higher- and lower-income persons. Higher-income individuals would have an economic incentive to relocate to provinces where they would pay less for publicly provided goods and services, either because those provinces priced on a benefit basis or because they adopted less redistributive forms of income taxation. Conversely, lower-income individuals would have an incentive to move into provinces that finance services in a manner that least disadvantages low income individuals. The result is a cycle of out-migration and in-migration whereby the departure of the rich and the arrival of the poor increases the proportion of lower-income persons in the province, reduces the per capita provincial tax base, and, accordingly, requires an increase in the provincial income tax rate in order to provide public goods and services at the original level. Each increase in income taxes would, in turn, cause more higher-income persons to leave and more lower-income persons to immigrate. After a certain point, the decline in the per capita tax base would force provinces to offer a lower level of goods and services. As a consequence, provinces that redistribute will be constrained in their ability to offer goods and services to their residents. Indeed, Oates goes further, identifying the same dynamic at work in any provincial effort to achieve vertical equity. Thus, if a province wished to achieve a more egalitarian distribution of income than currently existed, it too would create incentives for higher-income individuals, who would bear the burden of this policy, to migrate to jurisdictions with less egalitarian income tax policies. The end result would be a more egalitarian distribution of income, but a decline in per capita income.

One solution would be for provinces interested in redistribution to coordinate their public policies so as to make unavailable an attractive exit option within the federation for high-income individuals. Provinces might coordinate the structure of provincial income tax regimes, and/or ensure that they provide comparable levels of goods and services to their residents, acting as a cartel to set a price for their goods and services other than the one that would prevail in the absence of coordinated action. High-income individuals would lack the incentive to migrate inter-provincially, since they would be unable to escape redistribution. Inter-provincial coordination may be ineffectual, however, because in some circumstances provinces have strong incentives to defect from a coordinated regime of redistribution. Provinces will have an incentive to defect when the benefits forgone exceed the benefits of participating in such a regime. The forgone benefit is the additional tax revenue brought in by each additional high-income individual who migrates to one

province from another in response to an inter-provincial redistribution differential. Provinces benefit from the in-migration of each additional high-income individual as long as the tax yield exceeds of the marginal cost of providing goods and services to that person. But provinces will be able to derive that benefit only if other provinces do *not* defect and adhere to the coordinated redistribution regime, thereby creating the incentive for high-income persons to migrate.

The difficulty, though, is that each province has the same incentive to defect by adopting policies that are less redistributive in nature. Moreover, in response to a defection that has already occurred, a province will have an incentive to defect and adopt less redistribution in order to stem the out-migration of high-income individuals, since failing to do so would leave them in a worse situation than if they did not respond. Thus, given sufficient incentives, provinces will compete, rather than cooperate, on the terrain of redistribution. The net result will be lower rates of redistribution than would have occurred under successful inter-provincial coordination. In other words, if redistribution policy is left to the provinces alone, Canada risks a redistribution race to the bottom.<sup>190</sup>

#### C. POLICY PROPOSALS AND THE SHADOW OF THE PRIVY COUNCIL

What solutions have economists proposed to the difficulties of meeting the demands of vertical equity in a federation? Oates famously argued that the way to avoid the risk of redistribution races to the bottom was to separate 'the responsibility for raising revenues from that for determining levels of output of public services'<sup>191</sup> by conferring jurisdiction over the former on federal governments and jurisdiction over the latter on provincial governments. The federal government would raise the bulk of

190 The difficulties of coordinated activity in the context of redistribution can be referred to as an *inter-provincial collective action problem*. It is analogous to the collective action problems that arise when it is economically rational for individual economic actors to make individual decisions that, taken together, are against their individual economic interests. The structure of the collective action problem in the case of redistribution is what economists call a *prisoner's dilemma*. Prisoner's dilemmas are not insoluble, but they require a solution. One solution to the dilemma here would be to rely on legally enforceable intergovernmental agreements that prevail over conflicting provincial legislation. At present, the best view of the jurisprudence is that such agreements are legally unenforceable and, even if they can be enforced, cannot act as fetters on legislative sovereignty. *CAP Reference*, supra note 69, and Choudhry, 'Enforcement,' supra note 5 at 503–5. Short of a constitutional amendment to make intergovernmental agreements (as was proposed in connection with the Charlottetown Accord, supra note 169, to insert the proposed s. 106A into the Constitution Act, 1867), the other option would be to determine whether the federal government possesses sufficient jurisdiction over the sorts of subject-matters that risk a race to the bottom. I turn to this question in Part V, where I argue that the risk of races to the bottom counts as a reason for finding federal jurisdiction under the provincial inability test.

191 Oates, *Fiscal Federalism*, supra note 187 at 150.

the revenues and make transfer payments to the provinces for program expenditures. The reasoning behind this proposal is that the federal government enjoys a comparative institutional advantage over the provinces with respect to redistribution, since the incentives to migrate internationally are far lower than the incentives to migrate inter-provincially. In the Canadian context, a variety of transfer grants can be understood as vindicating vertical equity objectives. Equalization grants to the provinces, which are unconditional, can be viewed as means to offset and reduce interpersonal economic inequality because they provide provinces with the financial means to provide goods and services and/or provide transfers to low-income residents (either through the tax system or via direct cash payments). Conditional grants, such as the CHST, are more directly linked to reducing interpersonal economic inequality. The conditions that attach to these grants – at this time, confined to the national standards for health insurance programs spelled out in the Canada Health Act – seek to dictate the design of provincially delivered goods and services. Because these conditions reduce inter-provincial program variation, Boadway and Flatters aptly term this regulatory strategy ‘expenditure harmonization.’<sup>192</sup> These conditions can be viewed as instruments of redistribution, inasmuch as they oblige provincial governments to establish uniform standards for provincial programs for all provincial residents, regardless of level of income. The Canada Health Act, for example, requires that plans be comprehensive in scope (*i.e.*, cover all medically necessary hospital and physician services) and that they be universal and accessible; the definition of the latter prohibits financial barriers to access. Because of their redistributive nature, Tom Courchene argues that conditional grants are based on a ‘citizenship’ or ‘nationhood’ rationale. As he writes,

Canadians, wherever they may live, ought to have access to certain key economic and social rights – rights that ought to attend citizenship, as it were. Since some of these rights fall under provincial jurisdiction, it is imperative that the provinces have adequate funds to provide them.<sup>193</sup>

There is a massive economics literature on intergovernmental grants in Canada, which is largely devoted to criticisms of the existing arrangements of fiscal federalism. What is of interest for our purposes is that intergovernmental transfer payments are far from the ideal means of achieving vertical equity. Oates himself argued that these grants are an imperfect means of achieving interpersonal redistribution because they ‘are grants from one group of people to another,’<sup>194</sup> as opposed to

192 Boadway & Flatters, ‘System in Crisis,’ *supra* note 181.

193 T. Courchene, *Celebrating Flexibility: An Interpretive Essay on the Evolution of Canadian Federalism* (Toronto: C.D. Howe Institute, 1995) at 11.

194 Oates, *Fiscal Federalism*, *supra* note 187 at 79.

transfers between persons. Reductions in interpersonal inequality maybe a by-product of intergovernmental transfers, but they are not the necessary result. Indeed, it has been argued that equalization transfers may actually increase vertical inequity, because, in some cases, they transfer tax revenues from lower-income persons in 'have' provinces (e.g., Ontario) to higher-income persons in 'have not' provinces (e.g., Newfoundland) by permitting provincial governments in 'have' provinces to lower the tax burden on high-income persons.<sup>195</sup> Boadway has long disputed whether this in fact occurs, although recent evidence suggests that it might.<sup>196</sup> Based on these empirical claims, one suggestion has been to scrap equalization altogether and reorient Social Canada away from 'place prosperity' towards 'people prosperity'.<sup>197</sup> At best it can be said that intergovernmental transfers 'facilitate the achievement of vertical equity goals'<sup>198</sup> because they make possible greater vertical equity within provinces by enabling provincial governments to use policy instruments (social insurance, public services) that promote vertical equity.

So where does this leave us? What is interesting about the economics literature on intergovernmental grants is its acceptance of the limitations of intergovernmental transfers as a means to achieve vertical equity. Why would economists recommend less-than-ideal policy instruments? My strong sense is that economists have taken the received view of the division of powers as a given and have proposed policy instruments that conform to it. Boadway, for example, writes that 'the spending power is the only instrument available to the federal government.'<sup>199</sup> But one should not draw the further conclusion that intergovernmental transfers are the only policy instruments on the table. Governments can also achieve vertical equity goals through the tax and transfer system. Thus, the historically dominant presence of the federal government in the personal income tax system is, from this vantage point, a good thing. Moreover, from a functional standpoint, federally enacted social insurance and federally delivered social services can achieve the same end. Even if one holds the view that the federal government lacks jurisdiction over these policy instruments, it does not follow that those instruments do not better vindicate equity objectives. As compared to intergovernmental transfers, they certainly would, since they are directly concerned with interpersonal redistribution. And if that is the case, one should

195 D. Usher, *The Uneasy Case for Equalization Payments* (Vancouver: The Fraser Institute, 1995).

196 Boadway, 'Fiscal Federalism,' supra note 65, and 'Economics of Equalization,' supra note 179, vs. F. Poschmann, *Where the Money Goes: The Distribution of Taxes and Benefits in Canada* (Toronto: C.D. Howe Institute, 1998).

197 Boadway, 'Economics of Equalization,' supra note 179 at 60 (Boadway does not support this position).

198 Ibid.

199 Boadway, 'Fiscal Federalism,' supra note 65 at 199–202.

return to the Constitution and see whether the possibility exists that the federal government may enjoy jurisdiction over them as well. I turn to this task in Part v.

*v Recasting federal jurisdiction over social policy*

In Part v, I argue that the federal government possesses the jurisdiction to enact social insurance schemes and to regulate social service delivery under the national concern branch of POGG. The heart of the national concern doctrine, as well as the general regulation of trade branch of s. 91(2), is the so-called provincial inability test. I claim that the provincial inability test confers jurisdiction on the federal government in not one but three different circumstances: (1) negative extra-provincial externalities, (2) collective action problems, and (3) true provincial inability. Since redistribution races to the bottom result from inter-provincial collective action problems, I argue that public policies that have vertical equity as their goal – including publicly administered social insurance and social service delivery – fall within federal jurisdiction. In this section, I bracket the issue of the legality of direct federal social service delivery, which, on the basis of my analysis in Part II, I take as a given.

A. ORIGINS OF THE PROVINCIAL INABILITY TEST

Although it occupies a central place in the jurisprudential framework for the national dimensions branch of the POGG power and the general regulation of trade branch of s. 91(2), the provincial inability test is of relatively recent vintage. Its origin lies in an influential article published by Dale Gibson in 1976.<sup>200</sup> Gibson wrote against a background of doctrinal uncertainty. The national dimensions branch of POGG was clearly part of Canadian constitutional doctrine, having been announced by the Privy Council in 1896 in the *Local Prohibition Reference*.<sup>201</sup> Although the Privy Council subsequently distinguished the *Local Prohibition Reference* into near oblivion, towards the end of its role in judicial review in Canada, the Council revived the doctrine and, indeed, applied it to uphold federal legislation on liquor regulation.<sup>202</sup> But on the few occasions up to that point when the doctrine had been applied, neither the Privy Council<sup>203</sup> nor the Supreme Court<sup>204</sup> had explained why or when certain subject-matters would attain the requisite degree of national importance to fall with the jurisdiction of the federal government.

200 D. Gibson, 'Measuring National Dimensions' (1976) 7 Manitoba L.J. 15.

201 Supra note 35.

202 *Ontario (A.G.) v. Canada Temperance Foundation*, [1946] A.C. 193 (P.C.) [hereinafter *Canada Temperance Foundation*].

203 Ibid.

204 *Johannesson*, supra note 101; *Munro v. Canada (National Capital Commission)*, [1966] S.C.R. 663; *Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd.*, [1976] 1 S.C.R. 477 [hereinafter *Interprovincial Co-Operatives*].

In the face of this doctrinal uncertainty, Gibson sought to provide a principled basis for, and determinate content of, the national dimensions branch. His proposal is summarized as follows:

'national dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involved either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the 'national dimension' concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk.<sup>205</sup>

Gibson's proposal was adopted by a majority of the Supreme Court in *R. v. Crown Zellerbach*.<sup>206</sup> That case involved a constitutional challenge to a federal statute prohibiting the dumping of any substance in 'the sea,' except in accordance with the terms and conditions of a permit. The difficulty posed by the statute is that it defined 'the sea' to include marine waters under provincial jurisdiction. Notwithstanding this apparent intrusion into an area of provincial responsibility, the legislation was upheld under the national dimensions branch of POGG. Speaking for the majority, Le Dain J. held that marine pollution, in both provincial and federal marine waters, was a matter of national concern.

Although the case is of considerable importance regarding the division of powers and the environment, it also represents the leading modern statement of the national concern doctrine. Le Dain J. began by clarifying that the doctrine applies to two types of subject-matters: 'new matters' which did not exist at Confederation and matters 'originally ... of a local or private nature in a province [which] ... have since ... become matters of national concern.'<sup>207</sup> This statement is significant because it had been thought, prior to *Crown Zellerbach*, that subject-matters falling under the national concern doctrine might have to satisfy a 'newness' requirement.<sup>208</sup> The real question, then, is how to identify subject-matters that have become matters of national concern. Le Dain J.'s answer is contained in the following two propositions:

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly dis-

205 Gibson, 'Measuring National Dimensions,' supra note 200 at 33.

206 Supra note 106.

207 Ibid. at 432.

208 The leading statement of that position is the majority judgment in *R. v. Hauser*, [1979] 1 S.C.R. 984 (the *Narcotics Control Act*, R.S.C. 1970, c. N-1, falls under POGG power because deals with a new problem that did not exist at the time of Confederation). By contrast, Le Dain J. clearly considered that the doctrine extended to matters that were *not* new could nevertheless fall within federal jurisdiction. Indeed, if this were not the case, it is hard to understand how marine pollution could be held to be a matter of national concern, since it clearly did not meet the newness requirement.

tinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.<sup>209</sup>

There are two principal ideas here. First, the subject-matter must possess a 'singleness,' 'distinctiveness,' or 'indivisibility' that distinguishes it from matters of provincial concern; this property can be established by determining the effect on extra-provincial interests of a provincial failure to regulate the intra-provincial aspects of the matter effectively. *Le Dain J.* later calls this the provincial inability test. Second, the 'scale of impact' on provincial jurisdiction of assigning the matter to federal jurisdiction must be reconcilable with the division of powers.

These two propositions pose a number of difficulties. The most fundamental is that they are in tension with *Le Dain J.*'s opening observation that the national dimensions doctrine can operate to vest jurisdiction in the federal government over matters that were originally of a local nature but have grown into matters of national concern. What this means, presumably, is that provincial subject-matters can become federal ones when the issues they raise come to affect the entire country – that is, when they come to implicate the national interest and, accordingly, can best be dealt with by the single government elected by, accountable to, and with jurisdiction over all Canadians. *Le Dain J.* must mean that in regulating certain areas of socio-economic activity, the federal government enjoys a comparative advantage over provincial governments. But what is relevant here is the following point: if subject-matters can evolve in this way over time, *Le Dain J.* must contemplate the *migration* of provincial subject-matters from s. 92 to s. 91, through judicial recognition of changed circumstances. Indeed, even Lord Watson in the *Local Prohibition Reference* contemplated this kind of migration when he stated that 'some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.'<sup>210</sup> As Kathy Swinton writes, under the national concern doctrine, 'the Court ... acts as constitutional reformer or designer.'<sup>211</sup>

209 *Crown Zellerbach*, supra note 106 at 432.

210 *Supra* note 35 at 361.

211 K. Swinton, 'Federalism Under Fire: The Role of the Supreme Court of Canada' (1992) 55 *L. & Contemp. Prob.* 121 at 132.

But if this is true, it is impossible to hold at the same time that subject-matters that are transferred by the courts to federal jurisdiction are distinguishable from matters of provincial concern, and that the impact of that transfer upon provincial jurisdiction is reconcilable with the division of powers. They are not distinguishable from matters of provincial concern because what is at stake is whether issues on which provinces are competent to legislate have, to some extent, outgrown provincial jurisdiction. No one doubted, in *Crown Zellerbach*, for example, that the provinces had jurisdiction to regulate dumping in provincial marine waters. The question was whether a regime of divided jurisdiction with respect to marine pollution was the most functionally effective allocation of responsibilities. Similarly, it must be recognized that the impact of such a holding upon provincial jurisdiction can never be limited, because the effect is to allow the federal government to legislate in areas that had hitherto been areas of sole provincial responsibility. Again, consider *Crown Zellerbach*. Before the judgment, the operative legal regime for marine pollution in provincial waters was provincial. After the judgment, the status of provincial jurisdiction is unclear. On one reading, *Crown Zellerbach* vested exclusive jurisdiction over marine pollution with the federal government. If that is true, then the impact on provincial jurisdiction was dramatic. But on another reading, pollution in provincial marine waters is still a provincial subject-matter, such that there is concurrent jurisdiction.<sup>212</sup> If so, then both levels of government are

212 *Crown Zellerbach* itself contains language in support of both positions. On the one hand, the decision states that 'where a matter falls within the national concern doctrine of the peace, order and good government ... Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intraprovincial aspects.' *Crown Zellerbach*, supra note 106 at 432. Yet, as Allan Willis has pointed out, Le Dain J. contradicts himself later in his reasons when he states that '[t]he provincial inability test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with legislative problem' (ibid. at 434). A.L. Willis, 'The Crown Zellerbach (*R. v. Crown Zellerbach Canada Ltd.*, (1988) 49 D.L.R. 4th 161) Case on Marine Pollution: National and International Dimensions' (1988) 26 Can.Y.B.Int'l L. 235 at 244. This confusion over the effect of the national concern doctrine has persisted, to the point where the members of the Court have contradicted themselves. Thus, dissenting in *Hydro-Québec*, La Forest J. stated that '[d]etermining that a particular subject-matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament.' *Hydro-Québec*, supra note 106 at para. 115. But in *Hunt*, La Forest J. stated within a single paragraph that the federal government possessed jurisdiction, *inter alia*, under POGG, to legislate with respect to the recognition and enforcement of judgments *and* that the provinces could also legislate in this area. *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 [hereinafter *Hunt*] at para. 60. This confusion in the case law is reflected in the critical literature:

compare R. Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High But Level Playing Field* (North York, ON: York University Centre for Public Law and Public Policy, 1992) at 56 (concurrent) with A.R. Lucas, 'R. v. *Crown Zellerbach Canada Ltd.* ((1988) 49 D.L.R. 4<sup>th</sup> 161)' (1989) 23 U.B.C.L.Rev. 355 at 359 (exclusive) and Gibson, 'Canada Health Act,' supra note 71 at 19 (exclusive).

The text of ss. 91 and 92 would seem to support the view that jurisdiction over matters of national concern is exclusive, since both provisions clearly state several times that jurisdiction over the subject-matters listed therein is 'exclusive.' Building upon this foundation, Beetz J. famously remarked in *Bell (2)* that the Canadian Constitution allocates powers exclusively to the provincial or federal levels of government and that concurrent jurisdiction is rare and exceptional. Supra note 81 at 766. The difficulty with Beetz J.'s observation, though, is that it misstates the true nature of the jurisprudence of modern federalism. Although it is true that jurisdiction over the subject-matters enumerated in ss. 91 and 92 is exclusive, such that it would be unconstitutional for one level of government to target legislation at that subject-matter (e.g., provincial legislation directed at the regulation of federal undertakings, or federal legislation directed at the administrative of justice in a province), the courts have long permitted regulatory overlap through the use of the double aspect and necessarily incidental doctrines. Thus a vast amount of governmental activity, such as corporate and securities law (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 [hereinafter *Multiple Access* cited to S.C.R.]), environmental law (*Oldman River*, supra note 85), and even criminal law (*Rio Hotel Ltd. v. New Brunswick Liquor Licensing Board*), [1987] 2 S.C.R. 59, 44 D.L.R. (4th) 663; *Re Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1) is subject to legislative activity by both levels of government. Indeed, it is noteworthy that the result of one of the earliest cases on POGG, the *Local Prohibition Reference*, supra note 35, was to establish concurrent jurisdiction over liquor prohibition, with federal jurisdiction under POGG and provincial jurisdiction under ss. 92(13) and 92(16).

In this light, going an additional step and explicitly conferring concurrent jurisdiction on matters of national concern would be both in keeping with the direction of modern federalism and transparent. Moreover, in light of the fact that the national dimensions doctrine is a jurisdiction-transferring device, this approach would *better* preserve the federal balance, since provinces would not lose the power to legislate with respect to matters of national concern. It is worth recalling the result in *Crown Zellerbach*, which transferred exclusive jurisdiction over marine pollution in provincial marine waters to the federal government. Ironically, with respect to the national dimensions branch of POGG, exclusive, not concurrent, jurisdiction would better protect the provincial legislative role because it softens the blow of the doctrine.

Another reason for favouring concurrent, as opposed to exclusive, jurisdiction is that it would cohere with the jurisprudential framework for the general regulation of trade branch of s. 91(2). *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *General Motors* cited to S.C.R.], stands for the proposition that in cases of provincial inability, Parliament possesses the power to regulate intra-provincial economic activity. However, *General Motors* also recognized that provinces still possess legislative jurisdiction over that economic activity, jurisdiction which is now concurrent. For example, the fact that Parliament can regulate anti-competitive conduct within a province does not operate to exclude provincial jurisdiction over the same activity under s. 92(13). In fact, as the Court acknowledged, *Civil Code of Quebec* does just that. In cases of conflict, the federal regime is paramount, but should the federal government not enter the field, the provinces can still regulate the area.

presumably competent to regulate provincial marine pollution. However, because of the doctrine of paramountcy, in the event of a conflict between provincial and federal legislation, the federal law would prevail to the extent of that conflict. Although there is considerable disagreement as to when provincial and federal laws actually conflict,<sup>213</sup> the point remains that *Crown Zellerbach* had dramatic implications for provincial jurisdiction, notwithstanding Le Dain J.'s protestations to the contrary.

An additional problem is that the first of these propositions is in tension with the criterion that Le Dain J. invokes to determine whether federal jurisdiction is warranted: the existence of adverse effects on extra-provincial interests. For convenience, I term these *negative extra-provincial externalities*. Recall that Le Dain J. asserted that the potential for extra-provincial externalities from a provincial failure to adequately regulate an area is a factor in determining whether a matter of national concern is clearly distinguishable from matters of provincial concern. The facts of *Crown Zellerbach* provide a useful illustration of this point because federal jurisdiction was premised on a factual finding that pollution in provincial marine waters could have adverse effects on waters outside the province (in that case, marine waters under federal jurisdiction). As I will develop below, in federations, there are good reasons to vest responsibility over inter-jurisdictional externality-causing activity with the federal level of government. To put it briefly, the concern is that provinces may under-regulate activities if the costs of those activities can be externalized onto other jurisdictions.

In the context of the national dimensions doctrine, the externality story is a story about the incentives that shape the way provinces exercise their legal powers. Again, the analytical framework is largely functional. The key point is that the analysis presumes that the provinces possess jurisdiction but cannot be trusted to exercise it appropriately. But if it is the possibility of extra-provincial externalities that grounds federal jurisdiction, then it cannot be said that the activities that give rise to those externalities are distinct from matters of provincial concern. On the contrary, the whole problem is that these activities *do* lie within provincial jurisdiction and that provinces have incentives to regulate those activities sub-optimally. Indeed, if those activities were not within provincial jurisdiction, there would be no need to engage the national dimensions doctrine, since the responsibility for regulating those activities would be the federal government's already.

213 Compare *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, 42 D.L.R. (3d) 68 [hereinafter *Ross* cited to S.C.R.] (provincial and federal law conflict if impose conflicting duties) with *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361 [hereinafter *Hall* cited to S.C.R.] (provincial and federal law conflict if provincial duty interferes with exercise of federal right).

Where does this leave us? The various components of Le Dain J.'s reasons do not cohere. There are two options on the table, and we must choose between them. On the one hand, the national concern doctrine, at the very least, can be understood as a jurisdiction-shifting device employed by courts in cases of provincial inability. On the other hand, the doctrine can be viewed as limited in scope to those subject-matters that are distinct from matters of provincial concern and whose assignment to the federal government has a limited impact of the division of powers. In my view, the former view is preferable to the latter, for the simple reason that it is very uncommon for a subject-matter to be distinct from matters within provincial jurisdiction and, therefore, for the assignment of that subject-matter to federal jurisdiction to have a limited impact upon matters within provincial jurisdiction. Students of public policy and public administration have long debunked the twin myths that the federal and provincial governments regulate mutually exclusive spheres of activity and that the actions of one level of government have no effect on matters lying within the jurisdiction of the other. Despite the aspirations of the framers of the division of powers in 1867, jurisdictional overlap and policy interdependencies are the norm, not the exception. The story of the rise of the Canadian welfare state, for example, is marked by a central federal role in building Social Canada in conjunction with the provinces. As well, it has long been recognized that alterations to federal employment insurance and provincial social assistance programs have effects on each other.<sup>214</sup> And legal federalism has evolved to recognize this reality, through the use of constitutional doctrines that allow for overlapping federal and provincial regulatory regimes (the double aspect and necessarily incidental doctrines),<sup>215</sup> manage the interface between provincial and federal legislation (the doctrine of paramountcy)<sup>216</sup> and allow for the delegation of administrative and rule-making (but not legislative) powers between levels of government (the interdelegation doctrine).<sup>217</sup>

The preferable route is to work with the former option, which is centred on the provincial inability test. It is important, therefore, to determine what the test means. Moreover, the need to explain the

214 Norrie, Simeon, and Krasnick identified the causes of the evolution of overlapping jurisdiction and policy interdependencies: *inter alia*, the active use of the federal spending power, the disintegration of a consensus over the allocation of jurisdiction under the rationales underlying the division of powers, and the rise of activist governments in advanced industrial societies. K. Norrie, R. Simeon, & M. Krasnick, *Federalism and the Economic Union* (Toronto: University of Toronto Press, 1986) at 49–51.

215 *E.g.*, *Multiple Access*, supra note 212 (double aspect); *General Motors*, supra note 212 (necessarily incidental).

216 *E.g.*, *Ross*, supra note 213; *Hall*, supra note 213.

217 *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. (2d) 384.

meaning of the provincial inability test is all the more pressing because, in addition to lying at the heart of the national dimensions branch of POGG, the provincial inability test is also the central component of the general regulation of trade branch of s. 91(2). The leading case here is *General Motors*, where the Court shifted the constitutional basis of federal competition legislation from s. 91(27) to the second branch of s. 91(2). The case laid out a list of five factors (non-exhaustive, and not all required) to assess whether legislation could be justified under this head of jurisdiction. What is relevant is that, without reference to *Crown Zellerbach* or to Gibson's article, the Court invoked the idea of provincial inability to define and circumscribe the federal government's power to regulate intra-provincial economic activity – a core area of provincial jurisdiction under s. 92(13) – and, on the facts, found that the provinces were unable to effectively regulate anti-competitive activity within their borders.

#### B. PROVINCIAL INABILITY: WHAT DOES IT MEAN?

The provincial inability test has obvious appeal because it offers a solution to the perennial difficulty in interpreting ss. 91 and 92 – that is, that despite the aspiration to exclusivity reflected in the opening language of both provisions, many of the heads of jurisdiction, upon closer examination, actually overlap.<sup>218</sup> Faced with this inherent overlap, textualist interpretations of the division of powers are of limited utility. What is needed, as John Whyte has persuasively argued, is the identification and articulation of the fundamental organizing principles underlying the constitutional text, which can then be used to construe indeterminate constitutional provisions.<sup>219</sup>

In this light, the provincial inability test reflects the Dickson court's central contribution, and its major legacy, to the enduring problem of legal federalism. The basic intuition underlying the test is that the federal government can act only in those circumstances in which the provinces are unable to act. Although the Court provided little in the way of theoretical explanation to justify this principle, the test is consistent with at least the following account of the nature of the Canadian political community. Canada consists not of one political community but, rather, of a multiplicity of political communities, which often disagree on questions

218 The most famous example, of course, is the overlap between ss. 91(2) and 92(13) that exists because trade and commerce takes place through transactions and the creation of contractual rights (a species of civil right) in items of value in which people have proprietary interests. W.R. Lederman, 'Classification of Laws and the *British North America Act*' in W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 229 at 243–4.

219 J.D. Whyte, 'Constitutional Aspects of Economic Development Policy' in R. Simeon, ed., *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) 29 at 29–33.

of public policy but which nevertheless have come together and have created common institutions with the power to act on matters of common interest. To the question of when matters are of common interest, the answer provided by the Dickson court is those subject-matters where the provinces are unable to act alone – that is, when pursuing their self-interest requires them to act together. On this conception, the Canadian federation is imagined as a scheme for mutual advantage. In my view, this is a rather impoverished vision of the Canadian political community; indeed, I have argued elsewhere that Canada is a community of fate, bound together not simply by convenience and self-interest but also through shared accomplishments and history that can sustain rather thick bonds of social solidarity.<sup>220</sup> But, assuming that federalism is a scheme of mutual advantage, the provincial inability test provides a rational way to allocate jurisdiction between the provinces and the federal government.

But what does the provincial inability test mean? The best place to begin is with the Dickson court's various formulations of the test. When we look to these cases, unfortunately, it turns out that the provincial inability test, although central, is shrouded in obscurity.<sup>221</sup> Consider the following passages from *Crown Zellerbach* and *General Motors*:

[T]he legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting.<sup>222</sup>

[T]he failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.<sup>223</sup>

In determining whether a matter has the requisite degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the *intra*-provincial aspects of the matter.<sup>224</sup>

[P]rovincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests.<sup>225</sup>

220 Choudhry, 'Citizenship and Federations,' supra note 189 at 395–6.

221 For a similar point, see Swinton, 'Federalism Under Fire,' supra note 211 at 132.

222 *General Motors*, supra note 212 at 662.

223 Ibid. Strictly speaking, the Court in *General Motors* did not state that the potential for inter-provincial externalities counted as a factor in applying the provincial inability test. However, given the judgment in *Crown Zellerbach*, tying the two together seems to make sense.

224 *Crown Zellerbach*, supra note 106 at 432.

225 Ibid. at 434.

[A] national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament.<sup>226</sup>

For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control 'pollution price wars' would ... extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces.<sup>227</sup>

'[N]ational dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal [with] because they involved either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures ...<sup>228</sup>

Properly understood, the statements of the Court set out not one but *three* circumstances that can be described as situations of provincial inability. I term these (1) negative extra-provincial externalities, (2) collective action problems, and (3) true provincial inability. I now discuss each in turn.

### *1. Negative extra-provincial externalities*

'Externality' is a term used by economists to describe situations in which an entity (a person, a corporation) does not bear all of the costs, or receive all of the benefits, of decisions they take. In cases of negative externalities, some or all of the costs of a decision are borne by another entity; in cases of positive externalities, some or all of the benefits of a decision are received by another party. The basic idea behind an externality is that the disjuncture between the entity that makes a decision and the entities that bear the costs or receive the benefits of a decision means that that decision is made differently than it would be where the costs and benefits were strictly private. In cases of negative externalities, because costs can be shifted onto other entities, an entity may engage in more of an externality-causing activity than they otherwise would. The opposite is true for positive externalities.

Although externalities are often used to describe the decisions of, and the incentives operating on, private economic actors, they can also be used to examine the decisions of governments. Governments can make decisions that impose costs on other governments. In a federation, a province can externalize the costs of its public policies onto other provinces, or onto the federal government. A case study of the former can be

226 Ibid. at 432–433, quoting Gibson, 'Measuring National Dimensions,' supra note 200.

227 Ibid. at 433.

228 Ibid.

found in *Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd.*<sup>229</sup> In that case, two companies, one operating in Saskatchewan, the other in Ontario, operated chlor-alkali plants close to rivers that flow into Manitoba. The allegation was that both companies discharged mercury into these rivers, which then carried the mercury into Manitoba, where it was ingested by fish. According to the Manitoba government, the mercury ultimately had a negative impact upon the commercial fishery by rendering fish unfit for human consumption.

Examining the case through the lens of the law of nuisance, one could argue that the sources of the negative externality were the two companies, who shifted a portion of the costs of production onto the commercial fishery in Manitoba. However, there is another way to examine the problem. An important detail of *Interprovincial Co-Operatives* is that the two companies were operating lawfully under the laws of the provinces in which they operated. The negative extra-provincial externality was created by the environmental laws of Saskatchewan and Ontario, which did not prohibit the dumping of mercury into the rivers that took that mercury out of the province of origin and into Manitoba. In other words, the failure of Saskatchewan and Ontario to regulate activity within their provinces had an adverse effect on interests outside those provinces.

As the passages quoted above indicate, both *Crown Zellerbach* and *General Motors* clearly contemplated that this kind of scenario would count as an example of provincial inability. But, on further reflection, we find that 'provincial inability' is a bit of a misnomer. Consider the legal position of Manitoba. Because of the territorial limits on provincial jurisdiction, Manitoba lacked the legal power to regulate mercury discharges in waters outside its borders. Manitoba, therefore, was clearly unable to regulate pollution that harmed interests within the province. As the Court said, it was 'impossible to hold that ... Manitoba can ... require the shutting down of plants erected and operated in another province.'<sup>230</sup> But no one seriously doubted that Ontario and Saskatchewan possessed jurisdiction to regulate the mercury discharges; the operative assumption throughout the judgment was that mercury discharges were legal under Ontario and Saskatchewan law. At most, we can say that those provinces were not unable but merely *unwilling* to regulate these discharges.<sup>231</sup>

229 *Supra* note 204.

230 *Ibid.* at 515.

231 Why was this the case? One possible explanation is that Ontario and Saskatchewan lacked sufficient incentive to regulate mercury discharges that would leave the province. From their standpoint, the regulation of the chlor-alkali operations required a weighing of the costs and benefits of those operations to the province. To the extent that those costs were externalized onto Manitoba residents, Saskatchewan's and Ontario's incentives to regulate mercury discharges were thereby diminished.

In sum, the most that can be said is that the affected province, Manitoba, was unable, but not that no province was able, to regulate mercury discharges. There was no provincial inability as such. Nonetheless, in *Crown Zellerbach* and *General Motors*, the Court considered that this scenario warranted shifting jurisdiction to the federal government. And, indeed, this was the holding of the plurality (*per* Ritchie J.) in *Interprovincial Co-operatives*. Why did the Court reach this conclusion? One obvious solution would have been a negotiated or cooperative arrangement whereby Saskatchewan and Ontario regulated industries within their borders for Manitoba's benefit. The Court must have reasoned that because of the incentives at play, there were reasons to doubt that bilateral or multilateral bargains to address inter-provincial spillovers would be easy to achieve. If so, federal jurisdiction under the national dimensions doctrine was premised on the risk of inter-provincial non-cooperation. And this is exactly what Gibson said, in passages quoted with approval by Le Dain J. in *Crown Zellerbach*.

The idea that extra-provincial negative externalities should ground federal jurisdiction over subject-matters under the national concern doctrine is a dominant theme in the case law. In *Labatt Breweries v. Canada (A.G.)*<sup>232</sup> and *R. v. Wetmore*,<sup>233</sup> two cases that predate *Crown Zellerbach*, Estey J., and then a majority of the Court, endorsed this idea. And in two decisions that came down after *Crown Zellerbach*, the absence or presence of extra-provincial negative externalities was central to the question of whether the relevant subject-matter fell within the scope of the national concern doctrine. In *Ontario Hydro v. Ontario (Labour Relations Board)*,<sup>234</sup> for example, both dissenting and majority judgments agreed that the 'production, use and application of atomic energy' was a matter of national concern because 'it is predominantly extra-provincial and international in character and implications.'<sup>235</sup> Conversely, in *Hydro-Québec v. Canada (A.G.)*, four members of the Court (*per* Lamer C.J. and Iacobucci J.) found that provisions of a federal statute regulating toxic substances could *not* be grounded in the national concern doctrine, since the legislation was not limited in scope to substances that had inter-provincial effects.

Moreover, negative extra-provincial externalities were central to the holding in *General Motors*. Speaking for the majority, Dickson C.J. stated that one reason for finding that jurisdiction over anti-competitive activities went to the federal government was that 'the deleterious effects

232 [1980] 1 S.C.R. 914.

233 [1983] 2 S.C.R. 284.

234 [1993] 3 S.C.R. 327, 107 D.L.R. (4th) 457.

235 *Ibid.* at para. 33, *per* La Forest J.; see also Lamer C.J. at para. 73 and Iacobucci J. at para. 179.

of anti-competitive practices transcend provincial boundaries.<sup>236</sup> Although Dickson C.J. did not provide any elaboration, what he must have meant is that the failure of one province to regulate anti-competitive activity within its borders would impose costs on economic actors located outside that province. For example, imagine a hypothetical situation in which a particular good is only produced in Ontario and in which a single corporation possesses sufficient market power within Ontario to extract monopoly rents from consumers. Assuming that that monopolist has unimpeded access to markets in other provinces, the failure of Ontario to regulate this anti-competitive conduct would allow that monopolist to engage in monopoly pricing across the federation as a whole.<sup>237</sup>

## 2. *Collective action problems*

I introduced the idea of collective action problems, and applied it to collective decision making in federations, in Part IV. Two types of collective action problems exist in federations, both of which have been relied on as reasons by the Supreme Court to vest jurisdiction over certain subject-matters with the federal government. First, there are inter-provincial collective action problems, which are particularly important in the area of redistribution, as I explained earlier. Some of the passages

<sup>236</sup> *General Motors*, supra note 212 at 678.

<sup>237</sup> Two final points of clarification are in order. The first is that negative extra-provincial externalities can be felt not only in other provinces (*Interprovincial Co-operatives*, supra note 204) but in parts of Canada that lie outside provincial boundaries. Thus, the failure of a province could have adverse effects on interests in the territories, or in waters lying outside provincial jurisdiction. The latter, of course, was the situation in *Crown Zellerbach*. The second is that the economic complexion of externalities should not detract from the deeper, democratic justifications for using the idea in constitutional analysis. I have recently argued that one of the basic goals of federalism is to promote democratic self-government by provincial communities and that the hallmark of democracy is that those affected by decisions should have a say in determining them. S. Choudhry, 'Unwritten Constitutionalism in Canada: Where Do Things Stand?' (2001) 35 *Can. Bus. L.J.* 113. (For a similar argument, see P.C. Weiler, *In the Last Resort* (Toronto: Carswell, 1974)). Provincial public policies that adversely affect extra-provincial actors are in an important sense undemocratic, because the persons who bear those costs have not consented to them. The principle of 'no regulatory costs without consent,' I have argued, is the best normative justification of the rule against extraterritorial legislation in Canadian constitutional law. We can call this the negative implication of the principle, since it operates to limit provincial jurisdiction. But the positive implication of the principle is that jurisdiction over public policies that have the potential to impose costs on extra-provincial actors should be vested in the level of government that is accountable to all of those affected. In other words, the federal government should be given jurisdiction because it will take those costs into account in formulating its public policies. Again, to slip into the terminology of economics, the federal government will internalize the costs created by its decisions in a way that provinces will not.

quoted above invoke collective action problems of this sort, either explicitly or implicitly. The key phrase is in *General Motors*, where Dickson C.J. states that 'the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.'<sup>238</sup> Again, Dickson C.J. does not discuss provincial inability *per se*. Rather, what seems to do the work here is the fact that for certain types of regulatory regimes to be effective, they must be national in scope, and that the possibility of an inter-provincial solution – one negotiated by, agreed to, and implemented by all the provinces – is either unrealistic or infeasible. The premise of this argument, as is the case with negative externalities, is that provinces are constitutionally able to regulate an area of socio-economic policy but for some reason are unwilling to, creating the risk of inter-provincial non-cooperation.

Consider two examples of inter-provincial collective action problems. The first is the problem of races to the bottom, which I explored in depth in Part IV. Although the risk of a race to the bottom can occur whenever provinces adopt redistributive policies, a similar risk is created by any public policy that increases the cost of doing business. Labour standards of various kinds – minimum wage laws, workplace health and safety standards – are a prominent example. The basic point here is intuitively clear: that all provinces must buy into a coordinated regime of environmental or labour regulation or the scheme fails, because if one province is non-compliant, the rational response of other provinces would be to compete by adopting lax public policies.

The second example of an inter-provincial co-ordination problem arises in the case of public goods. A public good is a good that is non-rival and non-exclusive.<sup>239</sup> The marginal cost of providing *non-rival goods* to an additional consumer is zero. *Non-exclusive goods* are goods that it is impossible to exclude people from consuming. The classic example of a public good is national defence: the cost of providing the benefits of national defence to an additional resident is zero, and it is impossible to exclude some residents from the benefits of national defence. The relevant point here is that persons can benefit from non-exclusive goods without contributing to their cost. Non-exclusive goods, then, confer positive externalities on entities other than those who produce them – that is, the benefits of consumption are not captured fully by the entity that bears the costs of generating those goods. The problem created by public goods, and non-exclusive goods more generally, is that potential beneficiaries have an incentive to *free ride* – that is, to consume those

238 *Supra* note 212 at 662.

239 R.S. Pindyck & D.L. Rubinfeld, *Microeconomics*, 4th ed. (Upper Saddle River, NJ: Prentice Hall, 1998) at 673–4.

goods without contributing to the cost of producing them. The inability of the producer to fully capture the benefits of consumption means that that good will be produced at lower levels than it would were the benefits entirely internalized. As with negative externalities, the analysis that applies to private economic entities can also be applied to governments. Provincial governments can enact public policies that confer benefits on residents of other provinces who do not shoulder the costs of those policies. And the inability of provincial governments to fully capture the benefits of public investment creates the incentive to under-produce the relevant good.

In these two cases, can it really be said that there is no constitutional inability? In an important sense, an inability does exist, because the territorial limits on provincial jurisdiction (a) render provinces that want a uniform policy for the federation as a whole constitutionally unable to enact such a policy and (b) render provinces that provide non-exclusive goods unable to coerce non-residents into making financial contributions toward the cost of providing those goods. However, as is true of negative externalities, although the provinces that desire a certain policy may be unable to adopt it, it is not the case that no province can adopt the policy. Again, the problem is one of provincial unwillingness, not provincial inability.

In addition to inter-provincial collective action problems, there are also *federal-provincial collective action problems*. In a system of divided jurisdiction, some policy concerns straddle the division of powers between the provinces and the federal government, rendering either level of government constitutionally incapable of regulating the problem alone. The prime example in Canada is the establishment of agricultural marketing boards, which regulate both the supply and the price of agricultural products on the national level by allocating production and marketing quotas to producers. Inasmuch as these schemes involve the regulation of both intra- and inter-provincial trade, they appear to lie outside the jurisdiction of either level of government. It is commonly assumed that provincial governments, even collectively, are constitutionally precluded from enacting such a scheme, since it would amount to the regulation of inter-provincial trade. Conversely, federal jurisdiction does not extend to marketing and production that is entirely intra-provincial. The solution has been to enact a system of interlocking federal and provincial statutes (eleven in total) that together regulate the scheme in a comprehensive fashion by allocating production and marketing quotas that can be used either for intra-provincial or inter-provincial transactions. The result is a regulated national marketplace for agricultural produce. But should one province hold out and not cooperate, the creation of a regulated national marketplace would be impossible. Again, in a sense, there are constitutional inabilities at play, because

the governments that wish to adopt a national marketing scheme are constitutionally disabled from doing so. But the fact that some governments, even collectively, lack the requisite jurisdiction to adopt a policy for the entire federation does not mean that there is a provincial inability, since hold-out provinces possess the constitutional capacity to cooperate but decline to do so.

Both types of collective action problems – interprovincial and federal–provincial – were arguably at play in *General Motors*. For example, in his analysis of why the federal government possessed jurisdiction over competition policy under s. 91(2), Dickson C.J. simply stated that it was ‘essential that competition be regulated on the federal level.’<sup>240</sup> But how did Dickson C.J. arrive at this conclusion? Consider the alternatives. One would have been to conclude that competition policy is a provincial subject-matter, part of the provinces’ general jurisdiction over intra-provincial commercial activity. Indeed, given that abuses of market power occur through the mechanism of contract, provincial jurisdiction would appear to be fairly clear. In these circumstances, a uniform national competition policy would have required coordination among the provinces. The analogy would be to securities regulation, where provincial jurisdiction is clear and provincial securities commissions engage in regulatory cooperation to ensure a certain degree of uniformity in across the federation. Dickson C.J. did not explicitly consider and reject the inter-provincial option. However, some guidance as to his reasoning can be gleaned from Peter Hogg and Warren Grover’s arguments for federal jurisdiction in regulating anti-competitive activity, which he relied on. One of Hogg and Grover’s concerns was that an inter-provincial solution created the risk of a race to the bottom. As they write,

[A]ny individual or corporation ... has the capacity to ‘walk across’ provincial boundaries in order to buy or sell, lend or borrow, hire or fire. In the absence of artificial impediments, therefore, the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator.<sup>241</sup>

Assuming the mobility of factors of production, any business, faced with unfavourable competition policies, could shift its operations to a province with less stringent laws. The risk of non-cooperation (*i.e.*, defection) exists because provinces would have the incentive to vie with one another through competition policies to attract mobile capital. The risk that regulatory cooperation could disintegrate into regulatory competition counted as a reason to shift jurisdiction to the federal government.

240 *Supra* note 212 at 678.

241 *Ibid.* at 679, quoting P. Hogg & W. Grover, ‘The Constitutionality of the Competition Bill’ (1976) 1 *Can.Bus.L.J.* 197 at 200.

Another option, pressed by the Attorney-General of Quebec, would have been to conclude that competition policy straddled the division of powers and required the adoption of an interlocking set of provincial and federal statutes, with the former regulating anti-competitive activity that is intra-provincial in nature and the latter regulating inter-provincial economic activity, which lies beyond the reach of provincial law. The analogy here was the agricultural marketing boards. Indeed, the existence of remedies for unfair competition both at common law, through the restraint of trade doctrine,<sup>242</sup> and in the *Civil Code of Quebec*<sup>243</sup> suggests the capacity for provincial law to police monopolistic conduct. Presumably, a narrowly tailored federal statute could have targeted inter-provincial activity beyond the scope of provincial jurisdiction. But the Court rejected this line of argument, simply stating that the federal legislation would not be effective if it did not sweep in intra-provincial contracts. This is a puzzling answer, however, because, though it might speak to the requirements for effective federal legislation if the federal government were acting alone, it does not, strictly speaking, answer the question of why the regulation of anti-competitive activity could not be left to the federal government and the provinces acting in concert. The answer must be the risk of non-cooperation from the provinces.<sup>244</sup>

242 M.J. Trebilcock, *The Common Law Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986).

243 See note 212 supra.

244 Races to the bottom also help to make sense of *Hunt*, supra note 212. The principal holding was that a province's courts were obliged to recognize the judgments of courts of other provinces, and that this duty operated as a constitutional restraint upon provincial legislative capacity. But the Court went further, holding that Parliament possessed jurisdiction under the POGG and trade and commerce powers to regulate the enforcement of judicial orders emanating from another province. The latter result was surprising because it had been supposed that this subject-matter fell under provincial jurisdiction, particularly s. 92(14), the administration of justice. Although the Court neither relied on the provincial inability test nor fully articulated the rationale for this part of its holding, the fear of races to the bottom helps us to understand the holding.

The provincial law that was struck down was a 'blocking statute' enacted by Quebec that prohibited the removal from the province of any business records required pursuant to judicial proceedings outside the province. A similar statute was in force in Ontario. The effect of these statutes was to increase the costs of, and hence to discourage, inter-provincial commercial transactions, since parties would be forced to bring suit in the courts of Ontario and Quebec, in addition to the province in which the cause of action arose. From the vantage point of the federation as a whole, these statutes were undesirable because they undermined the Canadian economic union. In terms of the jurisdictional question, however, one option for the Court would have been to affirm provincial jurisdiction and to state that a national regime of recognition and enforcement could be created through inter-provincial regulatory cooperation. Interestingly, the Court instead vested jurisdiction in Parliament. Perhaps what prompted the Court's holding was that provinces had reason to adopt blocking statutes,

### 3. True provincial inability

Finally, there are cases of true provincial inability, where provinces really are constitutionally incapable of regulating subject-matters, even if willing to do so. In particular, provinces are constitutionally incapable of regulating activity in parts of Canada that lie outside the ten provinces, namely the Yukon and Northwest Territories, Nunavut, the territorial sea, and the continental shelf. The province's constitutional incapacity arises from the territorial limits on provincial jurisdiction, which are laid down by s. 92. Because of the assumption that the division of powers distributes legislative authority exhaustively between the provincial and federal governments,<sup>245</sup> the corollary of the territorial limits on provincial jurisdiction is that jurisdiction over these parts of Canada goes to the federal government. The constitutional pegs for this allocation of jurisdiction are the little-used 'gap' branch of POGG<sup>246</sup> and the Constitution Act, 1871.<sup>247</sup>

This variety of provincial inability is distinct from the other rationales for vesting federal jurisdiction over subject-matters under the national dimensions branch of POGG. Assuming that an activity in these parts of Canada creates negative externalities in a province, they do not arise from that province's failure to regulate the activity, because the relevant activity takes place outside the province. Inter-provincial and federal-provincial collective action problems are also not in play, since the relevant activity lies outside the provinces and can be regulated by the

since those statutes served to attract corporations wishing to increase the costs of litigation against them. And once one province enacted such legislation, other provinces would have a reason to do so as well, even though, in the aggregate, provinces are made worse off by the result. Indeed, the Court alluded to this possibility when it stated that Ontario's and Quebec's laws could lead to the enactment of 'strict retaliatory laws' (at para. 61) and that '[o]ther provinces could, of course, follow suit' (at para. 65).

On a final note, it is worth remarking that the willingness of the modern Supreme Court to condition federal jurisdiction upon the risk of inter-provincial or federal-provincial non-cooperation is a dramatic departure from the jurisprudence of the Privy Council. In the *Board of Commerce* case, the first time the question of jurisdiction over competition policy arose, one reason relied on by the Privy Council for finding the legislation unconstitutional was the possibility of coordinated federal-provincial action (supra note 30 at 200-1). The same point was made by the Supreme Court in *Eastern Terminal*, in the context of agricultural marketing boards (supra note 42 at 448). And the possibility of an inter-provincial solution to the need for national standards was explicitly relied on by the Privy Council in *Snider* as a reason to strike down federal labour legislation (supra note 16 at 403-4). The idea in *Crown Zellerbach* and *General Motors* that the risk of non-cooperation could count as a reason for vesting jurisdiction over a subject-matter with the federal government shows how far Canadian constitutional doctrine has moved in the last fifty years.

245 *Insurance Reference*, supra note 28 at 596.

246 *Re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792 (territorial sea); *Re Nfld. Continental Shelf*, [1984] S.C.R. 86 (continental shelf).

247 (U.K.), 34-35 Vict., c. 28, s. 4.

federal government alone. Finally, and perhaps more importantly, invoking the national dimensions branch of POGG as a reason to grant the federal government jurisdiction here is redundant because the subject-matter (*e.g.*, the continental shelf) already lies under federal jurisdiction. So the national dimensions test must be an *additional* reason to assign subject-matters to POGG. And if this is true, then the provincial inability test, oddly enough, must mean something other than true provincial inability, in the way that I have described.

#### C. PROVINCIAL INABILITY AND SOCIAL POLICY

What are the implications of this analysis for the question of jurisdiction over social policy? *Crown Zellerbach* and *General Motors* have been hailed as a decisive repudiation of the Privy Council's narrow construction of the scope of federal jurisdiction over economic policy. Commentators now routinely argue that these two decisions confer on the federal government broad powers both to realize and to manage the Canadian economic union. In particular, it is now contended that under POGG and s. 91(2), either separately or in combination, the federal government has broad powers to implement international trade treaties that touch on matters of provincial jurisdiction,<sup>248</sup> to prohibit discriminatory barriers to inter-provincial economic mobility,<sup>249</sup> and even to create a national securities commission.<sup>250</sup> What is truly interesting is that this revolution on the economic policy side (although largely unrealized as yet because of the reluctance of the federal government to provoke conflict with the provinces) has not translated into a re-examination of the division of powers and social policy. This is rather surprising, given that, as I argued above, the economic and social policy components of the Privy Council's jurisprudence are inextricably linked. To be fair, courts have rarely had the opportunity to revisit the *UI Reference* decisions. But not a single academic commentator has re-examined the division of powers and social policy in the wake of *Crown Zellerbach* and *General Motors*, despite the fact that Social Canada has been one of the principal arenas of federal-provincial conflict over the last decade.

Consider social insurance first. The *UI Reference* decisions clearly stated that social insurance schemes that are mandatory and contributory lie outside federal jurisdiction. Moreover, even if federal legislation creating a non-contributory and non-mandatory health insurance could be

248 R. Howse, 'The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Relations' (1990) 16 *Can. Bus. L.J.* 160.

249 R.J. Howse, *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government* (Toronto: C.D. Howe Institute, 1996).

250 R. Leckey & E. Ward, 'Taking Stock: Securities Markets and the Division of Powers' (1999) 22 *Dalhousie L.J.* 250 at 261.

sustained under the spending power, such legislation could not regulate private conduct (*e.g.*, providers, private insurers). For the purposes of the provincial inability test, the enactment of these schemes would fall under federal jurisdiction if they raised inter-provincial collective action problems and, in particular, if they posed the risk of a race to the bottom. In the previous section, I noted that economists have long argued that redistribution races to the bottom are a real risk that federations must face and that social insurance schemes can be (and often are) structured in a redistributive fashion. It follows, therefore, that if a particular variety of social insurance were financed on a redistributive basis, the provincial inability test would operate to vest jurisdiction in the federal government under POGG. Whether a social insurance program is actually redistributive, however, is a question of fact that must be approached on a case-by-case basis.

In practical terms, this would amount to a significant increase in federal jurisdiction. It would mean that under POGG, Parliament could enact contributory and mandatory insurance schemes outside the context of unemployment insurance and pensions. For example, Parliament could enact a national pharmacare scheme that operated on this basis. Moreover, assuming that my earlier suggestion that non-mandatory and non-contributory health insurance is within federal jurisdiction is incorrect, the provincial inability test would serve to ground federal jurisdiction, provided that the scheme is redistributive. And even assuming that the federal government could create some kinds of social insurance under the spending power, relying on conditions to achieve its regulatory objectives, under POGG, the federal government could go further and directly regulate private conduct as part of its jurisdiction over redistributive social insurance. Parliament could, for example, legislate direct bans on extra billing and user fees or require health care providers to accept patients with federal health insurance. Parliament could even go so far as to enact a ban on private health insurance if doing so was part and parcel of establishing a publicly administered and publicly funded scheme that was redistributive – for example, because it removed the option of exit for the better-off.

Now consider regulatory jurisdiction over social services provided by non-governmental entities. Here, the argument for federal jurisdiction under the provincial inability test is much harder to make. It would be very difficult to convincingly demonstrate, for example, that the provincial inability test gives the federal government jurisdiction over the regulation of the licensing of the medical or nursing professions. But one could argue for federal regulatory jurisdiction over those aspects of social service delivery that are connected to redistributive goals. For example, suppose the federal government made it a policy priority to provide Canadians with equitable access to affordable, quality day care services. Instead of adopting the health care model (*i.e.*, universal coverage for all

on equal terms), the federal government could instead focus on the neediest and *mandate* that day care centres set aside a designated percentage of spots for children of families that meet a federally administered means test and that they charge them a percentage of the prevailing market rate. Statutory mandates could be used with respect to a variety of services provided by non-governmental entities, including health care (*e.g.*, reduced rates for uninsured services for persons who meet a needs test) and housing (*e.g.*, reduced rates for rental accommodation). Whether such policies are advisable is another matter altogether. But from a constitutional standpoint, the point is that this is an example where federal regulatory jurisdiction could be used for redistributive ends. Again, jurisdictional issues must be approached on a case-by-case basis.

#### VI *Conclusion: Recasting the politics of social policy*

In my introduction, I stated that my task was to interrogate the constitutional framework within which the politics of social policy takes place. The fact that federal–provincial relations are played out in the shadow of this framework suggests that it has influenced policy outcomes. Challenging that framework may accordingly have important effects on federal–provincial relations in the area of social policy. In this conclusion, I address some potential criticisms to my argument and suggest concrete ways in which challenging the constitutional assumptions of Social Canada could alter the politics of social policy, both now and in the future.

##### A. OBJECTIONS AND RESPONSES

The strongest objection to my analysis is that it would greatly increase the scope of federal jurisdiction over a broad range of policy areas hitherto thought to lie within exclusive provincial jurisdiction. Upon closer examination, this is not one objection but two: first, that my proposal would create an imbalance between federal and provincial jurisdiction; and, second, that it disrupts and displaces settled understandings of legal federalism on which both levels of governments have relied in framing public policy.

I address the second objection first. This is essentially an argument about legal stability and the threat to it posed by shifts in judicial interpretations of the Constitution. It is undeniable that what I propose would alter the received wisdom of the division of powers and, indeed, would require that the *UI Reference* decisions be overruled with respect to jurisdiction over mandatory, contributory insurance. However, although stability is an important value, particularly when public and private actors have relied on court decisions, it must be weighed against other competing values that might count as reasons for overruling those decisions. In the context of Canadian federalism, for example, the courts have often

departed from settled precedent, reviving both the general regulation of trade branch of s. 91(2) and the national dimensions branch of POGG, despite attempts by the Privy Council to narrow both doctrines into oblivion. In both these cases, although precedent was relied on (because both doctrines could be traced to judgments of the Privy Council), the weight of precedent counted against these decisions and ultimately gave way to other considerations. The same can be said for the Supreme Court's recent case law on the inter-provincial conflicts of laws, which has an important constitutional dimension.<sup>251</sup> Thus, simply to invoke legal stability is insufficient. Rather, what is required is an argument that the substantive reasons in favour of new legal rules are outweighed by stability concerns. I would argue that the substantive reasons underlying my analysis are powerful enough, and tied closely enough to developments in the jurisprudence, to overcome any concerns regarding precedent.

The first objection is more serious. Putting this argument in its strongest terms, a critic could argue that races to the bottom are an unavoidable fact of life in federations characterized by mobile capital and labour. To rely on the possibility of a race to the bottom as a reason to vest jurisdiction in the federal government over social policy is potentially very dangerous, since the same line of reasoning could be used to confer jurisdiction across a broad variety of areas (*e.g.*, labour standards), effecting a fundamental shift in the balance of power towards the federal government. This criticism assumes that allocations of jurisdiction under the division of powers would lead to unilateral federal legislative intervention into long-established spheres of provincial jurisdiction. Federal unilateralism would provoke a hostile reaction in Quebec, in particular, given that province's traditionally hostile stance to federal social policy initiatives.

However, this is not the only way in which the division of powers shapes policy outcomes. To an important extent, allocations of jurisdiction affect the initial endowments of federal and provincial governments in intergovernmental negotiations. With respect to Social Canada, for example, the federal government's bargaining power has historically been significantly weakened by the unavailability of a unilateral federal option.<sup>252</sup> The standard assumption of all parties is that with respect to Social Canada, the important policy levers fall under provincial jurisdiction, which, in turn, affects the bargaining dynamic because it eliminates the possibility of a credible federal threat to 'go it alone.' Recasting federal jurisdiction over social policy should, accordingly, affect the conduct of federal-provincial negotiations. Moreover, whether or not this will have any material effect on outcomes is difficult to gauge in the abstract and will depend on a variety of factors, such as the particular

251 *Hunt*, supra note 212; *De Savoye v. Morguard Investments*, [1990] 3 S.C.R. 1077; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

252 For a similar point, see Lederman, 'Forms and Limitations,' supra note 66 at 410-2.

policy context, the positions of important interest groups, public opinion, and the priorities of each level of government. Policy outcomes are shaped by, but do not follow directly from, allocations of jurisdiction. In the social policy context, for example, the historically central role of the provinces will count for a great deal.

Nonetheless, it is undeniable that identifying areas of federal jurisdiction could have real impact, even if that jurisdiction remains largely unexercised. In addition to altering the dynamic of federal–provincial relations, such identification would enhance federal accountability for social policy. Cass Sunstein has recently argued that constitutional rules that assign decision-making authority to particular institutions can enhance political accountability by clarifying the lines of responsibility for formulating public policy.<sup>253</sup> The constitutional rules of federalism play this role by identifying which institutions are vested with the responsibility for governing a given area of socio-economic activity. To be sure, because these are power-conferring rules, there is no guarantee that jurisdiction will be exercised at all, let alone in a particular way. The spending power, for example, has been used both to expand and to contract the welfare state. But the assignment of jurisdiction makes it impossible for the federal government to argue that it is constitutionally disabled from creating and implementing certain public policies. The claim of disempowerment is not an uncommon move for the federal government in the social policy arena, which it has advanced in tandem with its claims to involvement in areas that allegedly lie outside its jurisdiction. A good example is the federal government's stance during the Parliamentary debates surrounding the enactment of the Medical Care Act. Indeed, it is arguable that the claim of disempowerment is strategically important to the federal government in the social policy arena, since it enables the federal government to float policy initiatives without then facing the further question of why it does not act on them itself, as opposed to seeking the cooperation of the provinces. The claim of disempowerment, in other words, reduces the costs of federal policy activism in areas that lie outside its jurisdiction. Recasting jurisdiction over Social Canada will make this claim unavailable to the federal government. If the federal government really desires to launch a new social policy initiative, the limitations will be financial and political, not constitutional.

#### B. CONCRETE POLICY IMPLICATIONS

Where and when could Social Canada be recast? At present, the principal area of federal–provincial conflict in the social policy arena is health care. One of the looming issues on the health policy agenda is the rise in the share of total health care expenditures not covered by the CHA. The

253 C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

CHA provides federal funding to provincial health insurance plans for physician- and hospital-based treatment.<sup>254</sup> An important omission is coverage for pharmaceuticals, which account for an ever-increasing share of total health expenditures, rising from 9.5 per cent in 1985 to 15.5 per cent in 2000.<sup>255</sup> The increase in the relative share of drug expenditures is reflected in the growth of such expenditures of 303 per cent in absolute terms. Although drug expenditures continue to rise, Canada lacks a national pharmacare program. Drug coverage in Canada consists of a patchwork of public (both federal and provincial) and private programs. According to a recent report,<sup>256</sup> 90 per cent of Canadians have some drug coverage; 11 per cent have full coverage, 69 per cent have coverage that pays 65 per cent or more of drug expenditures, and 10 per cent have insufficient insurance (*i.e.*, coverage that pays less than 65 per cent of drug expenditures), while 10 per cent have no insurance at all. Moreover, coverage varies substantially across the provinces. For example, Quebec is the only province in which all residents are adequately insured (*i.e.*, there are no residents who are uninsured or under-insured). By contrast, 27, 32, and 41 per cent of the populations of Alberta, British Columbia, and Saskatchewan, respectively, are under-insured.

The establishment of a national pharmacare program was identified as a priority by the federal government before the most recent election.<sup>257</sup> The goal was twofold: to control costs through the monopoly purchasing power of governments and to broaden access to comprehensive coverage. The federal government's interest in the matter could be traced, in no small part, to the report of the National Forum on Health, which proposed the creation of a publicly financed and publicly administered system of pharmaceutical insurance for all medically necessary prescription drugs, with no deductibles or co-payments.<sup>258</sup> However, both the

254 For a fuller discussion of this point, see C.M. Flood & S. Choudhry, 'Strengthening the Foundations: Modernizing the *Canada Health Act*' (May 2002) [unpublished, on file with author].

255 Canadian Institute for Health Information, 'Drug Expenditures in Canada 1983-2000,' online: Canadian Institute for Health Information <<http://www.cihi.ca/wedo/hexpenddrug.shtml>> (date accessed: 19 April 2002).

256 Applied Management (in association with Fraser Group & Tristat Resources), 'Canadians' Access to Insurance for Prescription Medicines: Executive Summary,' online: Health Canada <[http://www2.itssti.hc-sc.gc.ca/B\\_Pcb/HTF/projectc.ns4/ExecSum/NA202/\\$File/execsum\\_eng.pdf](http://www2.itssti.hc-sc.gc.ca/B_Pcb/HTF/projectc.ns4/ExecSum/NA202/$File/execsum_eng.pdf)> (date accessed: 1 May 2002).

257 M.M. Jean, Address (National Conference on Pharmacare, 6 November 1997), online: Health Canada <<http://www.hc-sc.gc.ca/english/media/speeches/pharmae.htm>> (date accessed: 1 May 2002); A. Rock, Address (Conference on National Approaches to Pharmacare, 19 January 1998), online: Health Canada <<http://www.hc-sc.gc.ca/english/media/speeches/pharma2e.htm>> (date accessed: 14 June 2001).

258 National Forum on Health, 'Directions for a Pharmaceutical Policy in Canada,' online: National Forum on Health <<http://www.nfh.hc-sc.gc.ca/publicat/finvol2/pharm/reform.htm>> (date accessed: 1 May 2002) at para. 1.

National Forum on Health and the federal government indicated that a federally created and administered scheme was not an option.<sup>259</sup> And in advance of the September 2001 First Ministers' meeting on health care, proposals for a national pharmacare program were quietly dropped by the federal government.

Why the initial federal caution, and then the federal retreat? There are a variety of explanations. Perhaps the most important is the greatly diminished political capital of the federal government in the wake of declines in federal transfers, combined with the demand by the provinces that the federal government restore and then increase transfers for services covered by the CHA before they would even consider a federally sponsored pharmacare plan. But, as I have just argued, surely another factor was the unavailability of a unilateral federal response. Recasting Social Canada, accordingly, could alter the bargaining dynamic. The possibility of a unilateral federal initiative might make provincial governments more willing and the federal government less willing to compromise, leading to shared-cost programs with more demanding national standards, more comprehensive regimes of provincial reporting, and so on.

What about the future? Unilateral federal initiatives in the social policy arena, at present, appear to be a political non-option. Although as recently as a year ago there was considerable speculation that the advent of post-deficit politics in Ottawa could lead to a major unilateral federal initiative, the decline in the federal government's financial situation, coupled with the increase in federal transfers to the provinces, has significantly reduced the federal government's room to manoeuvre. Moreover, the ongoing need to forge a stable accommodation with Quebec makes an aggressive federal stance extremely unlikely for the foreseeable future. However, the potential represented by the federal government's large amounts of un-exercised jurisdiction over social policy is not without practical importance. As I argued above, it may affect the dynamic and outcome of federal-provincial negotiations. Moreover, renovating the jurisprudence of social policy may foreshadow a shift in the practice of the federal government, perhaps many years down the road.<sup>260</sup>

259 Ibid.; Rock, *supra* note 257 at 5.

260 In this respect, social policy would stand alongside economic and environmental policy as an area where courts have interpreted federal jurisdiction broadly but where the federal government has been extremely reluctant to exercise the jurisdiction that it has. In the economic policy arena, the federal government very likely possesses the jurisdiction to create a national securities commission and to implement international trade agreements that trench on provincial jurisdiction. In the environmental context, the contrast between court decisions and political practice is striking. Many commentators take the view that the federal government is increasingly leaving environmental protection to the provinces. See, *e.g.*, K. Harrison, 'Intergovernmental

Why might the federal government wish to create new social insurance schemes, to regulate social services provided by non-governmental entities, or to engage in direct social service delivery in the future? It has long been observed that in the post-war period, the spending power has served as an important instrument of national unity, creating a shared sense of political community across the federation centred on the idea that Canadians, regardless of where they reside, should receive comparable levels of public services and have access to comparable levels of health care and (formerly) social assistance. However, political support for inter-provincial transfers, either explicit (equalization) or implicit (CHST), is now under considerable strain from Alberta and Ontario. David Milne has argued, for example, that 'the mood among contributing provinces is understandably less sanguine than in earlier years.'<sup>261</sup> The source of this discontent, according to Milne, is the disproportionate burden of federal deficit reduction shouldered by the three 'have' provinces (formerly British Columbia, Alberta, and Ontario, but now only the latter two). Indeed, according to Stefan Dupré, the cap on CAP and the CHST produced declines in federal transfers of approximately 40 per cent to those provinces, whereas the 'have-not' provinces did not suffer nearly as much, since they continued to receive equalization payments.<sup>262</sup> Milne concludes that

[a]rbitrary and thoughtless measures of that kind obviously do much to undermine the support and goodwill necessary for the whole system of intergovernmental transfers, particularly programs like equalization. ... [D]ividing rich and poor provinces in this blatantly unfair way threatened the consensus needed for the whole system of fiscal transfers.<sup>263</sup>

But if Milne is right, much more is at stake than the future of transfer payments. The fiscal decentralization of Canada threatens to erode our shared sense of political community. Ironically, it is perhaps by partially de-federalizing the social union, by establishing a direct link between the federal government and the populations it serves through social programs, that the federal government may best ensure the survival of the federation into the new millennium.

Relations and Environmental Policy: Concepts and Context' in P.C. Fafard & K. Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston, ON: School of Policy Studies, Queen's University, 2000) 3.

261 D. Milne, 'Equalization and the Politics of Restraint' in R. Boadway & P.A.R. Hobson, eds., *Equalization: Its Contribution to Canada's Economic and Fiscal Progress* (Kingston, ON: John Deutsch Institute for the Study of Economic Policy, 1998) 175 at 195.

262 Stefan Dupré, cited by Milne, *ibid.* at 195.

263 *Ibid.* at 198.