
The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations

Bruce Ryder*

The author explores the possibility of employing Canadian constitutional doctrine to develop a more flexible approach that would allow for greater provincial autonomy and First Nation self-government within the existing scheme of ss 91 and 92 jurisprudence. Canadian constitutional doctrine is first interpreted through the competing models of the classical and modern paradigms. The former emphasizes a sharp division of powers and has traditionally been used, the author argues, to invalidate legislation seen to interfere with the market economy. The modern paradigm, on the other hand, recognizes competing jurisdictions and has been used to uphold legislation focusing on morals. The author then brings this analysis to bear on the issue of provincial autonomy, focusing on the doctrinal writings of Québécois scholars. Using the classical paradigm to restrict federal intrusion, and the modern paradigm to expand provincial powers will, the author argues, enhance provincial autonomy within the existing federal structure, pending further constitutional amendment. Finally, the author extends the analysis to the issue of First Nations autonomy, arguing that similar doctrinal analysis could be used to promote self-government for the First Nations.

L'auteur analyse l'interprétation jurisprudentielle des art. 91 et 92 de la Constitution afin de déterminer si le cadre constitutionnel actuel peut s'accomoder d'une plus grande autonomie des provinces et des peuples autochtones. De la doctrine constitutionnelle canadienne se dégagent deux conceptions divergentes de la distribution des pouvoirs législatifs effectuée par la Constitution. La conception classique conçoit les sphères respectives de compétence comme distinctes et exclusives; un des motifs sous-jacents de cette interprétation tendant à restreindre l'exercice du pouvoir législatif aurait été, selon l'auteur, la protection de l'économie de marché. La conception moderne, par contre, reconnaît le chevauchement inévitable des juridictions, et ne le conçoit pas comme un mal, étant donné le but moral important poursuivi par les législateurs. L'auteur envisage ensuite la question de l'autonomie provinciale, en se référant à la doctrine québécoise. Il conclut qu'invoquer la conception classique pour restreindre les interventions législatives fédérales tout en élargissant les pouvoirs législatifs provinciaux à l'aide de la conception moderne permettrait aux provinces d'acquérir une plus grande autonomie à l'intérieur de la structure constitutionnelle actuelle. Une démarche semblable accorderait aussi aux peuples autochtones une plus grande mesure d'auto-détermination, en attendant, dans un cas comme dans l'autre, d'éventuels amendements constitutionnels.

* Assistant Professor, Osgoode Hall Law School, York University. I would like to thank Joel Bakan, Annie Bunting, Joon Min Cho, Richard Cullen, Reuben Hasson, Peter Hogg, Patrick Macklem, Andrew Petter and Lee Waldorf for their support and comments on an earlier version of this paper.

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Introduction

In a recent case, Chief Justice Dickson remarked that “[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers.”¹ This is an accurate description of only part of our constitutional jurisprudence. It may be that, in the post-World War II era, judicial interpretation of the constitution has gradually moved away from a “classical” view of the distribution of powers, that allowed for little overlap and interplay of provincial and federal powers, towards the more flexible “modern” federalism described by the Chief Justice. But this movement, from what I will call the classical paradigm to the modern paradigm in Canadian federalism, has been neither consistent nor steady. Indeed, both approaches have been invoked by the courts at all stages of our history of constitutional judicial review. Nevertheless, the larger trend does emerge from a study of the cases. One can say, at least, that the modern paradigm has replaced the classical paradigm as the dominant approach to the judicial interpretation of the division of powers.

¹*O.P.S.E.U. v. A.-G. Ontario*, [1987] 2 S.C.R. 2 at 18, 41 D.L.R. (4th) 1 [hereinafter *O.P.S.E.U.* cited to S.C.R.].

The classical and modern paradigms represent competing judicial responses to the interpretation of the federal division of powers in sections 91 to 95 of the *Constitution Act, 1867*.² Both seek to give effect to two foundational principles of the Canadian constitution, namely, responsible government and federalism. The preamble to the 1867 *Act* announces that

the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

The British constitutional system of responsible government was accordingly adopted by the federating colonies in Canada. It is a system of representative democracy in which the head of state acts on the advice of the executive, which is in turn accountable to a democratically elected legislature. In the United Kingdom, Parliament has supreme and absolute legislative authority. Any and all laws are within the competence of Parliament. In Canada, the principle of parliamentary sovereignty was altered to take account of the desire of the provinces to be "federally united." Thus, sovereign legislative power was divided between the two levels of government. But it follows from the fusion of parliamentary sovereignty and federalism that the totality of legislative power is distributed between the federal Parliament and the provincial legislatures. This principle, that the distribution of powers is "exhaustive," means that any and all laws are competent to one level of government or the other. As the Privy Council stated, "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."³ As all laws must be within the competence of at least one level of government, the people of Canada are entitled to demand that the judicial interpretation of the division of powers not compromise the availability of a full range of options from the combined competences of their democratically elected legislative bodies.⁴

²*Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) [hereinafter *Constitution Act, 1867*].

³*A.-G. Ontario v. A.-G. Canada (Reference Appeal)*, [1912] A.C. 71 at 81, 3 D.L.R. 509 (P.C.). See, generally, P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 257-58 & 339-40.

⁴While the distribution of powers in ss 91-95 of the *Constitution Act, 1867* is exhaustive, there are important limitations in other parts of the 1867 *Act* on the manner in which those powers may be exercised. For example, the powers of the federal and Quebec governments are limited by the language rights in s. 133 (see *Jones v. A.-G. N.B.*, [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583), as the powers of the Manitoba government are limited by the language rights guaranteed by s. 23 of the *Manitoba Act, 1870*, R.S.C. 1985, App. II, No. 8 (see the *Reference re Language Rights under the Manitoba Act, 1870*, [1985] 1 S.C.R. 72, 19 D.L.R. (4th) 1). In addition, the provincial powers over education cannot be exercised so as to interfere with denominational school rights (s. 93 and s. 22 of the *Manitoba Act, 1870*; see *Reference re An Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18), and neither level of government can tax Crown lands

At the same time, the federal principle embodied in the preamble requires that provincial and federal governments be coordinate and autonomous within their respective spheres of competence.⁵ This principle is reflected in the constitutional division of powers in ss 91-95 that is unalterable by the unilateral action of either level of government.⁶ The provinces' "desire to be *federally* united" was a product of their insistence on the preservation of the institutions, laws and customs of regional majorities.⁷ The autonomy inherent in a federal system would prevent national majorities from establishing priorities and policies in areas of jurisdiction allocated to the provincial governments (and vice-versa). Hence, the emphasis placed on the notion of "exclusive" spheres of competence in the constitutional division of powers. Reference to "exclusivity" of

(s. 125) or establish inter-provincial tariffs (s. 122). And, of course, the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], and of aboriginal and treaty rights by the enactment of s. 35 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*], has placed significant new constraints on the exercise of federal and provincial legislative and executive powers.

Thus, the principle of parliamentary sovereignty has never been absolute in the Canadian constitution, and it is less so since 1982. However, the limitations on government power contained in the 1867 and 1982 *Acts* do not alter the fact that the provisions distributing power in ss 91-95 of the 1867 *Act* ought to be interpreted in a manner consistent with the principle of exhaustiveness. Judicial review of legislation in Canada is a two-stage process: the first step is to determine whether the legislation is within the powers allocated to the enacting government; the second step is to ensure consistency with the *Charter* and the other rights guarantees set out in the *Constitution Acts*. See, e.g., *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

This paper is concerned with the first stage of the constitutional analysis — the interpretation of the division of powers. The emphasis placed on the relevance of the principle of exhaustiveness at this stage of the analysis should not obscure the important limitations on legislative power set out elsewhere in the constitutional text.

⁵See Wheare's oft-quoted definition of federalism: "By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent." K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963) at 10.

⁶There are other provisions of the *Constitution Act, 1867* that are inconsistent with the classic federal design of equally autonomous governments. Most notable among these provisions are the federal government's ability to unilaterally interfere with matters within provincial jurisdiction by exercising the federal disallowance and declaratory powers (ss 90 and 92(10)(c) respectively). As a result, the Canadian constitutional text is most accurately described as "quasi-federal." See Wheare, *ibid.* at 20. However, Canadian constitutional practice has evolved in the direction of a true federalism characterized by equal autonomy. *Supra*. For example, the disallowance and declaratory powers have fallen into disuse, and their exercise by a contemporary federal government would provoke enormous political consequences. Thus, while my emphasis on the federal nature of the Canadian constitution fails to capture the ambiguities of the quasi-federal constitutional text, it is an accurate description of the historical and continuing political forces that shape the living reality of the constitution.

⁷See, e.g., A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982); G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 172-3 (quoting the views of Prime Minister Tilley of New Brunswick).

legislative powers appears no less than seven times in ss 91-93, six times in reference to provincial powers. The provincial and federal governments have mutually exclusive jurisdiction to make laws in relation to the subject matters assigned to them by the division of powers.

The classical and modern paradigms represent different judicial approaches to defining “exclusivity” of federal and provincial powers, and thus of preserving provincial autonomy. The classical paradigm is premised on a “strong” understanding of exclusivity: there shall be no overlap or interplay between federal and provincial heads of power. The heads of power in the federal and provincial lists should not be interpreted literally, but should be “mutually modified” in light of the subjects accorded to the jurisdiction of the other level of government so as to avoid overlapping responsibilities as much as possible. Each level of government must act within its hermetically sealed boxes of jurisdiction, or “watertight compartments” (“compartiments étanches”).⁸ Any spillover effects on the other level of government’s jurisdiction will not be tolerated. Such legislative spillover must be contained, either by ruling such laws *ultra vires*, or by “reading them down” so that they remain strictly within the enacting legislature’s jurisdiction. A word that captures the classical approach to exclusivity has emerged in the francophone constitutional scholarship: “étanchéité.”⁹

The modern paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modern approach to exclusivity simply prohibits each level of government from enacting laws whose dominant characteristic (“pith and substance”) is the regulation of a subject matter within the other level of government’s jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government’s catalogue of powers. If a law is in pith and substance within the enacting legislature’s jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government’s jurisdiction. And if a problem of national or international dimensions is functionally beyond the capacity of a province to regulate effectively,

⁸The metaphor is from Lord Atkin’s judgment in the *Labour Conventions* case: “[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.” *A.-G. Canada v. A.-G. Ontario (Labour Conventions)*, [1937] A.C. 326 at 354, 1 D.L.R. 673 (P.C.) [hereinafter *Labour Conventions* cited to A.C.].

⁹See, e.g., P. Patenaude, “L’érosion graduelle de la règle de l’étanchéité: une nouvelle menace à l’autonomie du Québec” (1979) 20 C. de D. 229; J.-C. Bonenfant, “L’étanchéité de l’A.A.N.B.: est-elle menacée?” (1977) 18 C. de D. 383; H. Brun & G. Tremblay, *Droit constitutionnel* (Montreal: Éditions Yvon Blais, 1982) at 340-41. The anglophone scholarship lacks a noun that so concisely captures the classical meaning of exclusivity; the “watertight compartments” metaphor is the nearest equivalent.

it will be allocated to federal jurisdiction. In these ways, the modern paradigm, to borrow Dickson C.J.'s words, allows for a "fair amount of interplay and indeed overlap between federal and provincial powers."¹⁰

Both the modern and classical paradigms are legitimate attempts to give meaning to the fundamental principles that ought to guide the judicial interpretation of the division of powers. Both attempt to preserve federal and provincial autonomy by giving real meaning to exclusivity, without compromising the democratic nature of the constitution by denying the principle of the exhaustive distribution of legislative power. The classical paradigm does so by attempting to cleanly slice the jurisdictional pie; the modern paradigm divides a cake of many overlapping layers. However, as I will attempt to demonstrate in this paper, each on its own imperfectly accomplishes federal and democratic goals. I will argue that the classical paradigm serves provincial autonomy well in so far as it limits the ability of the federal government to pass laws intruding on provincial areas of jurisdiction, but it also unnecessarily limits the scope of provincial jurisdiction and compromises the democratic principle of exhaustiveness. I will argue that the modern paradigm serves the principle of exhaustiveness well by ensuring that all legislation is within the competence of at least one level of government. But carried to its extreme, the modern paradigm poses a threat to provincial autonomy.

The weakness of the classical paradigm is that in a complex, interdependent world, social problems do not fit so neatly into jurisdictional boxes. Virtually any piece of legislation can be cut down by a holding of *ultra vires* if the classical paradigm is invoked in all its vigour. In addition, the watertight compartments metaphor can give rise to a legislative vacuum by hiving off parts of interconnected phenomena, granting jurisdiction over part to the federal government and part to the provinces. In this way, effective regulation of the whole is left to the unpredictable fate of attempts at inter-governmental cooperation. In sum, the classical paradigm is the course of judicial activism, because it puts more stringent constraints on legislation enacted by both levels of government. And, by creating legislative vacuums, it compromises the principle of exhaustiveness.

The modern paradigm is the course of judicial restraint; it avoids the deregulatory tendencies of the classical paradigm by maximizing the ambit of the legislative powers available to the federal and provincial governments alike. However, the weakness of the modern paradigm is that it can be employed in a manner that compromises provincial autonomy. By allowing legislation to have spillover effects on the other government's areas of jurisdiction, it creates areas of social life subject to overlapping or concurrent powers. Where overlap-

¹⁰*Supra*, note 1.

ping federal and provincial laws come into conflict, the rule of federal paramountcy provides that the federal law prevails, rendering the provincial law inoperative to the extent of the conflict. Thus, the modern paradigm, by extending the areas subject to concurrent powers, extends the potential for federal dominance inherent in the paramountcy rule. Carried to its logical extreme, the modern paradigm would make a mockery of provincial autonomy.

The above account considers the meaning of the classical and modern paradigms to two levels of government in Canada, the provinces and the federal government. Missing from the account thus far is the status of a third level of government that has been recognized in our constitutional history: namely, First Nations' governments. Neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* explicitly recognizes the existence of a third level of government. Nevertheless, the special status of First Nations people and governments are part of what Slattery has called the "hidden constitution."¹¹ The existence of First Nations was legally recognized in treaties with Britain and France,¹² and confirmed by the *Royal Proclamation of 1763*:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories, as not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds ...¹³

The *Royal Proclamation*, which remains in force today,¹⁴ characterized aboriginal title as a valuable interest in land normally acquired by purchase and prohibited private purchases of Indian lands.¹⁵ An exclusive procedure, the treaty process, was established for all future negotiations between the Crown and First Nations. Through the treaty process, the Crown recognized its horizontal, nation

¹¹B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt & J.A. Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 114.

¹²For an example of an early treaty with legal effect, see *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427. On the evolution of native rights in the colonial period, see M. Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18 U.B.C. L. Rev. 255 at 257-61. In Jackson's words, "[i]t was through the process of consensual treaty-making, in which Indian tribes were recognized as independent nations, that the terms of European settlement and the tribes' continued occupation of their hunting territories were mutually agreed" (*supra* at 257).

¹³R.S.C. 1970, App. II, No. 1 [hereinafter *Royal Proclamation*].

¹⁴The legal force of the *Royal Proclamation* is recognized in s. 25 of the *Constitution Act, 1982*, which provides that the *Charter* shall not be construed in a manner that abrogates or derogates from any rights pertaining to the aboriginal peoples of Canada including "any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763..."

¹⁵See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 751-54.

to nation, relationship with the First Nations.¹⁶ As Opekokew has argued,

[t]he Royal Proclamation of 1763, the treaties and other agreements between Indian governments and the various levels of government in Great Britain and Canada are no more than formal recognitions of our sovereign aboriginal rights by the other parties.¹⁷

In light of this history, Confederation was a legal non-event as far as the constitutional status of First Nations people is concerned. They were not consulted or involved in the formulation and adoption of the *Constitution Act, 1867*. The First Nations “did not consciously decide to enter the country.”¹⁸ The only recognition of the special status of First Nations people in the *Constitution Act, 1867* is s. 91(24), which allocates exclusive legislative jurisdiction over “Indians and Lands reserved for Indians” to the federal government. From the point of view of First Nations people, s. 91(24) simply granted to the federal government the exclusive jurisdiction to administer the responsibilities assumed by Britain in the treaties, and the exclusive jurisdiction to enter into further negotiations and agreements with the First Nations on behalf of the Crown.¹⁹ The inherent sovereignty of First Nations was never surrendered, nor could it be without the “full and free consent of the Indians.”²⁰ Thus, the British principle of parliamentary sovereignty has to be further adapted to the Canadian constitutional context by taking into account not only the existence of a federal division of powers between the provinces and the federal government and of entrenched constitutional rights,²¹ but also the existence of the unsundered inherent sovereignty of the First Nations.

However, both prior to and following Confederation non-native governments have viewed First Nations people as subjects of the Crown rather than as members of independent nations in their own right. Relying on the theory of parliamentary supremacy, and its corollary, the principle of exhaustive distribu-

¹⁶W. Many Fingers, “Commentary: Aboriginal Peoples and the Constitution” (1981) 19 Alta. L. Rev. 428.

¹⁷D. Opekokew, *The First Nations: Indian Government in the Community of Man* (Regina: Federation of Saskatchewan Indians, 1982) at 23.

¹⁸Many Fingers, *supra*, note 16 at 429.

¹⁹D. Opekokew, *The First Nations: Indian Government and the Canadian Confederation* (Saskatoon: Federation of Saskatchewan Indians, 1980) 46; Opekokew, *supra*, note 17 at 19-20; F. Plain, “A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America,” in Boldt & Long, eds, *supra*, note 11, 31 at 34 (s. 91(24) “was enacted to make clear the power of the federal government to engage in colonial expansion in the west”); C. Chartier, “Aboriginal Rights and Land Issues: The Metis Perspective,” in Boldt & Long, eds, *supra*, 54 at 56 (“the aboriginal peoples maintain that section 91(24) indicates only that the federal government has jurisdiction to enter into relationships and discussions with aboriginal nations”); Many Fingers, *supra*, note 16 at 428 (“Section 91(24) was a grant from Britain to Canada to administer responsibilities that Britain had assumed by its treaties.”).

²⁰Opekokew, *supra*, note 17 at 19.

²¹*Supra*, note 4.

tion of legislative power in a federal constitution, s. 91(24) of the *Constitution Act, 1867* has been interpreted by the federal government as conferring upon it plenary legislative authority over "Indians and lands reserved for Indians." Beginning with the 1869 *Act for the Gradual Enfranchisement of Indians*²² and the *Indian Act, 1876*,²³ the Dominion government sought to interfere with and ultimately replace First Nations' governments by defining and imposing the band council system. "Federal control of on-reserve governmental systems became the essence of Canadian-Indian constitutional relations."²⁴ On the few occasions on which the Supreme Court of Canada has considered the scope of federal power under s. 91(24), it has assumed that the section confers plenary authority on the federal government to pass laws dealing with "Indians and Lands reserved for Indians."²⁵ The federal government and the judiciary have thus rejected the First Nations' view of s. 91(24), which would allow for the assertion of federal jurisdiction to pass laws affecting their people only with the consent of First Nations people themselves.²⁶

The federal government has insisted that Indian government must fit into the existing division of powers between the provinces and the federal government — that is, that Indian government must be subordinate to the jurisdictional authority of the provinces and the federal government. Under such constraints the autonomy of Indian government would be severely limited.²⁷

Just as Quebec did not consent to the adoption of the *Constitution Act, 1982*, the First Nations did not consent to the adoption of the *Constitution Act, 1867* and its failure to explicitly acknowledge the reality of First Nations' governments. First Nations people have long demanded new constitutional arrangements that recognize First Nations governments as "full and equal partners in Canada's constitution."²⁸ Some progress was made with the adoption of section 35(1) of the *Constitution Act, 1982*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." For First Nations people, the concept of "aboriginal rights" entails their unsundered, original sovereignty as independent nations.²⁹ On

²²S.C. 1869, c. 6.

²³S.C. 1876, c. 18.

²⁴J.S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in I.A.L. Getty & A.S. Lussier, eds, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 56 at 62.

²⁵See, e.g., *Canada (A.-G.) v. Giroux*, (1916) 53 S.C.R. 172, 30 D.L.R. 123; *Re Eskimos*, [1939] S.C.R. 104, 2 D.L.R. 417.

²⁶Many Fingers, *supra*, note 16 at 432; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

²⁷L. Little Bear, J.A. Long & M. Boldt, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 174-75.

²⁸Opekokew, *supra*, note 19 at 46.

²⁹See T. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, vol. 1 (Ottawa: Supply and Services Canada, 1977); *Minutes of Proceedings of*

this view, s. 35(1) could be interpreted as an affirmation of the horizontal relationship existing between the Crown and First Nations. However, in its first judgment interpreting s. 35, *R. v. Sparrow*,³⁰ the Supreme Court indicated that it continues to view the constitution as exhaustively distributing legislative power between the two constitutional levels of non-native government. The Court did not question the assertion of sovereignty over the First Nations by the British Crown:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.³¹

Section 35(1) changes the constitutional situation by protecting existing aboriginal and treaty rights. This protection gives the First Nations “a measure of control over government conduct and a strong check on legislative power”³² exercised by federal or provincial governments; however, it is not a recognition of the legislative jurisdiction of First Nations’ governments. Rather than envisioning a federal relationship between coordinate and autonomous governments, the Supreme Court “is not willing to move away from a hierarchical vision of the relationship between the First Nations and the Canadian state in the realm of constitutional jurisprudence.”³³ According to the Court in *Sparrow*:

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like ...³⁴

we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.³⁵

the Special Committee on Indian Self-Government (The Penner Committee Report) (Ottawa: Queen’s Printer, 1983); M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) at 27; Many Fingers, *supra*, note 16; Opekokew, *supra*, note 17; Opekokew, *supra*, note 19.

³⁰[1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

³¹*Ibid.* at 1103.

³²*Ibid.* at 1110.

³³Macklem, *supra*, note 26 at 450.

³⁴*Supra*, note 30 at 1108.

³⁵*Ibid.* at 1109.

Thus, while s. 35(1) is an important advance in providing some constitutional protection to previously vulnerable aboriginal and treaty rights, it is abundantly clear that a new constitutional arrangement is required to place aboriginal self-government on a secure footing.

Until such a constitutional amendment is achieved, the distinct constitutional history of the First Nations ought to provide the interpretive lens through which the courts and the federal government approach s. 91(24) of the *Constitution Act, 1867*. In Macklem's words,

The judiciary must begin to construct principles that accept the fact that native people did not surrender their sovereignty or pre-existing forms of government by the mere fact of European settlement. The law governing the distribution of legislative authority over native people ought to eliminate the interpretive obstacles currently in place that permit extensive federal regulation of native people absent native consent, and construct principles governing the distribution of authority to allow for the ability of native people themselves to pass laws governing their individual and collective lives.³⁶

Rather than envisioning a hierarchical relationship between the First Nations and non-native governments — a vision founded in part on ethnocentric attitudes that view native cultural differences as giving rise to a need for “protection” and “assimilation” — the courts should adopt an autonomist approach to the interpretation of federal jurisdiction under s. 91(24). An autonomist conception of the distinct constitutional status of First Nations people would recognize that the creation of an equality of differences between the founding and original cultural groups requires that political spaces be accorded to those groups in which they can define their difference themselves.

The protection of provincial autonomy has been a value of primary importance in Canadian constitutional discourse,³⁷ resulting from an understanding

³⁶*Supra*, note 26 at 418.

³⁷For some of the classic judicial statements emphasizing that provincial autonomy is a foundational principle of the Canadian constitution, see *Hodge v. R.*, (1883) 9 App. Cas. 117 at 132 (P.C.) [hereinafter *Hodge*]; *A.-G. Can. v. A.-G. Ont. (Local Prohibition)*, [1896] A.C. 348, 5 Cart. 295 (P.C.) [hereinafter *Local Prohibition* cited to A.C.]; *Liquidators of the Maritime Bank v. Receiver General of New Brunswick*, [1892] A.C. 437 at 441-43, 5 Cart. 1 (P.C.) (the object of the 1867 Act was “neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy”); *Montreal (City) v. Montreal Street Railway*, (1910) 43 S.C.R. 197 at 232, 11 C.R.C. 203, aff'd [1912] A.C. 333, 1 D.L.R. 681 (“Division of legislative authority is the principle of the ‘British North America Act,’ and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division that is the end of the federal character of the Union.”); *In re the Initiative and Referendum Act*, [1919] A.C. 935 at 942, 48 D.L.R. 18 (P.C.); *Edwards v. A.-G. Canada*, [1930] A.C. 124 at 136, 1 D.L.R. 98 (P.C.) (the 1867 Act should be given “a broad and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as

that the federal principle was adopted in Canada as a means of protecting cultural and institutional differences associated with regionally-based majorities.³⁸

the provinces, to a great extent, but within certain fixed limits, are mistresses in theirs"); *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357 at 366, 2 D.L.R. 193; *In re the Regulation and Control of Aeronautics*, [1932] A.C. 54 at 70, 1 D.L.R. 58 (P.C.) (the preservation of the rights of minorities was "the foundation upon which the whole structure" of Canadian federalism was built; the "process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded"); *Labour Conventions*, *supra*, note 8 at 352.

Provincial autonomy remains a central concern in the modern jurisprudence, particularly in the cases dealing with the scope of federal jurisdiction to pass laws dealing with the "general regulation of trade" (s. 91(2)) or matters of a national dimension (p.o.g.g.). See, especially, *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.]; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.]; *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.], discussed briefly at *infra*, notes 222-27 and accompanying text.

³⁸While Canadian constitutional scholars agree that provincial autonomy as a means of respecting cultural diversity is an important constitutional value, not all would agree that it is a value deserving the interpretive weight accorded it in this paper and in the judgments cited *supra*, note 37. Ultimately, Canadians agree that the federal constitution demands that autonomy be accorded to the federal and provincial governments, but they disagree endlessly and vociferously on the appropriate scope of and balance between those respective autonomies. For example, there is a strong tradition in the francophone scholarship of emphasizing the value of provincial autonomy (see Part III, below); there is an equally strong tradition in the anglophone scholarship of advocating an increase in the powers of the federal government. See, e.g., F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977); the overview of Bora Laskin's centralist vision in K.E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 219-57; and the summary of the views of other anglophone scholars in A.C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Poli. Sci. 301 and J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123 at 130ff. For centralists like Laskin and Scott, a strong central government was necessary for effective and equitable social and economic regulation and for the protection of civil liberties: "provincial autonomy means national inactivity," and "the more we have of the one, the more we have of the other" (B. Laskin, "Reflections on the Canadian Constitution After the First Century" (1967) 45 Can. Bar Rev. 395 at 400).

The text, history and structure of the *Constitution Act, 1867* are too ambiguous to provide guidance on the appropriate weight to be placed on the value of federal or provincial autonomy respectively. "The inference from the structure will be essentially the importance of preserving two autonomous levels of government over time, rather than the appropriate place at which to draw the lines between federal and provincial responsibilities" (Swinton, *supra*, at 201-202). This has led some authors to conclude that the choice is largely "a matter of a priori belief rather than rational argument" (P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47 at 87); see also R. Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 Queen's L.J. 131 at 140.

I share the view of those who believe that Canada is a strongly federal society from a sociological point of view, and that provincial autonomy must be treated as a constitutional value of supreme importance in order to respect the basic reality of cultural diversity in the country, particularly the concentration of French Canadians in Quebec. This view underlies the writings of the

The First Nations have a similar claim to autonomy as a means of protecting their distinctive cultural and political traditions, a claim that has been relegated to a marginal position in Canadian constitutional interpretation. An understanding of the central place in Canadian constitutional discourse of the federal principle to the preservation of cultural difference, together with an acknowledgement of the fact that First Nations people never consented to the assertion of sovereignty over all elements of their lives by non-native governments constituted by the *Constitution Act, 1867*, provide the foundations for an autonomist approach to s. 91(24).

Until further constitutional reform is accomplished by amendment, a measure of autonomy can be accorded to First Nations governments by using standard interpretive techniques within the existing structure of Canadian federalism. Such an autonomist approach to s. 91(24) would draw inspiration from an understanding that the federal principle is the manner favoured by the Canadian constitution for the preservation of territorially-based cultural difference. The federal principle requires that each level of government be coordinate, equal and autonomous within their respective spheres of jurisdiction. On this approach, s. 91(24) imposes on the federal government an obligation to ensure the autonomy of First Nations governments. The federal government cannot pass laws dealing with "Indians and Lands reserved for Indians" absent the consent of the First Nations affected.³⁹ In addition, autonomy for First Nations people requires some protection from the application of provincial laws. Here is where the classical paradigm has a crucial role to play in an autonomist interpretation of s. 91(24). The classical paradigm could prevent provincial laws from applying on reserves, and could prevent provincial laws from applying to matters that touch the heart of the individual and collective identities of First Nations people on or off reserves. In addition, a classical approach to paramountcy would prevent any provincial laws from applying in areas where federal First Nations law is in force. And finally, a classical approach to inter-delegation would prevent the federal government from delegating the power to enact laws dealing with "Indians" or "Indian lands" to the provinces without the consent of First Nations people. As we shall see, the modern paradigm has been favoured by the courts in the interpretation of s. 91(24), so that in many respects First Nations people are subject to the concurrent application of federal and provincial laws. In this context, the modern paradigm represents an unacceptable paternalistic relationship between the federal government and First Nations people; it is fundamentally at odds with an autonomist interpretation of s. 91(24).

Québécois scholars discussed in Part III, below; see also D.M. Cameron, "Whither Canadian Federalism? The Challenge of Regional Diversity and Maturity," in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality?* 3d ed. (Toronto: Methuen, 1977) 304.

³⁹I am relying here on the argument of Macklem, *supra*, note 26.

The goal of this paper is to use the understandings of the strengths and weaknesses of the modern and classical paradigms outlined above to evaluate the degree to which the pattern of Canadian constitutional interpretation has furthered democratic principles and has promoted autonomy for the provinces and First Nations. While each paradigm has a legitimate and valuable role to play in furthering democracy and a meaningful federalism for the three levels of government, I will argue that the classical and modern paradigms have each been employed in a manner that does not further these foundational principles of the Canadian constitution. The occasions on which the classical paradigm has been invoked provide a road map of the deregulatory impulses of the Canadian judiciary, while the occasions on which the modern paradigm has been invoked chart those areas where the judiciary has been tolerant of regulation in the name of social order, morality or paternalism. One hardly need point out that the Canadian constitution enshrines no particular economic or social theory.⁴⁰ It is our elected representatives, rather than the judiciary, who ought to determine the appropriate scope and form of state regulation. I will attempt to show in this paper how the doctrinal structure of Canadian constitutional interpretation can be lifted from market and moral biases, and put to the service of democratic and federal principles. In doing so, I will attempt to engage with the “three solitudes” of Canadian constitutional thought, namely the differing perspectives of Québécois, First Nation and anglophone (non-native) scholars.⁴¹

In Part I, I will set out in more detail the distinct doctrinal features of the classical and modern paradigms that flow from their competing understandings of the meaning of exclusivity. In Part II, I will undertake a brief historical overview of the application of the classical and modern paradigms, concluding with an examination of a prominent recent example of the application of the classical paradigm, the Supreme Court decision in *Commission de la Santé et Sécurité du Travail v. Bell Canada*.⁴² I will attempt to show in Part II how the deregulatory bias of the classical paradigm has been applied to legislative attempts to regulate market relations, while the tolerance of the modern paradigm has been applied to legislation perceived to deal with questions of morality and social order. In Part III, I will consider the relationship of the classical paradigm to

⁴⁰See Holmes J.’s remark regarding the U.S. Constitution, dissenting in *Lochner v. New York*, 198 U.S. 45 (1905) at 75.

⁴¹I do not mean to suggest that views are uniform within these three groupings of thought regarding Canadian federalism. But different basic assumptions and cultural attitudes tend to inform scholarship in these three traditions. I say “three solitudes” because neither Québécois people nor members of the First Nations believe that they are full and equal partners in current Canadian constitutional arrangements, and because there has been very little successful dialogue across the cultural and linguistic divides. The anglophone scholarship, in particular, too frequently has failed to engage with the contributions of Québécois and First Nation scholars. On the other hand, Québécois and First Nation scholars have had little choice but to engage with and challenge the dominant vision of anglophone scholars.

⁴²[1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161 [hereinafter *Bell 1988* cited to S.C.R.].

provincial autonomy. I will argue that provincial autonomy and democratic values are best protected by applying the classical paradigm to limit the scope of federal jurisdiction, and by applying the elements of the modern paradigm to the scope of provincial jurisdiction, the paramountcy doctrine, and inter-delegation. While the claims of provincial autonomy have been a central concern of Canadian constitutional jurisprudence, the equally valid claims of First Nations people to autonomy have been ignored by the doctrinal structure of Canadian federalism. In Part IV, I will demonstrate that the modern paradigm has been applied to First Nations people; that is, they are subject to the concurrent jurisdiction of federal and provincial laws even when those laws touch matters at the heart of their collective identities. I will argue that the classical paradigm should be used to promote the autonomy of First Nations people by protecting them from the application of provincial laws, by giving a broad scope to the doctrine of federal paramountcy, and by prohibiting delegation of federal jurisdiction over "Indians and lands reserved for Indians" to the provinces without the consent of First Nations people.

I. Doctrinal Features of the Classical and Modern Paradigms

A. *The Classical Paradigm*⁴³

The doctrinal metaphor which most accurately captures the understanding of exclusivity animating the classical paradigm is the idea that the powers conferred by ss 91 and 92 of the *Constitution Act, 1867* constitute "watertight compartments."⁴⁴ The exercise of legislative power by Parliament or the provincial legislatures must be confined to discrete boxes, or "watertight compartments" of jurisdiction, without any spillover effects on matters falling within the classes of subjects allocated exclusively to the legislative jurisdiction of the other level of government. The judicial task is to find, in the text or precedent, the clearly demarcated boundaries of the mutually exclusive spheres of activity of both levels of government.

The classical paradigm entails a very narrow conception of the degree to which the "pith and substance" doctrine allows legislation to have "incidental

⁴³For other descriptions of the classical paradigm in federalism law, see J.A. Corry, "Constitutional Trends and Federalism," in A.R.M. Lower *et al*, eds, *Evolving Canadian Federalism* (Durham: Duke University Press, 1958) 92 at 95-96; P. Macklem, "Constitutional Ideologies" (1988) 20 *Ottawa L. Rev.* 117 at 129-33; J.R. Mallory, "The Five Faces of Federalism," in P.-A. Cr peau & C.B. Macpherson, eds, *The Future of Canadian Federalism/L'avenir du f d ralisme canadien* (Toronto: University of Toronto Press, 1965) 3 at 5-7; Monahan, *supra*, note 38 at 51-57; P. Monahan, "The Supreme Court and the Economy," in I. Bernier & A. Lajoie, eds, *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986) 105 at 144-49; K. Swinton, *supra*, note 38 at 259-91 (Chapter 9, "Beetz's Classical Federalism").

⁴⁴*Supra*, note 8.

effects” on the other level of government’s jurisdiction. If legislation does spill over the constitutional watertight compartments, even if its dominant characteristic (“pith and substance”) is a matter within the enacting government’s jurisdiction, and even if the spillage is incidental to the accomplishment of the otherwise valid legislative scheme, the legislation will be held to be *ultra vires* the enacting legislature unless the incidental effects are absolutely necessary to the achievement of the valid legislative objective. A less drastic, alternative remedy is to uphold the validity of the legislation but limit its application by “reading it down” so as to prevent the legislation from applying in areas outside of the enacting legislature’s “compartments” of jurisdiction. In this way, the inevitable “spillage” can be contained. This technique is known as the interjurisdictional immunity doctrine: laws must be read down to preserve the immunity (or exclusivity) of the other level of government’s areas of jurisdiction.⁴⁵

Thus, the classical paradigm represents an attempt to confine the exercise of legislative power to mutually exclusive and self-contained boxes of jurisdiction. This approach by definition allows no room for overlap and interplay of federal and provincial laws. Thus, the double aspect doctrine, articulated by the Privy Council in *Hodge*, has always been the *bête noire* of the classical approach. According to that doctrine, “subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.”⁴⁶ In other words, some laws will be competent to both levels of government, and some areas of social life will be subject to concurrent federal and provincial power. For the judge who favours the classical approach, like Lord Haldane, Chief Justice Duff or Justice Beetz, these notions are unattractive. For them, it is a theory that “ought to be applied only with great caution.”⁴⁷ Overlap and consequent concurrency of powers are antithetical to the theory of mutual exclusivity that animates the classical paradigm.

It also follows from the basic tenets of the classical approach that the doctrine of paramountcy should be given a broad scope. If the classical paradigm operated perfectly, there would be no overlapping laws and thus no need for a rule of paramountcy. But the classical paradigm expresses an ideal, not a reality. When the watertight compartments ideal falters, federal paramountcy provides

⁴⁵On the interjurisdictional immunity doctrine, see Hogg, *supra*, note 3 at 329-32; D. Gibson, “Interjurisdictional Immunity in Canadian Federalism” (1969) 47 Can. Bar Rev. 40; R. Elliott, “Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance: *Ontario Public Service Employees Union v. Attorney General for Ontario*” (1988) 67 Can. Bar. Rev. 523.

⁴⁶*Supra*, note 37 at 130.

⁴⁷See Lord Haldane in *A.-G. Can. v. A.-G. Alta (Insurance)*, [1916] 1 A.C. 588 at 596, 26 D.L.R. 288 (P.C.) [hereinafter *Insurance Reference* cited to A.C.], Duff C.J. in *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396, 3 D.L.R. 305 at 309, and Beetz J. in *Bell 1988*, *supra*, note 42 at 706.

a simple means of sweeping away any overlapping provincial legislation and thus restoring the classical ideal.

On the classical interpretation, federal paramountcy means that wherever there is overlap or duplication of federal and provincial laws — wherever federal legislation has “covered the field” — the federal law will render the provincial law inoperative. A related classical conception of paramountcy is the “negative implication” test. On this test, the courts read into federal legislation an unspoken implication that any overlapping provincial legislation is to be suspended. In other words,

a federal law may be read as including not only its express provisions, but also a “negative implication” that those express provisions should not be supplemented or duplicated by any provincial law on the same subject.⁴⁸

The classical understanding of exclusivity would prohibit the delegation of legislative powers from one level of government to the other. To permit such inter-delegation of power would be to allow for the creation of temporary areas of concurrent jurisdiction in violation of the principle of exclusivity. Rinfret C.J. expressed the classical approach to inter-delegation as follows:

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word “exclusively” used in both section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other.⁴⁹

B. *The Modern Paradigm*⁵⁰

The modern paradigm is based on a weaker understanding of exclusivity than the watertight compartments approach animating the classical paradigm.

⁴⁸Hogg, *supra*, note 3 at 359.

⁴⁹*A.G. Nova Scotia v. A.G. Canada (Nova Scotia Inter-delegation)*, [1951] S.C.R. 31 at 34-35, [1950] 4 D.L.R. 369 [hereinafter *Nova Scotia Inter-delegation* cited to S.C.R.].

⁵⁰In describing the modern paradigm, I have relied heavily on Patrick Monahan’s similar account in his excellent article, *supra*, note 38 at 64-69. While few authors have named a “modern paradigm” in Canadian federalism, I consider Dickson C.J. to be its chief judicial proponent and Peter Hogg to be its chief academic proponent. For a summary of Dickson C.J.’s approach to the division of powers, see Swinton, *supra*, note 38 at 293-317. As she puts it,

[t]he way of concurrency of legislative powers, just as the adoption of a narrow definition of conflict between federal and provincial laws for purposes of paramountcy doctrine, is the way of judicial restraint, and Dickson was quite content to travel that road, leaving the resolution of problems arising from overlap and interaction of jurisdiction to the political forum” (*ibid.* at 314).

Hogg’s leading textbook on Canadian constitutional law (*supra*, note 3) is a thorough articulation and defence of the modern understanding of exclusivity in the name of judicial restraint (*supra* at 99) and provincial autonomy (*supra* at 364). For example, he advocates the liberal use of the pith and substance doctrine, allowing substantial impact on matters outside of the enacting level of government’s jurisdiction (*supra* at 313-15); he critiques the prohibition on legislative inter-delegation of powers (*supra* at 295-308); he defends a restrained role for paramountcy (*supra* at 355-65); and he critiques the interjurisdictional immunity doctrine (*supra* at 328-32).

The belief in clear boundaries separating the legitimate spheres of provincial and federal activity is abandoned in favour of a recognition of interdependence and overlap in federal and provincial spheres of activity.

Exclusivity, on the modern approach, means the exclusive ability to pass laws that deal predominantly with a subject matter allocated to the enacting government's jurisdiction. The pith and substance doctrine is applied liberally; in other words, so long as the dominant or most important characteristic of a law falls within a class of subjects allocated to the jurisdiction of the enacting government, the law will be held to be *intra vires*, even if there is spillover, or incidental effects, in areas outside of its jurisdiction.⁵¹

As the modern paradigm by definition allows for a wide scope of overlap and interplay between provincial and federal laws, the double aspect doctrine is embraced enthusiastically by its judicial proponents. As a result, areas of social life become increasingly subject to concurrent federal and provincial power.

The interjurisdictional immunity doctrine has no place in the modern paradigm, for it conflicts with the liberal approach to the pith and substance doctrine. Spillover is not to be contained, but is inevitable and indeed welcomed under the modern paradigm.⁵²

Similarly, the doctrine of paramountcy is given a narrower scope. The "covering the field" and "negative implication" approaches to paramountcy are rejected.⁵³ Overlap and duplication of laws does not give rise to federal paramountcy. Quoting Lederman and Hogg, Dickson J. stated in *Multiple Access Ltd. v. McCutcheon*⁵⁴ that

duplication is ... "the ultimate in harmony." The resulting "untidiness" or "dis-economy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to [...] provincial autonomy" ... Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.⁵⁵

The paramountcy doctrine is only invoked when absolutely necessary; that is, when there is an express conflict between federal and provincial laws in the sense that compliance with both laws is impossible.⁵⁶

⁵¹See Hogg, *ibid.* at 313-5; W. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill L.J. 185; W. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada," in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 266.

⁵²Hogg, *supra*, note 3 at 328-32.

⁵³*Ibid.* at 355-65.

⁵⁴[1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 [hereinafter *Multiple Access* cited to S.C.R.].

⁵⁵*Ibid.* at 190, quoting Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," *supra*, note 51 at 195, and P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 110, now *supra*, note 3 at 364.

⁵⁶See Lederman, *ibid.* at 191 ("In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one

The modern understanding of exclusivity would not prohibit federal inter-delegation of power. Rather, the modern judge would welcome the constitutional flexibility inherent in inter-delegation, and would not be concerned about its temporary creation of areas of concurrent jurisdiction. While the Supreme Court has continued to pay lip-service to the classical prohibition on legislative inter-delegation,⁵⁷ it has moved progressively closer to the modern position by sanctioning the use of devices such as administrative inter-delegation⁵⁸ and anticipatory incorporation by reference.⁵⁹ As Hogg has noted, the cases "have reinstated federal inter-delegation as an important tool of cooperative federalism," permitting Canadian legislatures to "do indirectly what they cannot do directly."⁶⁰ Although the Court has not clearly articulated the rationale for permitting federal inter-delegation in these forms, it seems likely that they flow from a desire to avoid the rigidity of the classical approach to exclusivity.⁶¹

The classical paradigm can be summed up as follows: every social problem should be capable of being addressed by only one level of government, and then only if the social problem fits neatly inside that government's jurisdictional compartments. The modern paradigm can be summed up as follows: every social problem ought to be capable of being addressed by at least one level of government, but preferably both. The attempt to demarcate bright line spheres of exclusive powers gives way to an acceptance of a great deal of overlap and interplay of exclusive powers.

enactment says 'yes' and the other says 'no,' 'the same citizens are being told to do inconsistent things;' compliance with one is defiance of the other.")

⁵⁷The decision in the *Nova Scotia Inter-delegation* case, *supra*, note 49, has not been overruled.

⁵⁸*P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392, 4 D.L.R. 146 [hereinafter *Willis* cited to S.C.R.]; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. (2d) 384 [hereinafter *Coughlin* cited to S.C.R.]; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

⁵⁹*A.-G. Ont. v. Scott*, [1956] S.C.R. 137, 1 D.L.R. (2d) 433 [hereinafter *Scott*]; *Lord's Day Alliance of Canada v. A.-G. B.C.*, [1959] S.C.R. 497, 19 D.L.R. (2d) 97; *Coughlin, ibid.*; *Dick v. R.*, [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33 [hereinafter *Dick* cited to S.C.R.].

⁶⁰Hogg, *supra*, note 3 at 307.

⁶¹In several uncharacteristically frank *dicta*, the judges have indicated that they favour the flexibility inherent in cooperative federal inter-delegation. For example, after upholding the administrative inter-delegation at issue in *Coughlin*, Cartwright J. stated that "it is satisfactory to find that there is nothing which compels us to hold that the object sought by this co-operative effort is constitutionally unattainable" (*supra*, note 58 at 576). Similarly, in *Reference re Agricultural Products Marketing Act*, Pigeon J. described the cooperative scheme of administrative inter-delegation as perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires regulation in both intraprovincial and extraprovincial trade. ...when after 40 years a sincere cooperative effort has been accomplished, it would really be unfortunate if this was all brought to nought (*supra*, note 58 at 1296).

II. The Historical Application of the Two Paradigms

The elements of both the modern and classical paradigms have been invoked as judicial responses to defining the exclusivity of the division of powers since the early days following Confederation. Indeed, the pattern in which they continue to be used was established early on in a series of cases dealing with the liquor trade and the insurance industry respectively. It was largely these two trades that provided the stage on which competitive attempts by federal and provincial governments to regulate trade played out in the late nineteenth and early twentieth century.

Regulation of the insurance industry was necessary to give the public greater security and confidence in the industry, because of the especially vulnerable position of the consumer of insurance:

Because the terms and conditions of insurance policies are in practice stipulated by the insurer, and are not well understood by the insured, governments sought to protect the insured by requiring the inclusion of certain conditions in every policy. Because the financial strength, probity and permanence of an insurer cannot in practice be judged by the insured, and are essential to the fulfilment of the policy, governments sought to control entry to, and supervise the performance of, the industry by licensing insurers, by requiring a security deposit, by limiting the insurers' powers of investment, and by official inspection of their books.⁶²

Insurance regulation was, thus, an early form of consumer protection legislation designed to counter the potential for abuse of market power by insurance companies.⁶³

Regulation of the liquor trade also sprung from a desire to protect the consumers of liquor and their dependents. The movement demanding regulation of the liquor trade had a strong moral and religious flavour. The movement was headed by church groups and early women's organizations, such as the Women's Christian Temperance Union. These groups believed that the consumption of alcohol was a threat to the moral and domestic order, and thus an evil that had to be eradicated by prohibitive legislation.⁶⁴

⁶²Hogg, *supra*, note 3 at 457.

⁶³For overviews of the history of regulation of the insurance industry, see C.D. Baggaley, *The Emergence of the Regulatory State in Canada, 1867-1939* (Ottawa: Economic Council of Canada, 1981) at 232-42; Hogg, *supra*, note 3 at 457-60; C. Armstrong, "Federalism and Government Regulation: the Case of the Canadian Insurance Industry, 1927-34" (1976) 19 Can. Pub. Admin. 88.

⁶⁴On the history of prohibition legislation, see J. Schull, *Ontario Since 1867* (Toronto: McClelland and Stewart, 1978) at 88-94; R.E. Spence, *Prohibition in Canada* (Toronto: Ontario Branch of the Dominion Alliance, 1919); J.F. Davison, "The Problem of Liquor Legislation in Canada" (1926) 4 Can. Bar Rev. 468; G. Decarie, "Something Old, Something New...: Aspects of Prohibitionism in Ontario in the 1890's" in D. Swainson, ed., *Oliver Mowat's Ontario* (Toronto: Macmillan, 1972) 156; G.A. Hallowell, *Prohibition in Ontario, 1919-23* (Ottawa: Love Printing Service, 1972); A.H.F. Lefroy, "Prohibition: The Late Privy Council Decisions" (1896) 16 Can. L. Times

In its early decisions, the Privy Council held that the regulation of the liquor trade was a double aspect matter; it upheld prohibition legislation passed at the provincial and federal level.⁶⁵ The regulation of the insurance industry, on the other hand, was within the exclusive competence of the provincial governments; federal attempts to regulate the trade were consistently ruled *ultra vires*. In this manner, the Privy Council established a pattern that continues to shape Canadian federalism: where legislation is characterized as necessary to the preservation of morality and the social order, the judiciary is more likely to invoke the tolerant doctrines of the modern paradigm; where legislation is viewed as an interference with market relations, the judiciary is more likely to invoke the restrictive approach of the classical paradigm.

The first insurance law challenged was an Ontario statute, upheld in *Citizen's Insurance Co. v. Parsons*.⁶⁶ In *Parsons*, Sir Montague Smith took great care to interpret jurisdiction over the regulation of trade in such a manner as to avoid overlap of federal and provincial jurisdiction. He accomplished this objective by resorting to a process of interpretation by which the general language granting powers to each level of government must be "mutually modified" in order to preserve spheres of absolute and exclusive jurisdiction:

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intentment be modified and limited.⁶⁷

Using this technique in order to prevent the creation of any "conflict" between federal and provincial heads of power,⁶⁸ Sir Montague Smith was able to cleanly divide jurisdiction over trade. Federal jurisdiction over "trade and commerce" was restricted to the regulation of interprovincial and international trade, and the general regulation of trade affecting the whole Dominion. Provincial jurisdiction extended to intraprovincial trade: the regulation of transactions completed solely within a province fell within exclusive provincial jurisdiction. Therefore, federal legislation did not comprehend the power to regulate the contracts of a particular business or trade within a province. There would be no overlap or competition of federal and provincial powers in the regulation of the insurance industry within the provinces.⁶⁹

125; J.C. Morrison, *Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations; 1867-1896* (Toronto: Ontario Department of Public Records and Archives, 1961).

⁶⁵See *infra*, notes 70-87 and accompanying text.

⁶⁶(1881) 7 App. Cas. 96, 1 Cart. 265 (P.C.) [hereinafter *Parsons* cited to App. Cas.].

⁶⁷*Ibid.* at 110.

⁶⁸*Ibid.* at 109.

⁶⁹For a similar analysis, see Monahan, *supra*, note 38 at 57-61.

The classical approach to the division of jurisdiction over trade adopted by the Privy Council in *Parsons* frustrated persistent federal attempts at regulating the insurance industry. In the *Insurance Reference*, the Privy Council held that the federal *Insurance Act*,⁷⁰ which prohibited insurance companies from carrying on business without a federal license, was *ultra vires*. The *Act* did not apply to provincially-incorporated companies operating solely within the province of incorporation. Nevertheless, Lord Haldane emphasized that the licensing provision “deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province.”⁷¹ The Dominion government’s jurisdiction over trade and commerce did not extend “to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.”⁷²

The federal government responded by re-enacting the provisions of the *Act* ruled *ultra vires* in the *Insurance Reference* and making them solely applicable to foreign insurance companies.⁷³ This approach was also turned back by the courts on the grounds that the federal government was trying to use its power over aliens “to intermeddle with the conduct of the insurance business.”⁷⁴ The federal government also tried to rely on its criminal law power by adding a provision to the *Criminal Code* making it an offence to carry on the business of insurance without a license.⁷⁵ The Privy Council struck down this provision as a colourable attempt to use the criminal law “to interfere with the exercise of civil rights in the Provinces.” To uphold the federal law, stated Duff J., would be to allow Parliament to

assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.⁷⁶

Thus, federal attempts to evade the classical paradigm applied to the regulation of markets failed.

The judicial response to the regulation of the liquor trade was markedly different. In *Russell v. R.*,⁷⁷ the Privy Council upheld a local option scheme for

⁷⁰*Insurance Act, 1910*, S.C. 1910, c. 32.

⁷¹*Supra*, note 47 at 595.

⁷²*Ibid.* at 596.

⁷³*Insurance Act*, S.C. 1917, c. 29; *An Act to Amend the Insurance Act*, S.C. 1927, c. 59.

⁷⁴*Re Insurance Act of Canada*, [1932] A.C. 41 at 51, 1 D.L.R. 97 (P.C.).

⁷⁵*An Act to amend the Criminal Code (Respecting Insurance)*, S.C. 1917, 7-8 Geo.V, c.26, amending *Criminal Code*, R.S.C. 1906, c. 146, now R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

⁷⁶*A.G. Ontario v. Reciprocal Insurers*, [1924] A.C. 328 at 340, 1 D.L.R. 789 (P.C.).

⁷⁷(1882) 7 App. Cas. 829 (P.C.) [hereinafter *Russell*].

the prohibition of liquor enacted by the Dominion in the *Canada Temperance Act*.⁷⁸ The court did not specify which head of federal power sustained the validity of the *Act*, although the judgment suggests that laws dealing with matters of morality, public order and safety would fall within either the p.o.g.g. power or the criminal law power. The court compared prohibition legislation with other criminal and public health legislation dealing with subjects such as contagious diseases,⁷⁹ dangerous substances,⁸⁰ poisonous drugs,⁸¹ arson⁸² and other "evils" and "vices."⁸³ In the court's words,

Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights.⁸⁴

In *Hodge*, the Privy Council upheld Ontario liquor licensing legislation. Hodge, who had been convicted of operating a billiard saloon on Saturday evening in contravention of the terms of his license, unsuccessfully sought to appeal his conviction by arguing that, after *Russell*, the regulation of the sale of liquor was a matter entirely within federal jurisdiction. In rejecting this argument, the Privy Council relied on the double aspect theory: "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."⁸⁵ The pith and substance of the Ontario Act was to promote "good government of taverns" and "to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct."⁸⁶ The conclusion that the regulation of the liquor trade was a double aspect matter was confirmed in the *Local Prohibition* case, in which the Privy Council held that the provinces had the jurisdiction to enact a local prohibition scheme very similar to that enacted by the Dominion in the *Act* upheld in *Russell*. The court had little doubt that the provinces had jurisdiction to pass laws for "the suppression of the drink traffic as a local evil."⁸⁷

The *Russell*, *Hodge* and *Local Prohibition* cases taken together indicate that the Privy Council was unwilling to cleanly divide jurisdiction to pass legislation over what it saw as matters relating to the preservation of morality or public order. The court did not engage in the process of mutual modification of powers relating to morality that it had employed in the *Parsons* case to delimit respective federal and provincial powers over trade. It resisted arguments made

⁷⁸*Canada Temperance Act, 1878, S.C. 1878, c. 16.*

⁷⁹*Supra*, note 77 at 839.

⁸⁰*Ibid.* at 838.

⁸¹*Ibid.*

⁸²*Ibid.* at 839.

⁸³*Ibid.* at 838-41.

⁸⁴*Ibid.* at 839.

⁸⁵*Hodge, supra*, note 37 at 130.

⁸⁶*Ibid.* at 131.

⁸⁷*Local Prohibition, supra*, note 37 at 370.

by the opponents of the liquor legislation to separate matters of local morality from matters of national morality, and thus restrict the powers of any one government over morality as a whole. Matters of morality were, rather, a seamless web, subject to the concurrent jurisdiction of federal and provincial governments. In contrast, the court in *Parsons* took care to divide the domain of market regulation into its local and national aspects in such a way that overlapping, concurrent legislation would not be tolerated.

The markets/morality dichotomy developed in the insurance and liquor cases helps explain the manner in which the modern and classical paradigms have been applied in constitutional cases up to the present day. Legislation that is characterized as regulating markets will be subject to the rigid strictures of the classical paradigm; in other words, it will have to fit into the watertight compartments of the enacting government's limited jurisdiction over markets. Legislation that is characterized as dealing with morality, public order or safety will be subject to the more tolerant doctrines of the modern paradigm; spillover effects on the other level of government's jurisdiction will not render such legislation invalid. Of course, legislation does not come pre-packaged with a markets or morality "tag." The characterization that is adopted is largely a matter of judicial discretion: a great deal of legislation, like the Acts regulating the insurance and liquor trades, regulates or prohibits market transactions in order to prevent harm perceived to arise from the trade in, or the consumption of, particular goods or services. Whether one sees such legislation as dealing with markets or with morality (in the sense of preventing harm to others) is simply a question of emphasis. Only certain kinds of harm will move the judiciary sufficiently to invoke the moral discourse of the modern paradigm.

The cases suggest that, apart from the trade in products associated with a social evil, the judges perceive free markets to be presumptively free of harmful side-effects. Thus, for example, federal legislation regulating anti-competitive behaviour did not survive when it was coupled with substantial powers to interfere in the operation of commodity markets;⁸⁸ federal anti-combines legislation

⁸⁸*In re Board of Commerce Act*, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C.). A good analysis of how the outcome of the case was affected by the judges' attitudes to market regulation can be found in B. Hibbitts, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21 *Ottawa L. Rev.* 65. As he notes, "there could be little doubt" that Viscount Haldane found it "philosophically satisfying" to hold the *Board of Commerce Act*, S.C. 1919, c. 37, *ultra vires*.

He had no love for the board as an administrative tribunal. He in fact devoted an entire paragraph of his judgment to detailing the wide range of its powers, stressing not only its authority over individuals of every stripe (traders and nontraders alike) and its control of prices and profits, but also its sweeping discretionary powers. As he put it (not without some disapproval one suspects), "the Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application" (*supra* at 114).

designed to facilitate the operation of free markets did survive when it was cast in less intrusive terms and placed under the moral cloak of the *Criminal Code*.⁸⁹ Federal regulation of the margarine trade would have been upheld had margarine posed a plausible threat to the health of consumers; however, the discourse of market freedom was invoked to strike down the legislation since its true purpose was to prevent harmful competition to dairy farmers.⁹⁰ Similarly, federal and provincial attempts to pass marketing legislation were struck down in the 1920s and 1930s as a result of the application of the rigid strictures of the classical paradigm.⁹¹ As a result, the courts placed the country in a "constitutional straitjacket"⁹² by creating a "no man's land" in which neither level of government could effectively regulate the economy.⁹³ In 1937, F.R. Scott described the situation as follows:

The history of recent cases dealing with the control of trade and commerce in Canada shows a fairly consistent attitude in the courts against control, an attitude which overrides any feeling for or against provincial autonomy ... Dominion control over the grain trade was successfully attacked in *King v. Eastern Terminal Elevators*, while a provincial attempt at a compulsory wheat pool was similarly held *ultra vires*. A provincial marketing scheme was set aside as interfering with interprovincial trade and commerce in the *Lawson Case*, and now the Dominion Marketing act is destroyed because it interferes with provincial trade. A provincial attempt to regulate the production and prevent wastage of gas and oil in the Turner Valley fields was frustrated. It would seem that even without special attention in the British North America Act, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts.⁹⁴

See also G. Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261 at 278.

⁸⁹*P.A.T.A. v. A.-G. Canada*, [1931] A.C. 310 (P.C.).

⁹⁰*Can. Fed. of Agriculture v. A.G. Que. (Margarine Reference)*, [1949] S.C.R. 1, 1 D.L.R. 433, aff'd [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.). While Parliament can regulate for a "public purpose" such as "public peace, order, security, health, morality" pursuant to its criminal law power, Rand J. concluded that the "public interest" does not extend to intervening in local markets in pursuit of a trade policy. Parliament cannot, under s. 91(27),

benefit one group of persons as against competitors in business in which, in the absence of legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to a particular trade within the provinces (*supra* at 50).

⁹¹*R. v. Eastern Terminal Elevator*, [1925] S.C.R. 434, 3 D.L.R. 1; *Lawson v. Interior Tree Fruit and Vegetable Committee*, *supra*, note 37; *In re Grain Marketing Act*, [1931] 2 W.W.R. 146, 25 Sask. L.R. 273 (C.A.); *Lower Mainland Dairy Products v. Crystal Dairy*, [1933] A.C. 168, 1 D.L.R. 82 (P.C.); *A.G. Canada v. A.G. Ontario (Natural Products Marketing)*, [1937] A.C. 377, 1 D.L.R. 688 (P.C.).

⁹²P.C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307 at 309.

⁹³F.R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" (1937) 3 Can. J. Econ. & Poli. Sci. 234 at 240: "The courts have created a no man's land in the constitution and are able to invalidate any marketing legislation they do not like."

⁹⁴F.R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation," rev'd and reprinted in Scott, *supra*, note 38, 90 at 101.

Markets simply do not fit neatly within watertight compartments of jurisdiction. To this day, the judicial activism inherent in the classical paradigm places marketing legislation and federal attempts to regulate the national economy on hazardous constitutional terrain.⁹⁵

Similarly, the pattern of allowing concurrent operation of prohibition laws that began with the *Russell* and *Local Prohibition* decisions can be traced through a series of more recent cases that have allowed for the concurrent operation of federal and provincial laws in the domains of morality and public order. For example, the regulation of immoral competitive behaviour such as fraudulent practices⁹⁶ and insider trading in federal securities,⁹⁷ the confinement of narcotic drug users,⁹⁸ the regulation of drunk driving⁹⁹ and other highway traffic offences,¹⁰⁰ public nudity,¹⁰¹ disorderly houses,¹⁰² obscene films,¹⁰³ and public assemblies¹⁰⁴ have all been found to be double aspect matters.

The above survey is necessarily a partial account of the history of the manner in which the courts have applied the modern and classical paradigms to the interpretation of the division of powers. No doubt different accounts could be constructed from the examination of areas of jurisdiction other than those discussed above. Nevertheless, the striking contrast in the pattern of decision-making in the moral and market domain respectively enables one to conclude that values that should have no constitutional significance are playing a role in the interpretation of the division of powers. Judicial resistance to the regulation of markets, and judicial tolerance of moral regulation have contributed to the shape of Canadian constitutional doctrine. The degree to which regulation of

⁹⁵Regarding marketing legislation, compare, e.g., *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, 67 D.L.R. (2d) 1 with *A.G. Man. v. Man. Egg and Poultry Association*, [1971] S.C.R. 689, 19 D.L.R. (3d) 169 and *Burns Foods v. A.G. Man.*, [1975] 1 S.C.R. 494, 40 D.L.R. (3d) 731, and see Weiler, *supra*, note 92 at 333-38. Regarding federal regulation of the economy, see *Labatt Breweries v. A.-G. Can.*, [1980] 1 S.C.R. 914, 9 B.L.R. 181; *Dominion Stores v. R.*, [1980] 1 S.C.R. 844, 106 D.L.R. (3d) 581. For a detailed analysis of these latter two cases, see J.C. MacPherson, "Economic Regulation and the B.N.A. Act" (1980-81) 5 *Can. Bus. L.J.* 172 (concluding (at 174) that "the constitutional basis for federal economic legislation has never been shakier").

⁹⁶*Smith v. R.*, [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

⁹⁷*Multiple Access*, *supra*, note 54.

⁹⁸*Schneider v. The Queen*, [1982] 2 S.C.R. 112, (*sub nom. Schneider v. B.C.*) 68 C.C.C. (2d) 449.

⁹⁹*Provincial Secretary of P.E.I. v. Egan*, *supra*, note 47.

¹⁰⁰*O'Grady v. Sparling*, [1960] S.C.R. 804, 25 D.L.R. (2d) 145; *Mann v. R.*, [1966] S.C.R. 238, 56 D.L.R. (2d) 1; *Stephens v. R.*, [1960] S.C.R. 823, 25 D.L.R. (2d) 296; *Francis v. R.*, [1988] 1 S.C.R. 1025, 41 C.C.C. (3d) 217 [hereinafter *Francis* cited to S.C.R.].

¹⁰¹*Rio Hotel Ltd. v. New Brunswick (Liquor License Board)*, [1987] 2 S.C.R. 59, 44 D.L.R. (4th) 663.

¹⁰²*Bedard v. Dawson*, [1923] S.C.R. 681, 4 D.L.R. 293.

¹⁰³*Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1.

¹⁰⁴*A.G. Can. and Dupond v. Montreal*, [1978] 2 S.C.R. 770, (*sub nom. A.G. Can. v. Montreal*) 84 D.L.R. (3d) 420.

markets or morals is desirable is an issue that ought to be left to the politically accountable branches of government.

While a case can be made that the classical paradigm reflects a deregulatory bias that has been applied to the market domain, at the same time it is frequently noted that it plays an important role in the promotion of provincial autonomy. While a market bias is not a legitimate value to be applied to the interpretation of the division of powers, the promotion of provincial autonomy is an important constitutional value in a federal state. Because these two values are frequently entangled in cases invoking the classical paradigm, it is a challenge to evaluate the constitutional legitimacy of particular decisions. It is necessary that we meet this challenge by attempting to untangle the values animating the use of doctrine in order to remove the application of the classical and modern paradigms from any illegitimate biases that have helped shape their application and put them to the service of legitimate constitutional values.

A good example of a decision in which the market bias and autonomist features of the classical paradigm are both visible is the recent decision of the Supreme Court in *Bell 1988*.¹⁰⁵ The case provokes a sense of déjà vu: a 1966 case that involved the same company and a similar factual and legal configuration, *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*,¹⁰⁶ is also a leading example of the application of the classical paradigm. In both the 1966 and 1988 cases, Bell Canada succeeded in using federalism arguments to avoid the application of Quebec labour laws.

In *Bell 1966*, the Supreme Court had to decide whether employees of Bell Telephone in Quebec were entitled to the protection of the Quebec *Minimum Wage Act*.¹⁰⁷ There was no question that the Quebec law was a valid exercise of provincial legislative authority over "property and civil rights"; and at the time there was no federal minimum wage.¹⁰⁸ Yet the court invoked the interjurisdictional immunity doctrine to read down the provincial law, on the grounds that the provinces lacked the power to pass legislation affecting a vital part of the management and operation of a federal undertaking.

In the few decades since it was decided, *Bell 1966* seemed to be a precedent resting on increasingly shaky ground. It had been forcefully criticized in the scholarly literature.¹⁰⁹ And in *O.P.S.E.U.*, Dickson C.J. and Lamer J. both

¹⁰⁵*Supra*, note 42. The case was part of a trilogy of cases dealing with the constitutional scope of application of provincial health and safety legislation. See also *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897, 51 D.L.R. (4th) 253 and *C.N.R. Co. v. Courtois*, [1988] 1 S.C.R. 868, 51 D.L.R. (4th) 271.

¹⁰⁶[1966] S.C.R. 767, 59 D.L.R. (2d) 145 [hereinafter *Bell 1966* cited to S.C.R.].

¹⁰⁷R.S.Q. 1941, c. 164.

¹⁰⁸The *Canada Labour Standards Code*, S.C. 1964-65, c.38, came into force on March 18, 1965, after the litigation had been initiated.

¹⁰⁹See Weiler, *supra*, note 92 at 340-42; Gibson, *supra*, note 45 at 53-56; Hogg, *supra*, note 3 at 329-32 & 465-66; and *infra*, note 191.

were willing to overrule *McKay v. R.*,¹¹⁰ a case that also applied the interjurisdictional immunity doctrine to preserve exclusive federal jurisdiction from encroachment by otherwise valid provincial legislation. In *O.P.S.E.U.*, Dickson C.J. stated that he favoured “caution” in the application of the interjurisdictional immunity doctrine:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between provincial and federal powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like “water-tight compartments” qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather, they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues ...¹¹¹

In the *Bell 1988* case, the court did not feel the “strong pull” of the modern paradigm; rather, it applied the interjurisdictional immunity doctrine embodied in *Bell 1966* and other cases.

The issue in *Bell 1988* was whether the *Quebec Act Respecting Occupational Health and Safety*¹¹² could apply to federal undertakings situate within the province. Beetz J., writing for a unanimous court, held that it could not. In doing so, he wrote a lengthy and scholarly judgment that reads like a textbook on the classical paradigm in Canadian federalism. One would never know from reading the judgment that there exists a competing approach to the interpretation of the meaning of exclusivity in the division of powers.

He began by pointing out that the pith and substance of the *Quebec Act* was the regulation of working conditions, labour relations and the management of undertakings. As these are matters that fall within s. 92(13), the *Act* was therefore *intra vires* the province.¹¹³ However, Beetz J. endorsed the broadest possible definition of the interjurisdictional immunity doctrine that could be drawn from the cases:¹¹⁴

¹¹⁰[1965] S.C.R. 798, 53 D.L.R. (2d) 532.

¹¹¹*Supra*, note 1 at 18.

¹¹²S.Q. 1979, c.63 (now R.S.Q. c. S-2.1) [hereinafter *Occupational Health and Safety Act*].

¹¹³*Supra*, note 42 at 816.

¹¹⁴The doctrine originated in cases in which provincial laws were held inapplicable to federally incorporated companies if they had the effect of “impairing” or “sterilizing” a company’s operations. *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, 18 D.L.R. 353 (P.C.); *Great West Saddlery Co. v. R.*, [1921] 2 A.C. 91, 58 D.L.R. 1 (P.C.). This test was later adopted to grant a similar immunity from the application of valid provincial laws to undertakings within federal jurisdiction. See *A.-G. Ont. v. Winner*, [1954] A.C. 541, 13 W.W.R. 657 (P.C.) and *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, 3 D.L.R. 481.

It would be difficult to argue that provincial labour legislation would impair or sterilize federal undertakings if applied to them. However, a more stringent test was ultimately articulated that prevents provincial minimum wage legislation and other labour legislation from applying to federal undertakings. In the cases involving labour legislation, the Court abandoned the “impairment” test

Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a., b. and c. of the *Constitution Act, 1867* ... It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings ...¹¹⁵

Beetz J. then undertook a lengthy evaluation of the provisions of the *Occupational Health and Safety Act* to determine whether its application would affect a "vital or essential part" of federal undertakings like Bell Canada.¹¹⁶ In fact, he spent forty pages of the judgment belabouring the obvious point that the *Quebec Act* interfered with the power of management in the employment context.¹¹⁷ For this reason, it could not apply to federal undertakings:

in entering the field of prevention of accidents in the workplace, as the legislator has the power to do, and in using, as probably could not be avoided in prevention matters, means such as the right of refusal, protective re-assignment, detailed regulations, inspection and remedial orders to "establishments" within the meaning of the *Act* ... the legislator could not fail to enter directly and massively into the field

in favour of a test that prohibited the application of provincial legislation to federal undertakings when it would affect "a vital or essential part of the operation as a going concern." See, e.g., *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248, 3 D.L.R. 801; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, 3 D.L.R. 72; *Bell 1966*, *supra*, note 106 at 771-72. It was this latter test that Beetz J. followed in *Bell 1988*:

In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it (*supra*, note 42 at 859-60).

¹¹⁵*Ibid.* at 761-62.

¹¹⁶The *Act* sets up a comprehensive scheme for the protection of workers from occupational hazards. The aim of the *Act* is set out in s. 2: "the elimination, at the source, of dangers to the health, safety and physical well-being of workers." Amongst other rights, the *Act* gives workers a right to refuse unsafe work (s. 12) and to collect regular wages while refusing such work (s. 14). A woman who believes that her working conditions may endanger her unborn child has a right to be reassigned to duties involving no such danger (s. 40). Chapter IV of the *Act*, which Beetz J. described as "crucial" (*ibid.* at 786), allows workers to set up health and safety committees (ss 68-9) which are granted wide-ranging powers of participation in the management of the workplace (s. 78).

¹¹⁷The following are some examples of Beetz J.'s emphasis on the *Act's* interference with management power in the workplace: "it is the very management and managerial authority in its entirety which the *Act* regulates" (*ibid.* at 812); it "aims at and regulates the management and operations of an undertaking" (*supra* at 810 & 814); it "appears to have been primarily motivated by a desire not to leave any aspect of the management and operation out" (*supra* at 814); it "creates a system of partial co-management of the undertaking by the workers and the employer" (*supra* at 810); it confers "managerial functions" on workers' representatives (*supra* at 811); it "inter-ven[es] at the heart of the contract of employment between the worker and the employer" (*supra* at 801); it "authorize[s] workers to withhold their services" (*supra* at 802); and it confers on the worker "rights which he or she may assert chiefly against the employer" (*supra* at 808).

of working conditions and labour relations on the one hand and, on the other ... into the field of the management and operation of undertakings. In so doing, the legislator precluded itself from aiming at and regulating federal undertakings by the *Act*.¹¹⁸

Beetz J. had stated earlier in the judgment that the purpose of the interjurisdictional immunity doctrine is to preserve a core area of exclusive federal jurisdiction, the core being defined by those subjects which “bear on the specifically federal nature of the jurisdiction.”¹¹⁹ While the litany of interferences with managerial prerogatives Beetz J. found in the legislative scheme is clearly problematic given the definition of the interjurisdictional immunity doctrine he adopted, it is not at all obvious why protecting the health and safety of workers, or management power more generally, “bears on the specifically federal nature of the jurisdiction” over interprovincial communication and transportation undertakings. Rather than focusing on a functional analysis of federal jurisdiction, his approach suggests that one determines whether the scope of a provincial law ought to be limited under the interjurisdictional immunity doctrine by measuring the degree to which it interferes with management power in the workplace.

In addition to affirming a broad interpretation of the interjurisdictional immunity, Beetz J. argued that the “double aspect” theory “ought to be applied only with great caution”:¹²⁰

The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the *same* aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.¹²¹

In this case, the Quebec legislature, and the federal government in enacting the almost identical occupational health and safety provisions in the *Canada Labour Code*,¹²² were both “pursuing the same objective by similar techniques and means.”¹²³ For Beetz J., the “exact correspondence” of the objectives of the federal and provincial occupational health and safety legislation

indicates that there are not two aspects and two purposes depending on whether the legislation is federal or provincial. In my opinion, the two legislators have legislated *for the same purpose and in the same aspect*. Yet they do not have concur-

¹¹⁸*Ibid.* at 798.

¹¹⁹*Ibid.* at 833.

¹²⁰*Ibid.* at 706, quoting Lord Haldane in *Insurance Reference*.

¹²¹*Ibid.* at 766.

¹²²R.S.C. 1970, c. L-1, ss 79, 79.1 & 80-106.1.

¹²³*Bell 1988, supra*, note 42 at 852.

rent legislative jurisdiction in the case at bar, but mutually exclusive jurisdictions.¹²⁴

Beetz J. offered two rationales for his thoroughgoing application of these features of the classical paradigm. First, he argued that overlapping legislation should be avoided as much as possible because it is inefficient and wasteful of administrative resources. After quoting Hogg's criticisms of the interjurisdictional immunity doctrine,¹²⁵ Beetz J. responded:

It is an argument which relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and perhaps inevitably, highly detailed. A division of jurisdiction in this area is likely to be a source of uncertainty and endless disputes in which the courts will be called on to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats.

Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote the proliferation of preventive measures and controls in which the contradictions or lack of coordination may well threaten the very occupational health and safety which are sought to be protected.

Federalism requires most persons and institutions to serve two masters; however, in my opinion an effort must be made to see that this dual control applies as far as possible in separate areas.¹²⁶

There is validity to the concern that overlap may frustrate the common goals of both levels of government; it is, at the very least, wasteful of administrative resources. But concerns about the desirable scope of government regulation are best left to the politically accountable branches of government unless there is tangible evidence that overlap is frustrating the accomplishment of the legislative goals. If so, the paramouncy doctrine should be invoked, for its role is to prevent such an operational conflict by rendering the provincial legislation inoperative. However, throughout the judgment Beetz J. pointed to the similarity between the federal and Quebec legislation, and did not describe how their overlap was creating discord rather than harmony.

The other rationale that Beetz J. offered in defence of the classical paradigm was the promotion of provincial autonomy. There is good reason to be concerned that the full-fledged application of the modern paradigm will seriously undermine provincial autonomy. As Beetz J. explained:

The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss 91 and 92 of the *Constitution Act, 1867* and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramouncy of fed-

¹²⁴*Ibid.* at 853.

¹²⁵*Supra*, note 3 at 328-32.

¹²⁶*Supra*, note 42 at 843-44.

eral legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution ...¹²⁷

This argument is compelling as a critique of the modern paradigm, but should it lead us to embrace the classical approach to exclusivity as Beetz J. suggests? Should we be troubled by the apparent paradox of asserting provincial autonomy as a defence for a result that limits the scope of a provincial law so that workers in Quebec have fewer rights than their neighbours simply because they happen to work for a federal undertaking? In the next section, I will explore the relationship of the classical paradigm to provincial autonomy in more detail through an examination of the works of Québécois scholars before reaching any definite conclusions about the desirability of the interpretive strategy employed by Beetz J. in *Bell 1988*.

III. The Paradigms and Provincial Autonomy

The future of confederation absolutely depends on the faithful and exact observance of the federal compact. ... for the true patriot nothing is more important or, should we say, is more sacred than the cause of provincial autonomy.

— P.B. Mignault¹²⁸

For Québécois constitutional scholars, the protection of provincial autonomy was the *raison d'être* of the adoption of a federal constitution in Canada, and represents the supreme value that ought to guide the interpretation of the division of powers.¹²⁹ In the understated style of the authors of the milestone

¹²⁷*Ibid.* at 766. Beetz J. also quoted the following passage from *Laskin's Canadian Constitutional Law* casebook:

Since most matters potentially have a "double aspect," particularly given the broad wording of the major federal and provincial powers, it is difficult to draw logical lines creating separate enclaves of exclusive jurisdiction. Restated, it is difficult to identify cases on a purely logical basis where the aspect doctrine will not be applied. The practical difficulty with applying the aspect doctrine to the fullest extent of its logic is that the resulting federal and provincial functional concurrency would liken our system to that in the United Kingdom where Parliament can always override municipal institutions. Through the operation of the paramountcy doctrine in Canada, federal legislation would supersede provincial legislation across the entire legislative field. This is, obviously, completely at odds with the notion of Canadian federalism (N. Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986) at 525).

The same point is made by Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada," *supra*, note 51 at 278, and by a number of the authors discussed in Part III, below.

¹²⁸P.B. Mignault, *Manuel de droit parlementaire* (Montreal: Librairie de Droit et de Jurisprudence, 1889) at 332-33 (translation from the *Report of the Royal Commission of Inquiry on Constitutional Problems*, vol. 2 (Province of Quebec, 1956) at 179, n. 4 [hereinafter *Tremblay Report*]).

¹²⁹The account which follows summarizes the views of those Québécois scholars whose writings share a commitment to the protection of provincial autonomy and a concern with the proper interpretation of the division of powers in light of that commitment. In the writing of these scholars

report of the Quebec Royal Commission on Constitutional Problems, “[p]rovincial autonomy, therefore, is something valuable.”¹³⁰ Indeed, the organizing theme of the *Tremblay Report* is the degree to which governmental practices and judicial interpretation of the division of powers have fostered a true federalism in which each level of government is equal, coordinate, and autonomous within its sphere of exclusive jurisdiction. A federal state, in the words of the *Tremblay Report*, requires

a division between two orders of government, co-ordinate with each other, and with each of them enjoying supreme authority in the sphere of activity assigned to it by the Constitution.¹³¹

The Québécois people agreed to Confederation only on the understanding that the Quebec state “would enjoy all the autonomy needed to preserve and develop its national life.”¹³² If the Canadian constitution guarantees less than full autonomy to Quebec in the organization of its national life, then it was “a fool’s bargain”.¹³³

Quebec sees with an anxious eye every federal intervention in fields which touch very closely upon the national life of its French-Canadian population ... To ensure its life, it has need of the full measure of autonomy and sovereignty which the federative compact guaranteed to it.¹³⁴

While the authors of the *Report* applauded the Privy Council for creating an “authentic federalism”¹³⁵ through its interpretation of the division of pow-

one finds an in-depth exploration of the relationship of Canadian federal interpretive practices to provincial autonomy.

The protection of provincial autonomy is not a central concern in all Québécois constitutional scholarship (see, e.g., G.A. Beaudoin, *La constitution du Canada*, 2d ed. (Montreal: Wilson & Lafleur, 1990)). And, of course, a commitment to promoting the autonomy of the Quebec state has led many to look beyond issues regarding the interpretation of the existing constitution and concentrate on advocating new constitutional arrangements that would recognize Quebec’s special status within Canada or other wide-ranging amendments to the federal constitution. See E. McWhinney, “Quebec Constitutional Theory” in *Quebec and the Constitution 1960-78* (Toronto: University of Toronto Press, 1979) 21; A. Dufour, “Le Statut Particulier” (1967) 45 Can. Bar Rev. 437; J. Brossard, “La révolution fédéraliste” (1972) 7 R.J.T. 1; J. Brossard, “Fédéralisme et statut particulier” in A. Popovici dir., *Problèmes de droit contemporain* (Montréal: P.U.M., 1974); J.-Y. Morin, “Le fédéralisme canadien après cent ans” (1967) 2 R.J.T. 13; A.G. Gagnon & J. Garcea, “Quebec and the Pursuit of Special Status” in R.D. Olling & M.W. Westmacott, eds, *Perspectives on Canadian Federalism* (Scarborough, Ont.: Prentice-Hall, 1988) 304.

¹³⁰Tremblay Report, vol. 2, *supra*, note 128 at 179.

¹³¹*Ibid.* at 151.

¹³²*Ibid.* at 153.

¹³³*Ibid.* at 156.

¹³⁴*Ibid.* at 185.

¹³⁵*Ibid.* at 165 & 171. For some of the classic statements by the Privy Council emphasizing the need for a strict adherence to the federal principle in order to preserve provincial autonomy, see *supra*, note 37.

ers,¹³⁶ they expressed deep concern that the federal government's post-war policies, particularly its assertion of unlimited federal taxation and spending powers, had imposed on Canada "only a quasi-federative system."¹³⁷

A similar emphasis on the priority of provincial autonomy as a constitutional value runs through generations of scholarship by Quebec jurists. In addition to challenging the centralist tendencies of the federal government's post-war policies, Québécois scholars have lamented any departure by the Supreme Court from the path of constitutional interpretation established by the Privy Council during its tenure as Canada's final court of appeal.

For example, in a 1951 article,¹³⁸ Pigeon offered an eloquent defence of the Privy Council's constitutional legacy in the name of provincial autonomy. He emphasized that "autonomy means the right of being different,"¹³⁹ which for a province means "the privilege of defining its own policies."¹⁴⁰ In marked contrast to anglo-Canadian scholars of the time, who tended to criticize the Privy Council for taking a narrow, technical or ahistorical approach to constitutional interpretation,¹⁴¹ Pigeon praised the Privy Council for interpreting the *B.N.A. Act* from the "higher view"¹⁴² of provincial autonomy:

the courts have consistently refused to allow any particular clause of the B.N.A. Act to be construed in a way that would enable the federal Parliament to invade the provincial sphere of action outside of emergencies ... The decisions ... firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union. In doing so they are preserving the essential condition of the Canadian confederation.¹⁴³

Pigeon's views are reflected in the work of subsequent Québécois scholars, who tend to use the Privy Council jurisprudence as a benchmark against which to measure the performance of the Supreme Court of Canada in constitutional cases since it took over as the final court of appeal in 1949. For example, the Supreme Court has given a broader interpretation than the Privy Council did to the major federal powers, particularly the trade and commerce power and the p.o.g.g. power. While anglo-Canadian scholars have tended to write from a functional perspective that applauds an expansion of the federal government's

¹³⁶The authors state that the Privy Council has been reproached "with only one thing — having prevented the central government from transforming the federative union into a legislative union" (*ibid.* at 163).

¹³⁷*Ibid.* at 171.

¹³⁸L.-P. Pigeon, "The Meaning of Provincial Autonomy" (1951) 29 Can. Bar Rev. 1126.

¹³⁹*Ibid.* at 1133.

¹⁴⁰*Ibid.*

¹⁴¹For useful overviews of anglo-Canadian analyses of the Privy Council jurisprudence, see Cairns, *supra*, note 38, and Bakan, *supra*, note 38.

¹⁴²*Supra*, note 138 at 1135.

¹⁴³*Ibid.* at 1134-35.

ability to deal with problems of a national scope, Québécois scholars have warned that the Supreme Court's approach threatens provincial autonomy. In a 1968 study, Jacques Brossard concluded that the Supreme Court "paraît s'éloigner de plus en plus de la jurisprudence provincialiste établie par le Comité judiciaire."¹⁴⁴ The path followed by the Court

s'éloigne, parfois considérablement, du fédéralisme authentique vers lequel tendait le Comité judiciaire et paraît s'avérer de plus en plus périlleuse pour les provinces et le Québec dont les intérêts sont spécifiques.¹⁴⁵

Amongst the many Québécois scholars who have agreed with Brossard's assessment and shared his concerns, the most common response has been to advocate that the courts adhere scrupulously to the doctrinal features of the classical paradigm. On the view of the autonomist supporters of the classical paradigm, the autonomy of the provinces is best protected if judges interpret the constitutional exclusivity of legislative powers in the strong, classical sense: there should be as little overlap of federal and provincial legislative powers as possible. The watertight compartments metaphor is embroidered on the flag of the classical autonomist.¹⁴⁶

The importance of a strong understanding of exclusivity to provincial autonomy is carefully analyzed in the work of scholars such as André Tremblay,¹⁴⁷ Pierre Patenaude¹⁴⁸ and Gil Rémillard.¹⁴⁹ Tremblay recognizes that "le partage des compétences ne pourra ériger de cloisons étanches entre les fonc-

¹⁴⁴J. Brossard, *La cour suprême et la constitution: Le forum constitutionnel au Canada* (Montreal: P.U.M., 1968) at 244.

¹⁴⁵*Ibid.* at 216. See also J. Brossard, "La révolution fédéraliste," *supra*, note 129 at 2; A. Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matières de propriété et de droits civils* (Ottawa: University of Ottawa, 1967). Tremblay noted that the Supreme Court's resuscitation of the national dimensions branch of the p.o.g.g. power was "lourd de danger pour l'autonomie des provinces" (*supra* at 294-5). In addition, he noted that, in the domain of trade and commerce, "les principes posés apparaissent peu respectueux de l'autonomie des provinces... la cloison placée entre le commerce local et le commerce extérieur n'est plus étanche qu'autrefois" (*supra* at 198-99).

¹⁴⁶See, e.g., Bonenfant, *supra*, note 9 at 384:

Jusqu'à ces derniers temps, on regardait comme un principe bien établi du droit constitutionnel canadien la réflexion presque poétique faite par Lord Atkin à la fin de la décision du Comité judiciaire du Conseil privé dans *L'Affaire des Conventions du Travail*, à savoir que... "bien que le navire de l'État (canadien) vogue maintenant vers des horizons plus vastes et sur des mers étrangères, il conserve encore des compartiments étanches, parties essentielles de sa structure première."

¹⁴⁷A. Tremblay, *Précis de droit constitutionnel* (Montreal: Thémis, 1982).

¹⁴⁸Patenaude, *supra*, note 9; P. Patenaude, "The Right to Flourish According to One's Own Culture" in Special Lectures of the Law Society of Upper Canada, *The Constitution and the Future of Canada* (Toronto: De Boo, 1978) 37.

¹⁴⁹G. Rémillard, "Des différentes espèces de compétences législatives et de leurs grands principes d'interprétation" (1976) 36 R. du B. 672; G. Rémillard, "Souveraineté et fédéralisme" (1979) 20 C. de D. 237; G. Rémillard, *Le fédéralisme canadien*, 2d ed., vol. 1 (Montreal: Québec Amérique, 1983).

tions attribuées aux deux paliers de gouvernement.”¹⁵⁰ While a pure watertight compartments approach may be impossible in practice, he argues that it should be strived for as much as possible.¹⁵¹ In his analysis, there are two problems with the judicial creation of areas of overlapping or concurrent jurisdiction: it compromises the federal principle by threatening provincial autonomy,¹⁵² and it compromises the democratic principle by rendering accountability more difficult as a result of blurred legislative responsibilities.¹⁵³

For Patenaude, any departure from the watertight compartments approach to exclusivity is a menace to the autonomy of Quebec.¹⁵⁴ He criticizes the erosion of the prohibition on inter-delegation of legislative power articulated by the Supreme Court in 1949 in *Nova Scotia Inter-delegation*; cases like *Coughlin* and *Scott* now make it possible for the principle of exclusivity to be compromised by the transfer of powers from the provinces to the federal government or vice versa.¹⁵⁵ And he deplores the liberal application of the ancillary powers doctrine and the double aspect doctrine, which create areas of overlapping jurisdiction in which the federal government is supreme by virtue of federal paramountcy:

Tout affaiblissement de la règle de l'exclusivité signifie la possibilité pour le Parlement fédéral, où les francophones sont minoritaires, de légiférer, avec prééminence, dans des domaines que les constituants avaient confiés de façon exclusive au Parlement des Québécois ... Les Québécois ne peuvent accepter que des domaines de compétence sur lesquels ils ont un contrôle exclusif puissent, sous couvert de la théorie de l'aspect, passer dans le champ où s'applique prioritairement la compétence fédérale.

L'affaiblissement de la règle de l'exclusivité conduit en effet à la création de domaines de compétence concurrente, ce qui est tout à l'avantage du pouvoir fédéral puisqu'il bénéficie de la règle de prépondérance.¹⁵⁶

Until new constitutional arrangements are made that better secure the autonomy of Quebec, Patenaude concludes, the Supreme Court should “respecter scrupuleusement la règle de l'exclusivité.”¹⁵⁷

¹⁵⁰*Supra*, note 147 at 94.

¹⁵¹*Ibid.* at 191 (“Ici comme ailleurs une répartition plus claire des responsabilités entre Ottawa et les provinces ne saurait être que bénéfique.”).

¹⁵²“Il est donc essentiel que ce partage des pouvoirs existe pour qu'un tel état soit dit fédéral. Il faut aussi que l'aménagement des compétences soit clairement établi... il faut la délimiter [la compétence] avec soin. Le fédéralisme véritable est incompatible avec l'attribution à un palier de gouvernement d'un pouvoir de décision qui, par exemple, détruirait progressivement l'autonomie des collectivités fédérées... Sans ce partage, il n'y aurait pas de véritable fédération et le régime politique ressemblerait à celui de l'état unitaire.” *Ibid.* at 92-93.

¹⁵³“Il est en effet indispensable que les responsabilités soient bien partagées de façon à ce que le citoyen puisse savoir à qui s'adresser et aussi à qui demander des comptes.” *Ibid.* at 92, n. 196.

¹⁵⁴*Supra*, note 9.

¹⁵⁵*Ibid.* at 231.

¹⁵⁶*Ibid.* at 234.

¹⁵⁷*Ibid.* at 235.

Rémillard places similar emphasis on the principle of exclusivity, which he defines as “l’attribution d’un monopole législatif qui ne doit souffrir aucune limitation.”¹⁵⁸ Like Patenaude, he notes that the rule prohibiting legislative inter-delegation of powers is related to this strict understanding of exclusivity.¹⁵⁹ Like Tremblay, he recognizes that some overlap of provincial and federal powers cannot be avoided. Within those areas of overlap, the federal and provincial governments are not equal and autonomous. Rather, the paramountcy rule reflects a hierarchical conception of powers — the provinces are subordinate to the superior (paramount) authority of the federal government.¹⁶⁰ For this reason, he argues that doctrines that give rise to areas of overlapping powers — such as the double aspect doctrine and the ancillary powers doctrine — ought to be applied with great caution.¹⁶¹ In the end, he suggests that the cause of provincial autonomy is furthered by promoting as much as possible the “étanchéité” of the division of powers:

Le moins que l’on puisse dire, c’est que cette “étanchéité” est maintenant fortement menacée. Rares, en effet, sont les compétences législatives accordées exclusivement aux provinces de par le texte de l’Acte de 1867, qui ne font pas, d’une façon directe ou indirecte, l’objet d’une législation fédérale. De fait, notre fédéralisme est de plus en plus basé sur des compétences devenues mixtes de par l’interprétation judiciaire, ce qui n’est pas sans mettre en danger le respect du principe de l’autonomie des États fédérés, qui est à la base de tout État vraiment fédératif.¹⁶²

Perhaps the clearest articulation of a similar classical autonomist view was put forward by Professor Jean Beetz (as he then was) in 1965,¹⁶³ many years before he was able to give those views judicial expression in the *Bell 1988* case. In line with the views later expressed by Rémillard and Patenaude, Beetz believed that any extension of concurrent areas of jurisdiction posed a threat to provincial autonomy: “Il suffirait ... d’étendre le champ de la compétence com-

¹⁵⁸*Le fédéralisme canadien*, *supra*, note 149 at 282.

¹⁵⁹*Ibid.* at 283.

¹⁶⁰“Souveraineté et fédéralisme,” *supra*, note 149 at 245. For these reasons, Rémillard argues that the provincial governments cannot properly be described as sovereign; they are, rather, autonomous, in the sense that they have “la liberté d’agir dans un cadre donné et sous une autorité supérieure” (*supra* at 244).

¹⁶¹On the double aspect doctrine: “Il va sans dire qu’une telle théorie peut mettre en cause sérieusement la souveraineté des provinces. Rares sont les domaines de législation qui sous certains aspects ne présentent pas d’éléments pouvant découler des compétences fédérales” (*ibid.* at 242). On the ancillary powers doctrine: “Le pouvoir implicite a donc des conséquences des plus importantes puisqu’il permet pratiquement de bouleverser le partage des compétences législatives originellement prévu dans la constitution fédérale. Les tribunaux doivent donc se montrer particulièrement prudents dans son application” (*Le fédéralisme canadien*, *supra*, note 149 at 295).

¹⁶²*Ibid.* at 307.

¹⁶³J. Beetz, “Les attitudes changeantes du Québec à l’endroit de la Constitution de 1867” in Crépeau & Macpherson, eds, *supra*, note 43, 113. For an overview of Beetz’s classical approach to federalism as a scholar and judge, see Swinton, *supra*, note 38 at 259-291.

mune pour augmenter du même coup la suprématie fédérale.”¹⁶⁴ Beetz expressed concern regarding the extension of concurrency in terms that echo his judgment in *Bell 1988*:

le juriste québécois sera porté à s'inquiéter de la tendance ... vers une extension des compétences communes: il lui semble que l'adoption de deux lois, l'une fédérale, l'autre provinciale, toutes deux destinées à régir la même activité matérielle, toutes deux adoptées dans le même but et sous le même aspect, est clairement exclue par la constitution sauf en matière d'agriculture, d'immigration, et de pension de vieillesse; mais surtout, cette tendance a pour effet d'étendre la zone de suprématie des lois fédérales; elle est nettement centralisatrice.¹⁶⁵

It follows from this view that provincial autonomy is best preserved by seeking to eliminate any areas of overlap between federal and provincial powers; as Beetz put it, the goal is to reduce “zones of contact” between the two levels of government:

La protection de l'identité québécoise est d'abord d'une nature juridique plutôt que politique ... L'objet consiste à réduire les zones de contact entre une majorité trop forte et une minorité trop faible, dans les domaines considérés comme d'importance vitale, parce que l'on semble croire, à cette époque, qu'un tel contact avec l'autre en ces domaines risquerait de détruire l'identité collective de la minorité.¹⁶⁶

In this way, by confining federal and provincial legislative powers to discrete, watertight compartments of jurisdiction, Quebec would inhabit a “constitutional reserve” — a guaranteed political space free from federal interference in which the cultural survival of the Québécois people could be assured:

De la même façon que la collectivité québécoise est concentrée sur un territoire, de même, certains champs de l'activité politique lui sont-ils « réservés »; en d'autres termes, elle est, pour ces domaines, considérée comme devant vivre dans une « réserve » constitutionnelle.¹⁶⁷

The classical paradigm has thus been clearly and passionately defended by autonomists such as Rémillard, Patenaude, and by Beetz in both his professorial and judicial capacities. The common theme running through their writings described above is that the classical approach to exclusivity is necessary to ameliorate the impact of the hierarchical conception of federalism embodied in the judicially created rule of federal paramountcy.¹⁶⁸ If overlapping powers give rise

¹⁶⁴*Ibid.* at 132.

¹⁶⁵*Ibid.* at 121.

¹⁶⁶*Ibid.* at 123.

¹⁶⁷*Ibid.*

¹⁶⁸The same concern can be found in the anglophone scholarship (see, e.g., the authors cited in note 127, *supra*), but with a different emphasis: it is mentioned not as a rationale for adhering scrupulously to the classical paradigm, but as a reason for exercising caution regarding the application of the modern paradigm.

to spheres of hierarchical relations, then an authentic federalism of equals requires that overlapping powers be eliminated.

While this view is compellingly straightforward, strict adherence to a classical conception of exclusivity does not appear to provide the optimal juridical strategy for promoting the autonomy of Quebec and the provinces. I will analyze two aspects of the classical paradigm that fail to promote provincial autonomy. First, the judicially created rule prohibiting the inter-delegation of powers unnecessarily limits the legislative options available to provincial governments. Secondly, the confinement of provincial heads of power to watertight compartments in order to avoid creating overlapping spheres of competence has the same effect.

The classical understanding of exclusivity is usually associated with the rule prohibiting the inter-delegation of legislative powers. The principle of exclusivity was relied on by the Supreme Court of Canada in the *Nova Scotia Inter-delegation* case as one of the reasons why the constitution should not be interpreted so as to permit legislative inter-delegation. Rinfret C.J. reasoned as follows:

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other.¹⁶⁹

The judges concluded that in the absence of an express power of inter-delegation in the constitution, the two levels of government should not be allowed to agree to rearrange the mutually exclusive spheres of legislative authority allotted by the division of powers.

The authority of the *Nova Scotia Inter-delegation* case has been gradually eroded over time, to the point that its continuing doctrinal significance is uncertain and its theoretical underpinnings must be re-evaluated. Subsequent decisions allowed legislatures to circumvent the rigidity of the prohibition on legislative inter-delegation by sanctioning the use of devices such as administrative inter-delegation and anticipatory incorporation by reference.¹⁷⁰ Based on these cases, commentators were able to conclude that

The only vestige of a prohibition against inter-delegation which could now be argued to remain would be the rule that one legislative body cannot enlarge the powers of another by authorizing the latter to enact laws which would have no significance and no validity independent of the delegation.¹⁷¹

¹⁶⁹*Supra*, note 49 at 34-35.

¹⁷⁰*Supra*, notes 58-59.

¹⁷¹Hogg, *supra*, note 3 at 307. For similar assessments of the case law, see Patenaude, *supra*, note 9 at 230-31; Weiler, *supra*, note 92 at 316-18; E.A. Driedger, "The Interaction of Federal and

Even this conclusion has been placed in doubt by the recent Supreme Court decision in *Dick* in which the court stated that there was no constitutional impediment to the incorporation by reference in the federal *Indian Act*¹⁷² of provincial legislation that could not otherwise validly apply to "Indians."¹⁷³ On the court's interpretation of s. 88 of the *Indian Act*, the federal government was not simply recognizing and adopting the exercise of provincial legislation that was independently valid in all respects; rather it was conferring a power on provincial legislatures that they otherwise lacked: the power to pass legislation touching the "core of Indianness."¹⁷⁴ Previous cases had permitted such a delegation of power only if it occurred through an administrative intermediary;¹⁷⁵ no previous case had permitted the delegation of legislative power directly to the legislative branch of the other level of government.¹⁷⁶ Arguably, the *Dick* case goes further than any previous case in undermining the *Nova Scotia Inter-delegation* holding.¹⁷⁷

However, the *Nova Scotia Inter-delegation* case has not been overruled. The Supreme Court continues to pay lip service to the decision while it chips away at its doctrinal and practical relevance. In the face of this contradictory doctrinal situation, legislatures are more likely to respond by resorting to the established methods of evading the decision than to employ a scheme of legislative inter-delegation that would directly challenge the continuing constitutional validity of the *Nova Scotia Inter-delegation* decision. This raises the question: are there any good reasons for not explicitly overruling the *Nova Sco-*

Provincial Laws" (1976) 54 Can. Bar Rev. 695 at 709; K.M. Lysyk, "The Inter-Delegation Doctrine: A Constitutional Paper Tiger?" (1969) 47 Can. Bar Rev. 271; W.R. Lederman, "Some Forms and Limitations of Cooperative Federalism" (1967) 45 Can. Bar Rev. 409; G.V. La Forest, "Delegation of Legislative Power in Canada" (1975) 21 McGill L.J. 131.

¹⁷²R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

¹⁷³*Supra*, note 59 at 328, and see discussion below at 370-76.

¹⁷⁴Were it not for this interpretation of s. 88, provincial laws that touch on matters at the heart of native identity would not apply to native people because they would be read down pursuant to the interjurisdictional immunity doctrine.

¹⁷⁵*Coughlin*, *supra*, note 58; *Willis*, *supra*, note 58; *Reference re Agricultural Products Marketing Act*, *supra*, note 58.

¹⁷⁶Hogg argues that the decision in *Lord's Day Alliance of Canada v. A.-G. B.C.*, *supra*, note 59 did in fact sanction federal legislation that had the effect of enlarging the powers of the provincial legislatures; see *supra*, note 3 at 305-307.

¹⁷⁷It could be argued against this interpretation of *Dick* that provincial laws of general application that affect the "core of Indianness" do have independent validity apart from the federal delegation — they can validly apply to non-native provincial residents. The interpretation of s. 88 in *Dick* simply leads to the incorporation of valid provincial laws and uses them for federal purposes, namely the regulation of First Nations peoples' lives pursuant to s. 91(24). Even on this view, the extension of federal inter-delegation in *Dick* is overly casual given the differences between s. 88 and the earlier cases, and more importantly, given the distinct constitutional considerations that ought to guide the interpretation of federal jurisdiction pursuant to s. 91(24). See below at text accompanying notes 287-89.

tia Inter-delegation ruling and allowing the open inter-delegation of legislative powers?

There appear to be two main contentions advanced against permitting legislative inter-delegation. The first is the argument emphasized by the Supreme Court in the *Nova Scotia Inter-delegation* case itself: the various legislative bodies should not be allowed to alter the mutually exclusive spheres of jurisdiction determined by the constitutional division of powers. On this view, legislative inter-delegation is an improper substitute for the constitutional amendment procedures in Part V of the *Constitution Act, 1982*:

handing over a plenary and primary legislative discretion in this manner, even on a bilateral basis subject to revocation, is not really delegation at all, it is amendment of the federal constitution, however partial or temporary such amendment may be.¹⁷⁸

As Hogg has pointed out, the analogy to constitutional amendment is flawed:

A delegation of power does not divest the delegator of its power; nor does it confer a permanent power on the delegate. The delegator has the continuing power to legislate on the same topic concurrently if it chooses, and more important, it can withdraw the delegation at any time.¹⁷⁹

In order to preserve the integrity of the constitutional division of responsibility, it is necessary that inter-delegation be allowed only upon mutual consent of the legislatures involved, and only if the delegation is revocable by either party. If consent were not required, there would be no guarantee of debate and accountability at both levels to the transfer or exchange of power. Similarly, revocability is necessary to ensure ongoing consent and accountability. If these conditions are satisfied, the delegating legislative body would retain ultimate responsibility for and control over the exercise of the delegated powers (which would not, of course, be the case if the powers were transferred by legislative amendment).¹⁸⁰ If, for example, the federal government agreed with the Quebec

¹⁷⁸Lederman, *supra*, note 171 at 421.

¹⁷⁹Hogg, *supra*, note 3 at 297.

¹⁸⁰On several instances in which proposals have been considered to amend the constitution to explicitly permit legislative inter-delegation, the importance of mutual consent and revocability have been recognized. For example, the Fulton-Favreau proposals of 1964 would have allowed for legislative inter-delegation upon mutual consent of the legislatures involved, and the delegation could be revoked at any time by the delegating body. For a discussion, see Lederman, *supra*, note 171 at 425-26. Similarly, the P  pin-Robarts Report of 1979 recommended that "[a] new constitution should recognize the right of the central and provincial governments to delegate to each other, by mutual consent, any legislative power..." (emphasis added). Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services, 1979) at 131. While these proposals would have overcome the *Nova Scotia Inter-delegation* decision by constitutional amendment, the same result could be achieved by the development of similar judicial doctrines if the *Nova Scotia Inter-delegation* case is overruled.

government to delegate powers over broadcasting to Quebec, the merits of the initial delegation would be debated in Parliament as well as the National Assembly. And the ongoing desirability of the delegation of such powers could be continually challenged by the citizens of Canada and Quebec and their respective parliamentary and legislative representatives.

As long as the condition of continuing mutual consent is met, legislative inter-delegation does not change the division of powers, nor does it represent the abdication of constitutional responsibility by the delegating level of government over a subject matter within its exclusive jurisdiction; it is merely one way in which a legislative power may be exercised by the delegating government.¹⁸¹ On this view, exclusivity is not compromised because the receiving legislature is simply acting as the agent of the delegating legislature. If the delegating legislature decides that the delegate is not serving the needs of the public adequately in the delegated area of jurisdiction, it can revoke the delegation. Indeed, in the absence of an explicit prohibition on legislative inter-delegation in the constitution, there would appear to be no warrant for qualifying the democratic principle of exhaustiveness — all possible exercises of legislative power must be within the authority of one level of government or the other:

The legal powers of the British Parliament being absolutely unlimited and the Dominion and provincial powers, when acting in concert, being equal to the powers of the British Parliament, how is it possible ... that the power or delegation *inter se* does not exist in these bodies? The issue then is simply this: granted that absolute sovereignty exists in Canadian legislatures, is there anything which can override the natural attribute of this sovereignty to delegate in any way?¹⁸²

A second argument against inter-delegation is that it blurs jurisdictional responsibilities and thus renders political accountability more difficult. The same criticism has been made of the use of the federal spending power in areas of exclusive provincial jurisdiction. As Trudeau put it:

A fundamental condition of representative democracy is a clear allocation of responsibilities: a citizen who disapproves of a policy, a law, a municipal by-law, or an educational system must know precisely whose work it is so that he can hold someone responsible for it at the next election ... Since the same citizens vote in both federal and provincial elections, they must be able to determine readily which government is responsible for what; otherwise the democratic control of power becomes impossible.¹⁸³

¹⁸¹J.B. Ballem, "Constitutional Law — Delegation — Approach of the Supreme Court of Canada to the B.N.A. Act" (1959) 29 Can. Bar. Rev. 79 at 85.

¹⁸²*Ibid.* See also Hogg, *supra*, note 3 at 297.

¹⁸³P.E. Trudeau, "Federal Grants to Universities" in *Federalism and the French Canadians* (Toronto: MacMillan, 1968) at 79. A similar point is made by Tremblay, *supra*, note 147 at 92 n. 196, and by Lederman, *supra*, note 171 at 426 (delegation "could seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions.").

This is an argument against all forms of inter-delegation and, indeed, against anything other than a watertight compartments division of powers. The effect of inter-delegation is to create an area of temporary, concurrent responsibility. Whenever jurisdiction over a subject matter is concurrent, it will be more difficult for citizens to discern which level of government is responsible for any particular policy. To the extent that some overlapping of powers is unavoidable in a federal state, the political accountability argument is an argument against federalism itself.

Like Trudeau, Petter argues that blurring of jurisdictional responsibilities threatens the political accountability that forms the basis of responsible government. Petter adds a further objection — the interspersion of political responsibility has the effect of fragmenting democratic energies: “[t]he result is to require those advocating a particular reform to fight a battle on two fronts.”¹⁸⁴

However, delegation, and more generally the creation of areas of overlapping responsibility, has both advantages and disadvantages from a democratic point of view. One can question the severity of the problems identified by Trudeau and Petter: there is little empirical evidence to suggest that citizens are confused or politically disempowered, for example, by the existence of concurrent federal and provincial powers over agriculture, immigration and pensions, nor that such effects occur in areas of judicially-created concurrency, such as the regulation of highway traffic. While concurrency does blur bright lines of accountability, it also creates the possibility of a heightened, dual accountability. The dissatisfied citizen may know very well that she or he can turn to either level of government to seek reform. While it is true that intermingling of responsibilities blurs accountability and heightens opportunities for government buck-passing, it also furthers desirable intergovernmental competition and creates “multiple access points” for citizens seeking reform. Democratic criteria, in other words, cut both ways in evaluating the desirability of delegation or concurrency. In Simeon’s words:

Democratic criteria can evaluate very differently the advantages and disadvantages of overlapping responsibilities — either frustrating citizens by their complexity, or advantaging them by offering multiple access points.¹⁸⁵

In sum, the arguments in support of the position that inter-delegation violates federal and democratic principles are not persuasive. Rather, the rule prohibiting legislative inter-delegation is an unwarranted interference with “such basic constitutional principles as the ... doctrine of plenary and ample power and

¹⁸⁴A. Petter, “Meech Ado About Nothing? Federalism, Democracy and the Spending Power” in K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 187 at 192. See also A. Petter, “The Myth of the Federal Spending Power” (1989) 68 Can. Bar Rev. 448.

¹⁸⁵Simeon, *supra*, note 38 at 152.

its associated doctrine that the totality of legislative power is distributed to Canadian legislative bodies.”¹⁸⁶ Although inter-delegation of powers is not permitted on a classical understanding of exclusivity, it would enhance provincial autonomy by significantly enlarging the potential political space available to the provinces. So long as ongoing mutual consent is a precondition to any valid delegation of power, constitutional flexibility can be obtained with no loss of constitutional responsibility.

The second aspect of the classical paradigm that fails to promote provincial autonomy is the insistence on confining provincial and federal powers alike to discrete boxes of jurisdiction in order to avoid areas of concurrency. As the classical autonomists are right to emphasize, areas of overlapping powers create political spaces in which the provinces are subordinate to the federal government. Nevertheless, from the point of view of provincial autonomy, the occupation of a subordinate space is better than no occupation whatsoever. To the extent that the classical paradigm confines provincial powers *as well as* federal powers to strictly defined watertight compartments of jurisdiction, provincial autonomy is compromised. Clearly there is real danger in allowing the imperial tendencies of federal jurisdiction to spread *over* provincial areas of jurisdiction. Rémillard’s emphasis on the hierarchy entailed in overlap is a useful image here: the expansion of supreme federal jurisdiction over top of provincial spheres of jurisdiction would suffocate provincial autonomy. There is no such danger involved in allowing provincial areas of jurisdiction to extend *under* federal areas of jurisdiction. From the point of view of provincial autonomy, overlap (or, perhaps more accurately, “underlap”) in such contexts is far preferable to no provincial role at all.

Jacques-Yvan Morin captured the heart of the matter when, in discussing the relationship of the range of the penumbral “zones grises” at the edges of federal and provincial spheres of jurisdiction to provincial autonomy, he stated “Il reste en effet à savoir si la pénombre s’étendra sur les compétences provinciales ou sur les pouvoirs fédéraux.”¹⁸⁷

Only the former type of overlap — the extension of the penumbra of federal jurisdiction over areas reserved to the provinces — is a threat to provincial autonomy. Thus, according weight to the value of provincial autonomy in the interpretation of the division of powers suggests that the doctrinal features of the classical paradigm should be invoked in defining the scope of federal jurisdiction and those of the modern paradigm in defining the scope of provincial jurisdiction.¹⁸⁸

¹⁸⁶Hogg, *supra*, note 3 at 297.

¹⁸⁷J.-Y. Morin, “Vers un nouvel équilibre constitutionnel au Canada” in Crépeau & Macpherson, eds, *supra*, note 43, 141 at 144.

¹⁸⁸The generality of these propositions will be altered in Part IV to take into account the equally valid constitutional claim to autonomy of First Nations people.

On this analysis, the doctrinal structure of Canadian federalism has only imperfectly promoted provincial autonomy. A good example is the manner in which the interjurisdictional immunity doctrine has been applied by the courts. The vast majority of the cases define core areas of *federal* jurisdiction that are immune from the application of otherwise valid provincial laws. This doctrinal approach originated with the federally incorporated company cases, and has since been applied to federal undertakings (such as Bell Canada), the postal service, the armed forces, the R.C.M.P., federal elections and "Indians and lands reserved for the Indians."¹⁸⁹ As I will argue in the next section, the application of the interjurisdictional immunity doctrine to legislation affecting First Nations people is justifiable, as their distinct constitutional status gives rise to a special claim to autonomy. Otherwise, there is no justification for invoking interjurisdictional immunity to read down provincial statutes in the name of protecting an exclusive core of federal jurisdiction. The exclusivity of federal jurisdiction is adequately protected by the modern paradigm: if provincial statutes have spillover effects on a federal area of jurisdiction, the federal government has the constitutional powers to protect itself. It has the exclusive ability to pass laws that in pith and substance deal with a federal subject matter, and the rule of federal paramountcy will ensure that a federal law will prevail over any inconsistent provincial law.¹⁹⁰

Where the pith and substance of a provincial law is a subject matter allocated to exclusive provincial competence, reading down the law to protect federal areas of jurisdiction unnecessarily restricts the scope of provincial powers and thus of provincial autonomy. For this reason, the *Bell 1966* case was heavily criticized in Quebec.¹⁹¹ Rather than applying the doctrinal features of the clas-

¹⁸⁹See *supra*, note 114. Useful summaries of these cases can be found in Elliott, *supra*, note 45 at 523, n. 1; Finkelstein, *supra*, note 127 at 525-31. The application of the interjurisdictional immunity doctrine was recently extended to a new subject matter, that of federally established transportation services operating within a province on federal lands: *Commission de transport de la communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838, 74 D.L.R. (4th) 23.

¹⁹⁰Hogg, *supra*, note 3 at 329-32.

¹⁹¹G. L'Écuyer, *La cour suprême du Canada et le partage des compétences 1949-1978* (Québec: Ministère des Affaires intergouvernementales, 1978) at 239 (after criticizing the court's conclusion in *Bell 1966* that the Quebec minimum wage law could not apply to a federal undertaking even in the absence of a federal law, he commented that "[o]n peut s'interroger sur le nombre de réglementations provinciales qui seront rendues ainsi rendues inapplicables aux entreprises de juridiction fédérale."); J.-C. Bonenfant, "La cour suprême et le partage des compétences" (1976) 14 *Alta. L. Rev.* 21 at 28 (*Bell 1966* "favorisa la thèse fédérale, elle fut vertement critiquée dans le Québec."); R. Chaput, "La cour suprême et le partage des pouvoirs: Retrospectives et inventaires" (1981) 12 *R.G.D.* 35 at 69-70 ("Les autonomistes ... regretteront que la Cour suprême ait utilisé la fissure causée par Sir Lyman Duff dans le renvoi de 1925 sur la législation concernant les heures de travail pour opérer graduellement une brèche importante dans la juridiction des provinces en matière de Travail ..."). See also P. Blache, "La doctrine du champ inoccupé se porte-t-elle mal?" (1967) 2 *R.J.T.* 39.

sical paradigm to provincial statutes, provincial autonomy is best promoted by giving a liberal application to the pith and substance doctrine when considering provincial statutes and by taking a restrained approach to paramountcy.

The importance of applying these elements of the modern paradigm to provincial statutes is well illustrated in recent Supreme Court decisions dealing with jurisdiction over broadcasting. The importance to Quebec of some ability to shape communications policy is described by Rémillard:

Il est donc capital pour le Québec d'avoir les compétences nécessaires pour établir sur son territoire la politique des communications qui lui convient, en fonction de son identité et de ses responsabilités culturelles.¹⁹²

As the Privy Council and the Supreme Court have held that the regulation of radio and television broadcasting falls within federal jurisdiction,¹⁹³ a strict application of the classical paradigm would leave very limited scope for the application of provincial legislation dealing in pith and substance with matters within provincial jurisdiction — such as education, or the use of the french language at workplaces within the province — to federal broadcast undertakings.

In *A.G. Quebec v. Kellogg's of Canada*¹⁹⁴ and *Irwin Toy Ltd. v. A.G. Quebec*,¹⁹⁵ the Supreme Court upheld Quebec laws regulating advertising directed at children. In both cases, advertisers argued that the Quebec government lacked the power to regulate television advertising. In *Kellogg's*, Martland J. for the majority of the court held that the pith and substance of the law was the regulation of business activity in the province and its effect on a television broadcast undertaking was a merely incidental one. Laskin J., in dissent, took the classical approach, holding that the provincial law could not validly apply to a broadcast undertaking within exclusive federal jurisdiction.

The reasoning of Martland J. for the majority in *Kellogg's* was affirmed by the court in *Irwin Toy*: the legislation prohibiting advertising directed at children simply had an incidental affect on television undertakings. On the other hand, if a provincial law touched on "essential and vital elements" of a federal undertaking, or if it had the effect of impairing the operation of a federal undertaking, it could not constitutionally apply. In this way, the court also affirmed the inter-jurisdictional immunity doctrine applied in *Bell 1988* and other cases. While the results in *Kellogg's* and *Irwin Toy* were desirable, the continued affirmation of the interjurisdictional immunity doctrine is an unfortunate limitation on provincial autonomy. A preferable approach would be to allow a provincial law to

¹⁹²Rémillard, *Le fédéralisme canadien*, *supra*, note 149 at 474.

¹⁹³*Re Regulation & Control of Radio Communication (Radio Reference)*, [1932] A.C. 304, 2 D.L.R. 81 (P.C.); *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178.

¹⁹⁴[1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314 [hereinafter *Kellogg's* cited to S.C.R.].

¹⁹⁵[1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

apply to federal undertakings, whether or not the law touches upon essential or vital elements of the undertaking, so long as the law is in pith and substance within a provincial head of jurisdiction, and the effects on federal jurisdiction are merely incidental. If the federal government does not agree with the provincial policy as applied to a federal undertaking, it can pass its own legislation to render inoperative the application of the provincial law to the federal undertaking.¹⁹⁶

The positive aspect of the *Kellogg's* and *Irwin Toy* decisions is their liberal application of the pith and substance doctrines to allow provincial jurisdiction to extend "under" federal jurisdiction over broadcasting. In so doing, they expand the scope of provincial autonomy without compromising ultimate federal control of broadcasting policy. In order for this extension of provincial jurisdiction to be meaningful, the court must also take a restrained approach to paramountcy. Otherwise, the "underlapping" provincial legislation will be rendered inoperative by any federal broadcasting legislation that covers the field.

An argument was made to the court in *Irwin Toy* that by inserting conditions relating to children's advertising in a broadcaster's licence, the federal government had occupied the field and rendered inoperative any provincial law purporting to regulate the same subject matter. This argument was rejected on the grounds that there was no "practical and functional incompatibility" between the provisions of the federal licence and the Quebec regulatory scheme. In the words of the majority judges:

Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it, no conflict between the standards ever arises. It is only if advertisers seek to comply with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is no occasion to invoke the doctrine of paramountcy.¹⁹⁷

The importance to provincial autonomy of such a limited role for the doctrine of paramountcy cannot be overemphasized. As Rémillard explains:

le fédéralisme canadien est basé en très grande partie sur un partage de compétences concurrentes, d'où l'immense importance du principe de la prépondérance fédérale ... dont l'application s'étend aussi à toute compétence concurrente.¹⁹⁸

Since the modern approach allows "underlapping" provincial legislation to operate by giving a very narrow scope to the paramountcy doctrine, "il faut dire que c'est très heureux pour le respect du principe fédératif."¹⁹⁹ Commenting on

¹⁹⁶Hogg, *supra*, note 3 at 328-32.

¹⁹⁷*Supra*, note 195 at 964.

¹⁹⁸Rémillard, *Le fédéralisme canadien*, *supra*, note 149 at 300.

¹⁹⁹*Ibid.* at 303.

the Supreme Court's clear articulation of the modern approach to paramourty in *Multiple Access*, Rémillard states:

Il s'agit certainement là d'un des jugements les plus provincialistes de la Cour suprême canadienne. En réduisant aussi la portée de la notion de conflit on peut penser qu'il est encore possible pour les provinces de conserver leur autonomie malgré la multiplication des compétences concurrentes.²⁰⁰

Any departure from the modern, express conflict approach to paramourty is thus a blow to the federal principle. In this sense, the recent Supreme Court decision in *Bank of Montreal v. Hall*²⁰¹ is cause for concern. The issue in the case was whether the procedural requirements imposed by the Saskatchewan *Limitation of Civil Rights Act*²⁰² for the seizure of security interests could apply to a security interest created under the federal *Bank Act*.²⁰³ La Forest J. recognized that the regulation of bank security interests was a double aspect matter — both the federal and provincial laws could validly apply to the facts at hand:

there can be no hermetic division between banking as a generic activity and the domain covered by property and civil rights. A spillover effect in the operation of banking legislation on the general law of the provinces is inevitable.²⁰⁴

However, after upholding the validity of the two overlapping *Acts*, La Forest J. then held that the provincial law was rendered inoperative by virtue of federal paramourty. He reached this result notwithstanding that the challenged provision of the Saskatchewan *Limitation of Civil Rights Act* simply required a creditor to give notice to a debtor prior to the seizing of a security interest. As the Saskatchewan Court of Appeal noted in its decision upholding the application of the provincial *Act*, the effect of applying the provision would be to require “the Bank to follow certain procedures before realizing upon its security, and nothing more.”²⁰⁵ Presumably, it was important to the Saskatchewan legislature that debtors — including farmers like the defendant Hall whose machinery had been seized — be accorded certain rights before having their means of earning a livelihood interfered with.

La Forest J. cited the modern approach to paramourty, namely, that provincial legislation will be rendered inoperative only in the case of express conflict, in the sense that compliance with both statutes is impossible. Nevertheless, La Forest J.'s reasons make clear that his conception of this test entails a “negative implication” approach to paramourty:

²⁰⁰Rémillard, “Des différentes espèces de compétences législatives et de leurs grands principes d'interprétation,” *supra*, note 149 at 688.

²⁰¹[1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361 [hereinafter *Hall* cited to S.C.R.].

²⁰²R.S.S. 1978, c. L-16.

²⁰³R.S.C. 1985, c. B-1.

²⁰⁴*Supra*, note 201 at 145.

²⁰⁵*Bank of Montreal v. Hall* (1987), 54 Sask. R. 30 at 40, 36 D.L.R. (4th) 523, rev'd, *ibid.*, quoted in *supra* at 153.

dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose ... it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the *Bank Act* itself ... the determination that there is no repugnancy cannot be made to rest on the sole consideration that, at the end of the day, the bank might very well be able to realize on its security if it defers to the provisions of the provincial legislation. A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal Acts are in conflict, and, hence, repugnant ... The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal.²⁰⁶

The contrast to cases like *Irwin Toy* and *Multiple Access* could not be more clear. In those cases, the court refused to read a negative implication into federal legislation that the application of valid provincial legislation was to be excluded. If the federal government wants its legislation to be the sole applicable law, it can say so explicitly.²⁰⁷ Even though there was no such declaration in the *Bank Act*, La Forest J. stated that it constitutes

a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.²⁰⁸

In other words, where Parliament has covered the field by enacting a complete code of regulation, valid provincial legislation will be rendered inoperative by the paramouncy doctrine.

The departure from the modern approach to paramouncy (in deed if not in word) in *Hall* is an unfortunate development from the point of view of provincial autonomy. The invocation of the interjurisdictional immunity doctrine to read down provincial statutes in cases like *Bell 1988* is even more troubling. The interjurisdictional immunity doctrine represents, in effect, a more radical conception of paramouncy than the classical "covering the field" approach. The result of applying the interjurisdictional immunity doctrine is the practical equi-

²⁰⁶*Ibid.* at 154-5.

²⁰⁷Even then, there is a strong argument that such a declaration would be of no force and effect. The protection of provincial autonomy requires that the express conflict rule of paramouncy be treated as a constitutional principle beyond the ability of the federal government to unilaterally alter. See Beetz J.'s suggestion to this effect in *Dick*, *supra*, note 59 at 327. Again, the generality of this argument must be qualified regarding s. 91(24) in light of the distinct constitutional status of the First Nations: the federal or the First Nations governments must have the power to specify a broad approach to paramouncy (as the federal government has in s. 88 of the *Indian Act*) in order to afford native people protection from the application of provincial laws.

²⁰⁸*Supra*, note 201 at 155.

valent of an “uncovered field” rule of paramountcy in matters at the core of federal areas of jurisdiction. Even if the federal government has not legislated, the interjurisdictional immunity doctrine requires that provincial legislation be read down so as not to apply in those areas. In this sense, the interjurisdictional immunity doctrine is the polar extreme of the constitutional value embodied in the restrained, express conflict approach to paramountcy. In adopting this approach in *Bell 1988*, Beetz J. stated that criticisms of the interjurisdictional immunity doctrine rested on “a spirit of contradiction between systems of regulation.”²⁰⁹ In contrast, the modern paradigm applied in cases like *Multiple Access* allows for overlapping responsibilities, and rather than seeing in such overlap a “spirit of contradiction,” finds the duplication of laws to be the “ultimate in harmony.”²¹⁰

When it comes to determining the scope of provincial jurisdiction, the modern paradigm is to be preferred to the classical approach embodied in La Forest J.’s judgment in *Hall* and Beetz J.’s judgment in *Bell 1988*. The modern paradigm has the advantage of maximising the legislative space accorded to provincial governments in which, in Pigeon’s words, they can exercise their right of being different by defining their own policies.²¹¹ The classical paradigm does have the advantage of eliminating the administrative complexity and “spirit of contradiction” that comes with overlapping spheres of legislative jurisdiction. When considering the scope of provincial jurisdiction, the modern paradigm has on its side a constitutional value of the highest order: the promotion of provincial autonomy. On the other hand, whether a social problem is better regulated by one law or two is a question that is better left to be worked out by the legislative and executive branches of government. As Hogg has stated,

The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy.²¹²

On the other hand, the classical paradigm has an important role to play in confining the scope of federal jurisdiction in order to preserve provincial autonomy. It is in this context that classical techniques that would limit the degree to which federal legislation overlaps with provincial areas of jurisdiction have a legitimate constitutional role to play. However, there are very few instances in which federal legislation has been read down to protect areas of exclusive provincial jurisdiction.²¹³ This is especially true relative to the plethora of cases

²⁰⁹*Supra*, note 42 at 843.

²¹⁰*Supra*, notes 54-56.

²¹¹*Supra*, notes 139-40.

²¹²*Supra*, note 3 at 364.

²¹³Hogg states that “[a] case could be made for some degree of immunity for provincially-regulated undertakings from federal law, on the ground that the provinces cannot protect their undertakings from federal law...” (*ibid.* at 331). He then notes that “[t]here is no case applying the

invoking interjurisdictional immunity to preserve the exclusivity of federal jurisdiction. The promotion of provincial autonomy requires that this pattern of results be reversed.

As always, the interpretive goal should be to preserve provincial autonomy without compromising federal autonomy or the democratic principle of exhaustiveness. Provincial autonomy is best preserved by reducing as much as possible the scope of overlapping federal legislation. The courts should thus take a restrictive approach to federal legislation that overlaps with provincial areas of jurisdiction; and a liberal approach to provincial legislation that “underlaps” with federal areas of jurisdiction. If the pith and substance of a provincial law is a matter within provincial jurisdiction, it should be upheld even if its provisions have an “incidental” effect on a federal area of jurisdiction, so long as the provisions having an incidental effect are rationally or functionally related to the provincial legislative scheme as a whole. On the other hand, where provisions of valid federal legislation have spillover effects on a provincial area of jurisdiction, they should be upheld only if those incidental effects are “truly necessary” to the effective accomplishment of the valid federal objective.²¹⁴

This analysis challenges the existing case law. For example, Dickson C.J. recently commented that:

doctrine in favour of provincially-incorporated companies, or provincial instrumentalities...” (*supra* at 331, n.112). Elliott argues that it may be an overstatement to say there are no such cases; he cites a number of examples of cases in which federal legislation has been read down to preserve the exclusivity of provincial jurisdiction. *Supra*, note 45 at 542 (citing *Jabour v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, [1981] 2 W.W.R. 159; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, 9 N.R. 417; *Ref. re Validity of Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, 3 D.L.R. 721). See also *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, 17 D.L.R. (4th) 58 [hereinafter *Clark* cited to S.C.R.]. However, in most of these cases, federal statutes have been read down because their spillover effects on provincial areas of jurisdiction have not been found to be “necessarily incidental” to the federal legislative scheme. If interjurisdictional immunity had been explicitly invoked — if the courts had defined core areas of provincial jurisdiction immune from the application of any overlapping valid federal legislation (which they have not) — provincial jurisdiction would be absolutely exclusive even if a federal intrusion was necessarily incidental to the federal legislative scheme.

²¹⁴This analysis is similar to that of Dickson C.J. in *General Motors*, *supra*, note 37 at 670-71, in that he too recognizes a series of appropriate tests for determining the validity of provisions having an incidental effect on the other government’s jurisdiction, ranging from the less demanding “rational and functional connection” test, to the more severe “truly necessary” test. On Dickson C.J.’s analysis, the more restrictive tests will be appropriate the more serious the encroachment on provincial or federal power.

The difference in my analysis is that I am suggesting that encroachments on provincial power by the federal government are always more severe, and that encroachments on federal power by provincial governments are not nearly so serious from the point of view of the federal principle. Thus, unlike Dickson C.J., I am suggesting that the most severe test be consistently applied to encroaching federal legislation, and that the most tolerant test be consistently applied to encroaching provincial legislation.

it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate.²¹⁵

In making this comment, Dickson C.J. made no distinction between federal and provincial laws. Rather, he made it clear that he believed there should be symmetry in the application of constitutional principles of interpretation to federal and provincial laws:

Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power.²¹⁶

While Dickson C.J.'s "restrained" approach to "underlapping" provincial legislation is laudable, it should not be applied to overlapping federal legislation. The promotion of provincial autonomy requires that an asymmetrical approach be adopted, one that is not tolerant of federal incursions on provincial spheres of power. Such asymmetry may at first blush strike a discordant note with the conventional wisdom. It is however a principled counterbalance to the threat to an authentic federalism posed by the hierarchical relations created by federal paramountcy in areas of concurrent jurisdiction. A symmetrical approach ignores the fact that the federal paramountcy rule places the provincial and federal governments in very different positions in terms of their ability to preserve their respective autonomies.

At the same time, valid federal powers are rendered nugatory if overlap is prohibited even when such overlap is necessary to the effective exercise of federal powers. For this reason, the goal of eliminating all federal overlapping legislation in the name of provincial autonomy must give way to a limited extent to accommodate the democratic principle of exhaustiveness. Federal legislation should be read down so as not to interfere with provincial jurisdiction unless the overlapping federal provisions are *necessarily* incidental to the federal scheme.²¹⁷ A good recent example of federal legislation being read down in this

²¹⁵*Ibid.* at 669.

²¹⁶*Ibid.* at 670. Dickson C.J. quoted the following passage from Professor Hogg's textbook (*supra*, note 3 at 336): "I think it is plain both on principle and on authority that the provincial enumerated powers have exactly the same capacity as the federal enumerated powers to 'affect' matters allocated to the other level of government."

²¹⁷Rémillard recognizes the importance of confining the scope of the "ancillary powers" doctrine to necessarily incidental provisions: "Le pouvoir implicite a donc des conséquences importantes sur le partage des compétences législatives lorsqu'il est relié au pouvoir prépondérant du Parlement canadien." *Le fédéralisme canadien*, *supra*, note 149 at 297. For this reason, any overlap must be "nécessairement complémentaire d'une compétence exclusive." *Ibid.* at 297-98. Again, the only difference between Rémillard's analysis and my own is that I am suggesting that this restrictive approach be applied only to federal legislation.

way is the Supreme Court decision in *Clark*. The issue in the case was whether the more restrictive limitations period in the federal *Railway Act*²¹⁸ or the limitations period in the New Brunswick *Limitations of Actions Act*²¹⁹ should apply to the bringing of a negligence action by a child seriously injured in a railway accident. The court held that a limitation period relating to an action for personal injury caused by a railway is not an integral part of federal jurisdiction,²²⁰ and as a result, the federal provision had to be read down so that it did not apply to a common law negligence action.²²¹ In this way, the federal government was prevented from interfering with exclusive provincial jurisdiction over civil procedure and rights of action for damages for personal injury. On my analysis, this result should follow in any case where it cannot be said that an interference with provincial jurisdiction is *necessarily* incidental to valid federal legislation.

In a related manner, the principle of exhaustiveness is compromised if subject matters that are beyond the competence of the provinces to deal with effectively are also denied to federal jurisdiction. The effect of such a line of reasoning is to create a jurisdictional vacuum. Indeed, the Privy Council decisions in the Haldane era, by refusing to give any scope to the national dimensions branch of the federal p.o.g.g. power or to the federal power to pass laws dealing with the "general regulation of trade throughout the Dominion," had this effect. It is true that these heads of power must be applied with great caution, for they have virtually unlimited potential to lift matters out of provincial jurisdiction into the realm of federal competence. As Beetz J. argued in his influential dissent in the *Anti-Inflation Reference*, giving a liberal interpretation to the p.o.g.g. power would "embrace and smother provincial powers and destroy the equilibrium of the Constitution."²²² However, the national dimensions branch of p.o.g.g., like the general trade and commerce power, is a power "which if properly understood and properly constrained does not erode local autonomy but rather complements it."²²³ The key to "properly" constraining these powers is to limit their exercise to those instances where the "provincial inability" test is satisfied. This test is satisfied if the provinces acting alone or in conjunction would lack the constitutional powers to pass the scheme, or where there

is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.²²⁴

²¹⁸R.S.C. 1970, c. R-2, s. 342(1).

²¹⁹R.S.N.B. 1973, c. L-8, s. 18.

²²⁰*Supra*, note 213 at 708-709.

²²¹*Ibid.* at 710.

²²²*Supra*, note 37 at 458.

²²³Dickson J. (as he then was) in *A.G. Canada v. C.N. Transportation*, [1983] 2 S.C.R. 206 at 278, 3 D.L.R. (4th) 16.

²²⁴Hogg, *supra*, note 3 at 380.

If this test is applied as a precondition to the valid reliance on the p.o.g.g. and general trade and commerce powers, then those powers do not threaten provincial autonomy. Rather, they prevent the creation of a gap in the distribution of legislative powers; the democratic principle of exhaustiveness requires that there be no areas in which neither the federal nor the provincial government can constitutionally legislate.

The two most recent Supreme Court cases dealing with the national dimensions branch of p.o.g.g. and the general trade and commerce power, respectively, properly place a great deal of emphasis on the provincial inability test. In *Crown Zellerbach*, Le Dain J. adopted the criteria developed by Beetz J. in the *Anti-Inflation Reference* for determining whether a matter can be allocated to the national dimensions branch of p.o.g.g.:

For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution ...²²⁵

In order to possess these threshold characteristics, the matter must satisfy the provincial inability test. Before allocating a subject matter to the national dimensions branch of p.o.g.g, a court must find

that provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the "provincial inability" test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment.²²⁶

Similarly, in *General Motors* the Supreme Court made clear that a matter can be allocated to the federal general power over trade and commerce only if the provincial inability test is satisfied. Two of the criteria articulated by the court for determining whether federal legislation is a valid exercise of the general trade and commerce power are relevant here:

(i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) 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. These two criteria ... serve to ensure that federal legislation does not upset the balance of power between federal and provincial governments.²²⁷

²²⁵*Supra*, note 37 at 432.

²²⁶*Ibid.* at 434.

²²⁷*Supra*, note 37 at 662.

In summary, attention to the constitutional primacy of the value of provincial autonomy has significant implications for restructuring the application of the interpretive doctrines of Canadian federalism. I have attempted to sketch an approach that would promote provincial autonomy to a much greater degree than would the thoroughgoing application of the classical paradigm advocated by Beetz J. in *Bell 1988*. The classical paradigm preserves an imperfect measure of provincial autonomy by confining the operations of the federal government and the provinces alike to discrete, watertight compartments of jurisdiction. Provincial autonomy is not advanced by doctrines, such as interjurisdictional immunity, that place limitations on the scope of the operation of provincial statutes within the province. On the other hand, the application of the modern approach to the pith and substance doctrine will increase the scope of operation of provincial statutes and thus enhance provincial autonomy. In addition, it is crucial that the modern approach to the paramountcy doctrine be applied. In other words, paramountcy should have a restricted role such that provincial legislation is superseded only in the rare cases of express conflict or demonstrated functional incompatibility. The courts should take a much less tolerant stance regarding federal legislation that intrudes on provincial areas of jurisdiction. Such legislation should be read down unless the spillover effects on the provincial area of jurisdiction are absolutely necessary to the attainment of the valid federal objective, or if the legislation is necessary to respond to a problem of national scope that the provinces acting alone or in concert are constitutionally incapable of addressing.

IV. The Paradigms and First Nations Autonomy

The distinct constitutional status of First Nations people is recognized in section 91(24) of the *Constitution Act, 1867*, which gives to the federal government exclusive jurisdiction to pass laws dealing with "Indians and lands reserved for Indians." The special constitutional status of the original inhabitants of British North America was also recognized by the process of treaty-making that the *Royal Proclamation* of 1763 sanctioned as the sole means of extinguishing aboriginal title. Prior to the enactment of the *Constitution Act, 1867*, the First Nations did not consent to nor did they participate in any alteration of their special, horizontal relationship to the Crown. Moreover, the *Constitution Act, 1867* adopted the federal principle as the best means of preserving and respecting cultural differences within the newly formed Canadian state. By guaranteeing political spaces to the founding cultural groups in which they could define their own policies and preserve their institutions, the constitution sought to respect the right to cultural difference. These elements of Canadian constitutional history provide the foundations for an autonomist interpretation of the meaning of federal jurisdiction over "Indians and lands reserved for Indians." Respecting the distinct constitutional and cultural status of First Nations

people requires that they be accorded political autonomy in the definition of their collective and individual destinies.

On this approach, the federal government and the judiciary have an obligation to ensure the autonomy of First Nations governments. Federal laws affecting "Indians and lands reserved for Indians" should be valid only if they are passed with the consent of the First Nations people affected.²²⁸ Such an approach would involve a radical shift from the prevailing judicial view that s. 91(24) confers on the federal government plenary authority to enact any and all laws that in pith and substance are aimed at regulating "Indians" and "Indian lands." It would also involve a radical departure from the manner in which the federal government has exercised its powers under s. 91(24).

Whether or not such a conception of the meaning of s. 91(24) to the exercise of federal power is adopted, the autonomy of First Nations people can be significantly expanded within existing constitutional arrangements by using the doctrinal techniques of the classical paradigm to limit the scope of application of provincial laws to "Indians and lands reserved for Indians." In this part I will focus on three doctrinal features of the classical paradigm that should be employed to promote autonomy for First Nations people. First, the interjurisdictional immunity doctrine should be used to prevent provincial laws from applying on reserves and from applying off reserves to matters that touch the heart of First Nations peoples' identities. Second, the broad, classical approach to paramountcy should be applied to prevent provincial laws from applying in areas where federal laws or laws passed by First Nations governments have "covered the field." Finally, the classical prohibition on federal inter-delegation should be invoked to prevent the delegation of federal power in relation to "Indians" and "Indian lands" to the provinces, unless the consent of the three levels of government involved is obtained. The federal government should not be able to delegate its special constitutional responsibilities regarding First Nations people to the provinces without the consent of the First Nations themselves.

It is an understatement to say that the existing case law does not follow these autonomist prescriptions. With few exceptions, the courts have turned away from employing standard methods of constitutional interpretation in a manner that would promote the autonomy of First Nations people. Indeed, a reader unfamiliar with Canadian constitutional and political history could be forgiven for coming away from the case law with no understanding of the constitutional significance of autonomy and self-government to Canada's original inhabitants. If provincial autonomy is a value frequently cited in, although imperfectly promoted by, existing Canadian constitutional doctrine, autonomy for First Nations people is a hidden constitutional value whose injection into interpretive practices is long overdue.

²²⁸Macklem, *supra*, note 26.

For the most part, the courts have applied the modern paradigm to the interpretation of s. 91(24). As a result, First Nations people have been subjected to the concurrent, overlapping authority of federal and provincial governments to an even greater extent than have non-native residents of Canada. Sanders summarizes the case law as follows:

“Indians” fall into a “double aspect” area in which provincial laws will always apply in the absence of special federal legislation. No case states this proposition quite this bluntly.²²⁹

While no case states forthrightly that the regulation of “Indians” is a double aspect matter, the case law as a whole has produced “[t]he general rule ... that provincial laws apply to Indians and lands reserved for the Indians.”²³⁰ For example, in *R. v. Hill*,²³¹ the Ontario Court of Appeal upheld the conviction of a native man for unlawfully practising medicine in contravention of provincial legislation. One of the reasons the court gave for embracing the modern paradigm revealed the paternalistic attitudes that often surface in the literature defending the subjection of First Nations people to concurrent provincial and federal jurisdiction: the court refused to grant First Nations people immunity from provincial laws for that would leave them to “the condition and rights of their ancestors when this country was first discovered.”²³² Similarly, in *R. v. Martin*,²³³ the Ontario Court of Appeal upheld the conviction of a native man for violating *The Ontario Temperance Act*,²³⁴ even though the *Indian Act* contained similar provisions regarding the possession of liquor:

no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.²³⁵

These cases and others enabled provincial legislation to apply to First Nations people so long as the pith and substance of the legislation was a subject matter within provincial jurisdiction. In a landmark 1967 article, Kenneth Lysyk was able to conclude that

where Parliament has not legislated ... the provinces have a relatively free hand in legislating for the well-being of the Indian ... The area of constitutional flexibility is in fact very great ... there is little justification for the reluctance not infrequently expressed by provincial governments to undertake the same responsibility for

²²⁹D. Sanders, “The Application of Provincial Laws” in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1984) 452 at 453.

²³⁰Hogg, *supra* note 3 at 557.

²³¹(1907), 15 O.L.R. 406 (C.A.).

²³²*Ibid.* at 411.

²³³(1917), 39 D.L.R. 635, 41 O.L.R. 79 (Ont. C.A.) [cited to D.L.R.].

²³⁴S.O. 1916, c. 50.

²³⁵*Supra*, note 233 at 639.

ameliorating the conditions of Indians and Indian settlements that these governments would assume for non-Indians and non-Indian communities.²³⁶

This situation can be turned around by drawing on the elements of the classical paradigm in Canadian federalism. The goal is not to preclude the provinces from playing a substantial role in promoting the well-being of native communities — the provinces have an important role to play in transferring the land and resources to First Nations necessary to resolve land claims and provide a secure financial basis to meaningful First Nations governments. However, by employing the classical paradigm, the application of provincial legislation to First Nations people would be limited, and greater political space would be opened up for the First Nations themselves to define their difference and to develop the policies they deem necessary to guide their communities into the future.

The autonomist approach would resurrect and develop the competing, classical strand in the jurisprudence that first emerged in cases preventing the application of provincial game laws to native hunting on reserves. These cases suggested that Indian reserves should be regarded as “enclaves” removed from provincial jurisdiction. For example, in *R. v. Rodgers*,²³⁷ Prendergast J. stated that

Provincial statutes, even of general application, do not, as a rule, expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province.

²³⁶K.M. Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can. Bar Rev. 513 at 553. After undertaking a thorough survey of the pre-1951 case law, Micheline Patenaude reached a similar conclusion:

Rien ne nous permet donc de penser, jusqu’à maintenant, qu’avant 1951 les Indiens étaient une catégorie particulière de personnes qui échappaient à l’application du droit provincial. Il ne faisait pas de doute, en tout cas, qu’en dehors d’une réserve indienne un Indien devait obéir aux lois provinciales de la même façon qu’il pouvait s’en prévaloir (M. Patenaude, *Le Droit Provincial et les Terres Indiennes* (Montreal: Editions Yvon Blais, 1986) at 96).

For other analyses of the scope of provincial jurisdiction to pass laws affecting “Indians” and “Indian lands,” see D. Sanders, “The Constitution, the Provinces and Aboriginal Peoples” in J.A. Long & M. Boldt, eds, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 151; L. Little Bear, “Section 88 of the Indian Act and the Application of Provincial Laws to Indians” in Long & Boldt, eds, *supra*, 175; P. Hughes, “Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?” (1983) 21 Osgoode Hall L.J. 82; N. Lyon, “Constitutional Issues in Native Law” in Morse, ed., *supra*, note 239 at 408; Sanders, *supra*, note 229; D. Sanders, “Prior Claims: Aboriginal People in the Constitution of Canada” in S.M. Beck & I. Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda* (Montreal: Institute for Research and Public Policy, 1983) 225 at 256-61; K.M. Lysyk, “Constitutional Developments Relating to Indians and Indian Lands: An Overview,” in *The Constitution and the Future of Canada*, *supra*, note 148, 201 at 222-27; R.H. Bartlett, *The Indian Act of Canada*, 2d ed. (Saskatoon: University of Saskatchewan, Native Law Centre, 1988).

²³⁷(1923), 33 Man. R. 139, [1923] 3 D.L.R. 414 (C.A.) [cited to D.L.R.].

But everyone understands that they cannot apply to regions in the Province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted.²³⁸

On this interjurisdictional immunity theory, otherwise valid provincial laws must be read down so as not to apply on Indian reserves;²³⁹ or, in other words, the general territorial application of provincial heads of power must be modified when read in conjunction with federal power over Indian lands. As Perdue J. noted in *Rodgers*, reading down provincial laws in this way is essential to the preservation of essential cultural practices:

The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependent upon him.²⁴⁰

This approach — defining a core of federal jurisdiction under s. 91(24) that is immune from the application of provincial laws — is analogous to the use of the interjurisdictional immunity doctrine in the cases involving other heads of federal jurisdiction that was criticized above in Part III on the grounds that, in those contexts, the interjurisdictional immunity doctrine bears no relation to the promotion of autonomy for the provinces (or the First Nations). We saw that the courts have held that provincial laws must be read down if their application would “sterilize” federally-incorporated companies or would interfere with vital or essential elements of the operation of federal undertakings.²⁴¹ Applying this theory to s. 91(24) means that provincial laws must be read down so as not to apply to matters at the core of federal jurisdiction over “Indians” and “Indian lands.” While I suggested in the previous chapter that the interjurisdictional immunity doctrine unnecessarily limits provincial autonomy when applied to other heads of federal power, its use is essential in the context of s. 91(24) in order to promote autonomy for the First Nations.

Chief Justice Laskin developed the most expansive and compelling version of a classical approach to the exclusivity of federal power under s. 91(24) in several dissenting judgments in the 1970’s. In *Cardinal v. A.-G. Alberta*,²⁴² he argued that “Indian reserves are enclaves which, so long as they exist as Reserves, are withdrawn from provincial regulatory power.”²⁴³ He defended this

²³⁸*Ibid.* at 423.

²³⁹For other decisions applying the enclave theory to prevent the application of provincial game laws on reserves, see *R. v. Jim*, (1915), 22 B.C.R. 106, 26 C.C.C. 236 (B.C.S.C.); *R. v. Hill*, [1951] O.W.N. 824, 101 C.C.C. 343 at 352 (Ont. S.C.) (“the Parliament of Canada is the only competent legislative authority which can regulate the situation which is involved here”); *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.A.D.).

²⁴⁰*Supra*, note 237 at 416.

²⁴¹See the cases cited in *supra*, note 114, and *Bell 1988*, *supra*, note 42. For a more comprehensive account of the case law, see Elliott, *supra*, note 45 at 523, n. 1, and Finkelstein, *supra*, note 127 at 525-31.

²⁴²[1974] S.C.R. 695, 40 D.L.R. (3d) 553 [hereinafter *Cardinal* cited to S.C.R.].

²⁴³*Ibid.* at 716.

theory by pointing to the need to provide autonomy to the distinct cultural, political and economic status of reserves:

The significance of the allocation of exclusive legislative power to Parliament in relation to Indian Reserves merits emphasis in terms of the kind of enclave that a Reserve is. It is a social and economic community unit, with its own political structure as well according to the prescriptions of the *Indian Act*. ... The present case concerns the regulation and administration of the resources of land comprised in a Reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the application of such provincial legislation to Indian Reserves, the power will have lost the exclusiveness which is ordained by the Constitution.²⁴⁴

While the “enclave” theory has been heavily criticized by non-native scholars,²⁴⁵ it is a theory that can be supported if appropriate weight is given to the distinct constitutional status and history of the First Nations. Indeed, the approach articulated by Professor Beetz (as he then was) to defend the autonomy of Quebec makes good sense when applied to the First Nations:

De la même façon que la collectivité québécoise est concentrée sur un territoire, de même, certains champs de l'activité politique lui sont-ils « réservés »; en d'autres termes, elle est, pour ces domaines, considérée comme devant vivre dans une « réserve » constitutionnelle.²⁴⁶

²⁴⁴*Ibid.* at 716-8. See also Laskin C.J.'s dissenting opinion in *Four B Manufacturing v. United Garment Workers*, (1979), [1980] 1 S.C.R. 1031 at 1041, 102 D.L.R. (3d) 385 [hereinafter *Four B Manufacturing* cited to S.C.R.] (“Where ... the issue concerns the conduct of Indians on a reserve, provincial legislation is inapplicable unless brought in by referential federal legislation...”).

²⁴⁵D. Gibson, “The ‘Federal Enclave’ Fallacy in Canadian Constitutional Law” (1976) 14 *Alta. L. Rev.* 167; Hogg, *supra*, note 3 at 558 (“The [enclave] theory was always implausible, because it involved a distinction between the first and second branches of s. 91(24) for which there is no textual warrant, and it placed the second branch (‘lands reserved for the Indians’) in a privileged position enjoyed by no other federal subject matter. It is plain that there is no constitutional distinction between ‘Indians’ and ‘lands reserved for the Indians,’ and that provincial laws may apply to both subject matters.”); Hughes, *supra*, note 236 at 110 (attributing the enclave theory to a “politically-based perception that native peoples are a distinct social and political entity and should, therefore, be accorded distinct treatment ... the enclave theorists have allowed constitutional interpretation principles to take second place to their view of the uniqueness of Indian reserves.”).

While I agree with the general criticisms that have been made of the interjurisdictional immunity doctrine in its application to other heads of federal power, I believe these authors are wrong to suggest that federal jurisdiction under s. 91(24) should not be treated differently than any other head of power. To suggest that it should is not simply a “politically-based perception,” rather, it is one that brings to the fore the hidden constitutional history of First Nations people, and interprets s. 91(24) with that history in mind. If this seems to be an unusual or “political” theory, I would suggest that it is only because the legitimate constitutional claims to autonomy of First Nations people have been neglected or ignored for so long.

²⁴⁶*Supra*, note 163 at 123.

While autonomy for First Nations people would be furthered by interpreting federal jurisdiction over "Indian lands" as creating "constitutional reserves" immune from provincial legislation, it is not a plausible alternative to similarly interpret federal jurisdiction over the first branch of s. 91(24) ("Indians") as creating an "enclave" around all First Nations people that would shield them from the application of provincial laws off reserves. Lyon has noted this difficulty:

Indians themselves move freely about the country in places and activities having nothing to do with native culture ... Separate traffic laws for Indians on provincial roads, for example, would make no constitutional sense.²⁴⁷

At the same time, subjecting First Nations people to the full operation of provincial laws off reserves in the same manner as other Canadian citizens ignores their distinct constitutional status. The only practical alternative is to protect First Nations people off reserves from some provincial laws, namely those that touch matters at the core of their individual or collective identities as members of the First Nations. Again, such a cultural understanding of a core of federal jurisdiction over "Indians" was articulated by Laskin C.J. In *Natural Parents v. Superintendent of Child Welfare*,²⁴⁸ he argued that a provincial adoption law could not constitutionally apply of its own force to the adoption of a First Nations child by non-Indians:

It [the *Adoption Act*] could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness," to strike at a relationship integral to a matter outside of provincial competence.²⁴⁹

While provincial regulatory legislation that does not touch "Indianness," such as highway traffic legislation, could apply to native people,

Such provincial legislation is of a different class than adoption legislation which would, if applicable as provincial legislation *simpliciter*, constitute a serious intrusion into the Indian family relationship. It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians. Certainly, if it was applicable because of its so-called general application, it would be equally applicable by expressly embracing Indians. Exclusive federal authority would then be limited to a registration system and to regulation of life on a reserve.²⁵⁰

In subsequent cases, members of the Supreme Court have offered various formulations of the core of federal jurisdiction over "Indians" that is immune

²⁴⁷Lyon, *supra*, note 236 at 431.

²⁴⁸[1976] 2 S.C.R. 751, 60 D.L.R. (3d) 148 [hereinafter *Natural Parents* cited to S.C.R.].

²⁴⁹*Ibid.* at 760-61.

²⁵⁰*Ibid.* at 761.

from the application of provincial laws: otherwise valid provincial laws must be read down so as not to apply to Indians if their application would “impair the status or capacity” of Indians,²⁵¹ “regulate Indians *qua* Indians” or touch on matters that are “inherently Indian”²⁵² or that are “closely related to the Indian way of life.”²⁵³

Unfortunately, a majority of the Supreme Court has failed to use the “enclave” theory of “Indian lands” and a cultural understanding of the core of federal jurisdiction over “Indians” in a manner that would enhance the autonomy of First Nations people. In *Cardinal*, the Supreme Court upheld the application of the Alberta *Wildlife Act* to convict Cardinal of selling moose on a reserve, and in so doing rejected the enclave approach espoused by Laskin C.J. in his dissenting opinion. According to the majority:

A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act*, 1867, was to create enclaves within a Province within the boundaries of which Provincial application could have no application.²⁵⁴

Similarly, in *Four B Manufacturing*, Beetz J. for the majority upheld the application of provincial labour law on a reserve. In his view, provincial laws could apply to Indians on or off a reserve,

so long as such laws do not single out Indians nor purport to regulate them *qua* Indians, and as long also as they are not superseded by valid federal law.²⁵⁵

The Supreme Court has thus rejected a broad application of the interjurisdictional immunity doctrine to the second branch of s. 91(24) (“Indian lands”).²⁵⁶ In addition, the Supreme Court has given a narrow definition to the “core of Indianness,” thus severely circumscribing the role that the interjurisdictional immunity doctrine could play in relation to the first branch of s. 91(24) (“Indians”). As Lyon has stated, “[t]he dominant view in the Supreme Court ... denies federal status to any feature of native culture.”²⁵⁷ As a result, in a series

²⁵¹Dickson J. in *Kruger v. R.*, [1978] 1 S.C.R. 104 at 110, 75 D.L.R. (3d) 434 [hereinafter *Kruger* cited to S.C.R.].

²⁵²Beetz J. in *Four B Manufacturing*, *supra*, note 244 at 1047-48.

²⁵³La Forest J. in *Francis*, *supra*, note 100 at 1028.

²⁵⁴*Supra*, note 242 at 703.

²⁵⁵*Supra*, note 244 at 1048-49.

²⁵⁶The Court has held that provincial matrimonial property legislation must be read down to preserve exclusive federal jurisdiction over the possession of lands on a reserve. *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 26 D.L.R. (4th) 175 (S.C.C.); *Paul v. Paul*, [1986] 1 S.C.R. 306, 26 D.L.R. (4th) 196 (S.C.C.) (both holding that the right to possession of lands on a reserve is of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*, and that it follows that provincial legislation cannot apply to the right of possession of Indian reserve lands).

²⁵⁷*Supra*, note 236 at 445.

of cases, the Supreme Court has held that provincial game laws apply on reserves²⁵⁸ and off reserves,²⁵⁹ provincial adoption laws apply to First Nations children,²⁶⁰ provincial labour laws apply on reserves to native owned businesses,²⁶¹ and provincial highway traffic laws apply on reserves.²⁶² The Court has held that provincial adoption law had to be read down so as not to deprive a First Nations child of his or her federal legal status as an Indian.²⁶³ The courts have been willing to see the legal status of an Indian created by federal government legislation as being a matter at the core of federal jurisdiction, while they have not been willing to so characterize cultural and economic aspects of First Nations peoples lives. In *Four B Manufacturing*, Beetz J. elaborated upon his conception of matters that are "inherently Indian" in the following explanation of why the provincial legislation at issue in that case did not touch the core of federal jurisdiction so defined:

neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.²⁶⁴

It is difficult to understand why these legal attributes of Indian status, as defined by and imposed upon First Nations people by the federal government, are central to the subject matter of "Indians" and "Indian lands," while the maintenance of a child's ties with his or her culture or the exercise of aboriginal rights to hunt are not.²⁶⁵

In *Dick v. R.*,²⁶⁶ Lambert J.A. of the British Court of Appeal, in a dissenting opinion, advanced the definition of the "core of Indianness" by incorporating cultural as well as legal attributes of Indian status. He held that Dick's conviction for hunting deer out of season had to be set aside because the application of the *Wildlife Act* to "hunting for food impairs the status and capacities of the Alkali Lake Band members ..."²⁶⁷ On appeal to the Supreme Court of Canada, Beetz J., writing for the court, stated that he was prepared to assume, without

²⁵⁸*Cardinal*, *supra*, note 242.

²⁵⁹*Kruger*, *supra*, note 251; *R. v. Horseman*, [1990] 1 S.C.R. 901, 55 C.C.C. (3d) 353 [hereinafter *Horseman* cited to S.C.R.].

²⁶⁰*Natural Parents*, *supra*, note 248.

²⁶¹*Four B Manufacturing*, *supra*, note 244.

²⁶²*Francis*, *supra*, note 100.

²⁶³*Natural Parents*, *supra*, note 248.

²⁶⁴*Supra*, note 244 at 1047-48.

²⁶⁵See Macklem, *supra*, note 26 at 421: "To reduce the meaning of status and capacity to its legal attributes leaves the provinces free to eliminate all that constitutes native difference apart from the formal shell of legal status, so long as this process of elimination occurs through laws of general application."

²⁶⁶(1982) 41 B.C.L.R. 173, 3 C.C.C. (3d) 481 (C.A.) [cited to B.C.L.R.] *aff'd supra*, note 59.

²⁶⁷*Ibid.* at 184.

deciding, that Lambert J.A. was correct in concluding that the *Wildlife Act* had been applied in a manner that touched the “core of Indianness”:

In *Cardinal* ... it had already been held, apart from any evidence, that provincial game laws do not relate to Indians *qua* Indians. In the case at bar, there was considerable evidence capable of supporting the conclusions of Lambert J.A. to the effect that the *Wildlife Act* did impair the Indianness of the Alkali Lake Band, as well as the opposite conclusions of the courts below.

I am prepared to assume, without deciding, that Lambert J.A. was right on this point and that appellant’s submission on the first issue is well-taken ...

On the basis of this assumption and subject to the question of referential incorporation which will be dealt with in the next chapter, it follows that the *Wildlife Act* could not apply to the appellant *ex proprio vigore*, and, in order to preserve its constitutionality, it would be necessary to read it down to prevent its applying to appellant in the circumstances of this case.²⁶⁸

Betz J. did not have to decide whether such a cultural understanding of the “core of Indianness” immune from the application of provincial laws was the correct one, since he went on to find that the *Wildlife Act* was rendered applicable by s. 88 of the *Indian Act* in any case.

S. 88 provides as follows:

Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

There has been a great deal of judicial and academic discussion about the proper interpretation of s. 88. The debate has centred on the interpretation of the phrase “laws of general application” and whether Parliament’s intention was to make applicable to native people provincial laws that would otherwise not apply of their own force because they interfered with federal jurisdiction under s. 91(24) (the “referential incorporation” theory).²⁶⁹ According to a competing theory, the “declaratory” theory, s. 88 was not intended to make provincial laws applicable if they otherwise could not constitutionally apply to Indians because they interfered with exclusive federal jurisdiction.²⁷⁰ Unfortunately, there is little indica-

²⁶⁸*Supra*, note 59 at 320-21.

²⁶⁹On the referential incorporation theory, provincial laws that apply generally throughout the province, but cannot apply of their own force to First Nations people because they have an impact on matters at the heart of native identity, are “referentially incorporated” into federal law by s. 88. For an argument to this effect, see Lysyk, “The Unique Constitutional Position of the Canadian Indian,” *supra*, note 236 at 539.

²⁷⁰On the declaratory theory, s. 88 simply declares the pre-existing constitutional situation regarding which provincial laws can apply to native people. In other words, provincial laws are not ones of “general application,” and thus not rendered applicable by s. 88, if they touch matters

tion of Parliament's intent in the legislative history leading up the addition of s. 88 (then s. 87) to the *Indian Act* in 1951. The discussion relating to s. 87 that took place before the Joint Parliamentary Committee that studied the 1951 amendments to the Act focused on the need for protection of hunting rights and treaty rights generally, but otherwise sheds little light on the meaning of the phrase "provincial laws of general application."²⁷¹

On an autonomist approach, the declaratory theory of s. 88 is to be desired. On this approach, s. 88 has a dual purpose. First, it reversed the existing legal situation by making treaties supreme to any conflicting provincial legislation.²⁷² And it further advanced protection to First Nations people from the application of provincial laws by specifying in the concluding words of s. 88 that the broadest conception of the paramouncy doctrine should be applied to render provincial laws inoperative whenever they conflicted with the *Indian Act* or a law passed thereunder, and whenever they dealt with a subject matter "for which provision is made by or under" the *Indian Act*.²⁷³ Provincial laws of general application, on this reading of s. 88, are simply those that would apply to "Indians" or "Indian lands" of their own force — it does not include laws that touch matters at the heart of native identity. This interpretation of s. 88 is consistent with an autonomist understanding of s. 91(24); that is, that the federal government has a responsibility under s. 91(24) to ensure a measure of autonomy for the First Nations, which means, in part, securing protection from the application of provincial laws.

It was not clear, until the *Dick* case, whether the declaratory, autonomist approach or the referential incorporation approach to s. 88 would prevail. In *Kruger*, Dickson J. gave support to the declaratory theory. He set out two indicia

at the heart of native identity or otherwise interfere with federal jurisdiction under s. 91(24). On this view, the purposes of s. 88 are to give rights and powers accorded by treaty and by the *Indian Act* protection from interference by provincial laws.

²⁷¹See the Minutes and Proceedings of the Joint Committee of the Senate and House of Commons on the Indian Act, 2d Sess., 20th Parl., 1946, vol II. p.1446ff. If anything, the legislative history leans in favour of the declaratory theory. As Little Bear argues, "[t]he debate of the Joint Committee of the Senate and House of Commons on the Indian Act revolved around hunting rights, and leads one to believe that the section is a hunting reference. If this is so, then it would seem that the section is merely declaratory of the existing law prior to 1951." *Supra*, note 236 at 184.

²⁷²Prior to the enactment of s. 88 (and s. 35 of the *Constitution Act, 1982*), treaties were subject to overriding provincial (and federal) legislation. *R. v. White*, (1965) 52 D.L.R. (2d) 481n, 52 W.W.R. 193 (S.C.C.); *Sikyea v. R.*, [1964] S.C.R. 642, 50 D.L.R. (2d) 80; *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 709.

²⁷³In *Dick*, *supra*, note 59 at 327-28, Beetz J. questioned whether a federal legislative specification of the scope of the paramouncy rule would be effective to alter the judicially created express conflict approach to paramouncy. I suggested above (*supra*, note 207) that this line of reasoning is persuasive in the context of other federal heads of power, but should not be applied to s. 91(24) in light of the importance of a broad conception of paramouncy to First Nations autonomy.

for determining whether a provincial law was one of general application for the purposes of s. 88. First, it must apply generally throughout the province. Second, a law ceases to be one of general application when,

though in relation to another matter, *by its effect*, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company ... Such an act is no "law of general application."²⁷⁴

By stating that provincial laws that deal generally with a subject matter within provincial jurisdiction would cease to be "laws of general application" if they had an *effect* on matters at the heart of First Nations peoples collective identities, Dickson J. moved the interpretation of s. 88 in an important autonomist direction. Notwithstanding this statement, after concluding, remarkably, that the B.C. *Wildlife Act*²⁷⁵ was a law of general application on this test,²⁷⁶ Dickson J. was equivocal on whether proof that legislation has effects on Indian status and capacities would in itself take legislation out of the category of "laws of general application," or whether it had to be shown that this was the actual legislative policy or intent:

If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter — to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill* — it might very well be concluded that *the effect* of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that *the policy* of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians.²⁷⁷

While Dickson J. did not purport to resolve the debate regarding the declaratory and referential incorporation theories of s. 88,²⁷⁸ his definition of "laws of general application" lent support to the former theory. According to Hogg, the *Kruger* case made it clear "that the declaratory theory is correct".²⁷⁹

The phrase "laws of general application" would exclude laws that singled out Indians for special treatment. As noted earlier, such laws are likely to be classified as being in relation to Indians and therefore as invalid. Section 88 does not invigorate such laws. The phrase "laws of general application" also excludes laws that, while not singling out Indians for special treatment, have a specially severe effect on Indians by impairing their status or capacity. As noted earlier, such laws cannot apply to Indians of their own force. Section 88 does not make them applicable.²⁸⁰

²⁷⁴*Supra*, note 251 at 110, emphasis added.

²⁷⁵R.S.B.C. 1979, c. 433 [hereinafter *Wildlife Act*].

²⁷⁶There was no evidence presented in the case on this issue.

²⁷⁷*Supra*, note 251 at 112, emphasis added.

²⁷⁸*Ibid.* at 117.

²⁷⁹*Supra*, note 3 at 561, n. 66.

²⁸⁰*Ibid.* at 560-61.

However, Beetz J. rejected the declaratory, autonomist understanding of s. 88 in favour of the referential incorporation theory in the *Dick* case. In his view, the intent of the legislature is determinative in deciding whether a provincial law is one of general application. Effect is relevant only as evidence of intent.²⁸¹ Thus, even on the assumption that the application of the *Wildlife Act* had “the effect of regulating [Dick] *qua* Indian,”

it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator. While it is assumed that the *Wildlife Act* impairs the status or capacity of appellant, it has not been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or discriminates against them in any way.

I accordingly conclude that the *Wildlife Act* is a law of general application within the meaning of the s. 88 of the *Indian Act*.²⁸²

This result amounted to an adoption of the referential incorporation theory: even on the assumption that the *Wildlife Act* could not constitutionally apply of its own force and had to be read down to preserve the core of federal jurisdiction over “Indians” in order to be valid, it was nevertheless rendered applicable by its referential incorporation in federal law by s. 88.

Beetz J. then summarized the doctrinal result of his interpretation of s. 91(24) and s. 88: all valid provincial laws (*i.e.*, those that do not single out First Nations people and otherwise fall within provincial competence) apply to First Nations people in the absence of conflicting treaty rights or a paramount federal law. Valid provincial laws “which can be applied to Indians without touching their Indianness, like traffic legislation,”²⁸³ apply of their own force, without the assistance of s. 88. Other valid provincial laws, “which cannot apply to Indians without regulating them *qua* Indians,”²⁸⁴ are made applicable by s. 88.

In the result, while Beetz J. was open to the possibility of a cultural understanding of the “core of Indianness” that would advance the autonomy of First Nations people, he adopted a thoroughly anti-autonomist interpretation of s. 88. Dick’s conviction for killing a deer in ancestral hunting grounds to provide food for band members was sustained, as was the conviction in a companion case of two members of the Coast Salish nation who were charged with killing a deer for use in a traditional spiritual ceremony involving the burning of raw deer meat.²⁸⁵ As Little Bear has commented:

²⁸¹*Supra*, note 59 at 323-24.

²⁸²*Ibid.* at 325-26.

²⁸³*Ibid.* at 326.

²⁸⁴*Ibid.*

²⁸⁵*Jack and Charlie v. R.*, [1985] 2 S.C.R. 332, 21 D.L.R. (4th) 641 [hereinafter *Jack and Charlie*]. The *Jack and Charlie* and *Dick* cases both concerned charges laid before the enactment of the *Constitution Act, 1982*. The results in the two cases should no longer be possible in light of the

If Indian leaders are now complaining about a lack of breathing-room under the Indian Act, they will feel suffocated with the influx of run-of-the-mill provincial legislation pursuant to the *Dick* case.

The *ex proprio vigore* interpretation in the *Dick* case with respect to the application of provincial law effectively eliminates the special status enjoyed by Indians under section 91(24) of the Constitution Act, 1867, except for that provided by the Indian Act, in those parts of Canada where there are no treaties. If all provincial laws that do not touch "Indianness" apply by virtue of their own force, and if those that do are referentially incorporated via section 88, Indians who are not covered by any treaty are legally "surrounded."²⁸⁶

The referential incorporation theory of s. 88 also amounts to a sanction of the delegation of exclusive federal legislative power to the provinces. It is worth recalling the classical prohibition on legislative inter-delegation articulated by Chief Justice Rinfret in the *Nova Scotia Inter-delegation* case:

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used in both section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other.²⁸⁷

This argument was relied upon in the *Dick* case to challenge the constitutional validity of an interpretation of s. 88 that would allow for the anticipatory referential incorporation into federal law of provincial laws that would otherwise not apply of their own force to "Indians." Beetz J. gave a one sentence response to this argument: "In my opinion, *Scott* ... and *Coughlin* ... provide a complete answer to this objection."²⁸⁸ These cases sanctioned the devices of anticipatory incorporation by reference and administrative inter-delegation of powers. They did not sanction the enlargement of one level of government's powers by legislative inter-delegation. The *Dick* decision goes even further in undermining the prohibition on federal inter-delegation by allowing referential incorporation of provincial laws that are not independently valid in all of their applications. Beetz J. interpreted s. 88 in a manner that allows provinces to determine how matters at the "core of Indianness" will be regulated. This is a power that is beyond the competence of the provincial legislatures for it is at the heart of federal exclusive jurisdiction over "Indians."

I argued in the last chapter that federal inter-delegation in its various forms is a desirable device that can further provincial autonomy without compromising the principle of exclusive constitutional responsibility, so long as the condition of continuing mutual consent is fulfilled. Similarly, the federal government

Charter's guarantee of freedom of religion, and the entrenchment of "existing aboriginal and treaty rights" in s. 35. See *Sparrow*, *supra*, note 30.

²⁸⁶*Supra*, note 236 at 183.

²⁸⁷*Supra*, note 49 at 34-35.

²⁸⁸*Supra*, note 59 at 328.

should be able to delegate its exclusive jurisdiction over “Indians” and “Indian lands” to the First Nations with their continuing consent, and to the provinces, but only with the continuing consent of the provinces and, more importantly, the First Nations. Any other approach makes a mockery of the First Nations’ claims to autonomy and of the special relationship of the federal government to First Nations people.²⁸⁹ As the condition of mutual consent was not met prior to the adoption of s. 88, the referential incorporation theory of s. 88 is a violation of constitutional principles.

Another very troubling implication of the *Dick* case arises from Beetz J.’s assertion that the reference to “all laws of general application” does not include *all* laws of general application; rather, on his analysis, it is a reference only to those provincial laws that would not apply of their own force to First Nations people. In other words, the only laws referred to by s. 88 are those laws of general application that touch the “core of Indianness.” If this is so, the two autonomist goals of s. 88 — the protection of treaty rights and the specification of a broad approach to the paramountcy of the *Indian Act* — are undermined. If one follows through the logic of this approach, it means that provincial laws of general application that do not touch the “core of Indianness” will now prevail over treaty rights (subject, of course, to s. 35 of the *Constitution Act, 1982*), and they will not be subject to being rendered inoperative if they deal with matters for which “provision is made by or under” the *Indian Act* as prescribed by s. 88.

Thankfully, this implication of Beetz J.’s logic appears to have been ignored by the Supreme Court in subsequent decisions regarding the interaction of treaty rights and provincial laws. In both *Sioui* and *Horseman*, the court assumed that treaty rights will continue to prevail over inconsistent provincial legislation whether or not the provincial legislation touches the “core of Indianness.”²⁹⁰ The reasoning in *Sioui* ignores the definition given by Beetz J. in *Dick*

²⁸⁹See *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321; *Sparrow*, *supra*, note 30.

²⁹⁰In *Horseman*, Cory J. for the majority assumed that if *Horseman* had acted within his treaty rights, then he could not be charged with a violation of the *Alberta Wildlife Act* by virtue of s. 88. In direct conflict with Beetz J.’s definition of a “law of general application” in *Dick*, Cory J.’s reasoning proceeds on the assumption that *Horseman*’s treaty rights would prevail over any inconsistent section of the Act notwithstanding his conclusion that the Act did not affect “Indians *qua* Indians”: “it must be recognized that the *Wildlife Act* is a provincial law of general application affecting Indians not *qua* Indians but rather as inhabitants of the province. It follows that the Act can be applicable to Indians pursuant to the provisions of s. 88 of the *Indian Act* so long as it does not conflict with a treaty right” (*supra*, note 259 at 936).

Similarly, in *Sioui*, Lamer J. held that treaty rights prevailed over Quebec legislation without discussing whether the application of the Act affected matters at the core of native identity. *Supra*, note 12 at 1065 (“Section 88 of the *Indian Act* is designed specifically to protect the Indians from provincial legislation that might attempt to deprive them of rights protected by a treaty... If the treaty gives the Hurons the right to carry on their customs and religion in the territory of Jacques-Cartier park, the existence of a provincial statute and subordinate legislation will not ordinarily affect that right.”).

to the words “provincial laws of general application” in s. 88, and the reasoning in *Horseman* is inconsistent with it.

The confusion is exacerbated by the decision of the court in *Francis* in which Beetz J.’s approach to the meaning of “provincial laws of general application” in s. 88 was affirmed. The issue in *Francis* was whether the appellant could be convicted for a violation of the New Brunswick *Motor Vehicle Act*²⁹¹ that occurred on a reserve. The appellant argued that the charge was defective, as he could only be convicted under the *Indian Reserve Traffic Regulations*²⁹² (which simply incorporated and made applicable provincial highway traffic laws in force in a province). La Forest J., writing for the court, held that the provincial highway traffic law could apply of its own force on reserves:

I shall begin by saying that, in the absence of conflicting federal legislation, provincial motor vehicle laws of general application apply *ex proprio vigore* on Indian reserves. To hold otherwise would amount to resuscitating the “enclave” theory which was rejected by a majority of this court in *Cardinal* ... In *Kruger* ... this court held that general provincial legislation relating to hunting applies on reserves, a matter which is obviously far more closely related to the Indian way of life than driving motor vehicles. Indeed, Beetz J., speaking for the court in *Dick* ... expressly stated that provincial traffic legislation applies to Indians without touching their Indianness.²⁹³

In this way, the court continued to reject the relevance of the interjurisdictional immunity doctrine when applied to Indian reserves, and blithely found another aspect of Indian life on reserves subject to the double aspect doctrine and the concurrent operation of federal and provincial law it entails.²⁹⁴

²⁹¹R.S.N.B. 1973, c. M-17 [hereinafter *Motor Vehicle Act*].

²⁹²C.R.C. 1978, c. 959 [hereinafter *Indian Reserve Traffic Regulations*].

²⁹³*Supra*, note 100 at 1028-29.

²⁹⁴For an excellent discussion of the *Francis* case, see D. Pothier, “Developments in Constitutional Law: The 1987-88 Term” (1989) 11 Sup. Ct L. Rev. 41 at 107-110. As she points out, the contrast between *Francis* and the decision in *Bell 1988* could not be more pronounced (ironically, *Bell 1988* was decided the same day). In *Francis*, the court refused to invoke the interjurisdictional immunity doctrine to protect federal jurisdiction over Indian lands, while in *Bell 1988* it gave it a large definition to protect the core of federal jurisdiction over federal undertakings. And while Beetz J. cautioned against the casual application of the double aspect doctrine in *Bell 1988*, the court found no need in *Francis* to discuss whether there was a “real and not merely nominal” double aspect to the regulation of highway traffic on reserves. These two cases provide poignant evidence of the degree to which non-constitutional values are influencing the use of interpretive doctrines.

From the point of view of promoting autonomy for the provinces and the First Nations, the use made of the interjurisdictional immunity in *Bell 1988* and *Francis* ought to have been reversed: as I argued in Part III, reading down provincial statutes to protect exclusive federal jurisdiction over federal undertakings does not promote the autonomy of the provinces; while employing the interjurisdictional immunity doctrine to prevent provincial laws from applying on Indian reserves has everything to do with the promotion of autonomy for First Nations people.

Nevertheless, the argument remained, based on the paramountcy doctrine, that the provincial highway traffic laws were rendered inoperative on Indian reserves by virtue of the federal regulations "covering the field." Indeed, s. 88 of the *Indian Act* states that provincial laws of general application will not apply to Indians if those provincial laws "make provision for any matter for which provision is made by or under" the *Indian Act*. Since the *Indian Reserve Traffic Regulations* made provision for the matter of highway traffic on reserves, the New Brunswick *Motor Vehicle Act* could have no application to Francis or any other native person.

However, this argument was precluded by the logic of Beetz J.'s interpretation of the meaning of "provincial laws of general application" in the *Dick* case. In *Francis*, La Forest J. noted that counsel on all sides of the dispute had "rightly conceded" that s. 88 "had no direct bearing on this case":

In *Dick v. The Queen* ... this court held that s. 88 served to incorporate only those provincial laws that did not extend to Indians *ex proprio vigore*. In particular, Beetz J. expressly referred to traffic regulations as laws that applied to Indian reserves *ex proprio vigore* and as such not falling within the types of provincial laws extended to Indians by s. 88.²⁹⁵

On this reasoning, First Nations people will not benefit from the autonomist purposes of s. 88 insofar as provincial laws of general application that do not touch the "core of Indianness" are concerned. Such laws will not be subordinate to treaty rights pursuant to s. 88, nor will they be inapplicable by virtue of s. 88 to the extent that they deal with matters covered by the *Indian Act*.

S. 88 aside, there was nothing to prevent the court from invoking the paramountcy doctrine in this situation of overlapping, duplicative laws in order to render the provincial law inoperative. A classical, "covering the field," approach to paramountcy would best promote the autonomy of the First Nations by rendering inoperative any provincial law dealing with a matter covered in federal legislation. Instead, La Forest J. applied the modern, "express conflict" conception of paramountcy:

The mere fact that the federal government has adopted the provincial traffic laws does not, in my view, display a sufficient intent that it wished to cover the field exclusively. As Professor Laskin ... observed ... "It may be the better part of wisdom to require the federal Parliament to speak clearly if it seeks, as it constitutionally can demand, paramountcy for its policies."²⁹⁶

²⁹⁵*Supra*, note 100 at 1030-31.

²⁹⁶*Ibid.* at 1031. I have suggested in the discussion of *Hall* (*supra*, notes 201-208 and accompanying text) that, rather than applying a classically broad approach to the paramountcy of federal legislation passed under heads of powers other than s. 91(24), La Forest J. should have found the modern approach to paramountcy to be the better part of wisdom. On my analysis, La Forest J. is quite content to invoke differing conceptions of paramountcy, but I am suggesting that their use in *Hall* and *Francis* ought to have been reversed.

Parliament appeared to have spoken clearly when it demanded in s. 88 that a broad approach to paramountcy be applied to protect First Nations people from the application of provincial laws — provincial laws of general application cannot apply to Indians “to the extent that such laws make provision for any matter for which provision is made by or under the [Indian] Act.”

La Forest J.’s analysis in *Francis*, coupled with Beetz J.’s approach in *Dick*, leads to the following conclusions regarding paramountcy: a provincial law of general application that does not touch the “core of Indianness” will be subject to the modern, express conflict test; a provincial law of general application that touches the “core of Indianness” will be made applicable to Indians by s. 88 and also subject to the broad paramountcy of matters dealt with by the *Indian Act* prescribed by that section. On this analysis, if the courts do not move beyond a strictly legal “status and capacities” conception of the “core of Indianness,” s. 88’s autonomist approach to paramountcy is superfluous. For provincial laws that interfere with the legal rights inherent in Indian status under the *Indian Act* will likely run afoul of the modern express conflict approach to paramountcy in any case.

In sum, the Supreme Court has interpreted s. 91(24) of the *Constitution Act, 1982* and s. 88 of the *Indian Act* in a manner that frustrates the possibilities inherent in those sections to promote autonomy for First Nations people.²⁹⁷ While the interjurisdictional immunity doctrine, a broad approach to federal paramountcy, and a prohibition on federal inter-delegation absent the consent of the First Nations would all contribute to creating space in which First Nations governments could be guaranteed meaningful autonomy, these doctrines have been rejected in the context of s. 91(24). Similarly, the courts have rejected the declaratory theory of s. 88 which could have been employed to promote autonomy for the First Nations by reading the phrase “provincial laws of general application” as not including laws that have the effect of touching matters at the heart of native identity, and ensuring that all other provincial laws are subordinated to treaty rights and are suspended if they deal with matters dealt with by or under the *Indian Act*. Instead, the courts have made it possible for non-native governments to “legally surround” First Nations people by adopting the referential incorporation theory of s. 88, and by adopting a definition of “provincial laws of general application” that has the potential to undermine the autonomist purposes of s. 88. These results are all the more disappointing in light of the fact that the available doctrines — such as the interjurisdictional immunity doctrine

²⁹⁷Pothier, *supra*, note 294, reaches a similar conclusion: “The narrow approach to section 91(24) in *Francis* and earlier cases shows no hint of enabling section 91(24) to be used as such a springboard for the development of aboriginal self-government. The Court seems to be completely untouched by the fact that aboriginal self-government has been prominent on the constitutional agenda in the past few years” (*supra* at 109).

— have been employed liberally in other constitutional contexts in which their use cannot be defended in terms of democratic and federal principles.

In the last section, we saw that the classical paradigm is frequently advocated as the best means of promoting provincial autonomy. In contrast, I argued that both the modern paradigm (by extending the scope of application of provincial laws and by permitting the use of federal inter-delegation) and the classical paradigm (by confining the degree to which federal legislation is permitted to overlap with provincial heads of power) have a role to play in promoting provincial autonomy. In this section, we have seen that various aspects of the modern paradigm have been applied to the interpretation of federal jurisdiction over “Indians and lands reserved for the Indians”; as a result, First Nations people are subject to large areas of concurrent federal and provincial jurisdiction. The doctrinal techniques of the classical paradigm have a large role to play if autonomy for First Nations people is to be given its properly central place in the interpretation of the Canadian constitution.

Conclusion

An analysis of the case law interpreting the constitutional division of powers indicates that the doctrinal techniques of what I have called the classical and modern paradigms have been utilized by the courts at all stages of our constitutional history. Most scholars have associated the use of these paradigms with particular time periods and courts — the classical paradigm is frequently associated with the pre-World War II Privy Council era, and the modern paradigm with the Supreme Court of Canada’s post-war jurisprudence. I have suggested that it is more fruitful to map the use of the two paradigms by reference to differing judicial attitudes to regulation in different areas of social life. The deregulatory bias of the classical paradigm has been applied to legislation that is viewed as interfering with the operation of free markets; the judicial tolerance of the modern paradigm has been applied to legislation perceived to deal with issues of morality or social order, and have been used to override the special constitutional status of First Nations. These broad tendencies in the doctrinal structure of Canadian federalism can be traced from the early days following Confederation through to the present day.

Most Canadian scholars have been partisans of either the classical or the modern paradigm as the only appropriate approach to defining the meaning of exclusivity in the division of powers. The classical paradigm has been defended by jurists such as Jean Beetz as the best means of preserving an authentic federalism with equally autonomous provincial and federal governments. Others, such as Peter Hogg, have defended the judicial restraint inherent in the modern paradigm as the appropriate interpretive posture of an unaccountable judiciary. I have argued that the task of federal interpretation should not be approached as an either/or choice between the two paradigms. Both the classical and modern

paradigms are legitimate attempts to give real meaning to exclusivity and to the democratic principle of exhaustiveness. Each has an important role to play in promoting autonomy for the provinces and the First Nations.

Our constitutional jurisprudence is characterized by a remarkable unwillingness to recognize that there exist competing approaches to the interpretation of the division of powers. I suspect that this reticence flows in part from a reluctance to acknowledge that their use has indeed been inconsistent or "political." However, it is not an apolitical or principled position to advocate that the modern or the classical approach to exclusivity be adopted uniformly as the preferred method of interpretation of the constitutional division of powers. Such an approach does not do justice to the distinct constitutional status of the First Nations, nor to the differing constitutional positions, flowing from the rule of federal paramountcy, of the provincial and federal governments in terms of their ability to preserve their respective autonomies. I have argued that respect for the First Nations distinct constitutional status requires that the classical approach to exclusivity be applied to the interpretation of federal jurisdiction over "Indians" and "Indian lands." And I have argued that a recognition of the potential for federal dominance inherent in the federal paramountcy rule requires that the latter rule be given a narrow scope, and that a corresponding asymmetry be adopted in the interpretation of the scope of federal and provincial powers. Provincial heads of power should be "more exclusive" than federal heads of power other than s. 91(24), for the provinces, in contrast to the federal government's position vis-à-vis provincial legislation, lack the power to protect themselves from overlapping federal legislation.

It would be a mistake to believe that redirecting the manner in which the interpretive principles of Canadian federalism have been employed would in itself overcome the apparently growing divide between the "three solitudes" of the Canadian constitution. Neither Quebec nor the First Nations believe that they are full and equal partners in the Canadian Confederation, and both are seeking a fundamental restructuring of constitutional arrangements. Sweeping constitutional change appears inevitable, while at the same time, if past experience is any guide, it may be some time before the details are put in place.

Thus, there is some value in challenging the tendency in the current constitutional climate to make the mistaken assumption that all existing possibilities for constitutional accommodation have been exhausted. I have tried to show in this paper, that until the time that constitutional amendments are made, there is significant unexplored potential within the existing framework of Canadian constitutional law for promoting the autonomy of the provinces and the First Nations.
