U.S. and Canadian Federalism: Implications for International Trade Regulation

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U.S. AND CANADIAN FEDERALISM:
IMPLICATIONS FOR INTERNATIONAL TRADE REGULATION

Gregory W. Bowman*

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* Associate Professor, West Virginia University College of Law. I wish to thank Nick Covelli, Mark Drumbl, Bruce Elman, Ian Holloway, Howard Katz, and Anne Lofaso for their helpful comments on this Article, and Ronald Krotosynski for his thoughtful guidance in the initial development of this Article. Thanks are also due to Laura Stealey (J.D. 2012) and Yasmina Ghantous (J.D. 2012) for invaluable research support and to the Hodges Foundation for its support of research for this Article. Earlier versions of this Article were presented at the Southeastern Association of Law Schools (SEALS) 2010 Annual Meeting and at faculty colloquia at the West Virginia University College of Law and the George Washington University Law School. Any errors or omissions in this final Article are, of course, solely my own.
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I. INTRODUCTION

In recent decades, some of the most pressing issues in U.S. politics have concerned either international trade or federalism. On the international trade front, the North American Free Trade Agreement (“NAFTA”) was fiercely debated during and after the 1992 U.S. presidential election (who can forget Ross Perot’s prediction of a “giant sucking sound” of U.S. jobs moving south to Mexico?); the World Trade Organization (“WTO”) protests in Seattle in 1999 revealed deep-seated ambivalence about globalization; and increased trade with China has been both long desired (cheaper goods) and long feared (job loss, loss of economic power). On the federalism front, devolution of power to U.S. states has been a central tenet of Republican ideology since the 1994 federal election, and the excessive size and scope of the U.S. federal government is a core focus of the modern Tea Party movement.


4 The Republican members of the U.S. House of Representatives in the 104th Congress (1995–1997) prepared and presented their “Contract with America,” a central focus of which was reduction in the size and scope of the federal government. Republican Contract With America, U.S. HOUSE OF REPRESENTATIVES, available at http://www.house.gov/house/Contract/CONTRACT.html (“This year’s election [1994] offers the chance, after four decades of one-party control, to bring to the House a new majority that will transform the way Congress works. That historic change would be the end of government that is too big, too intrusive, and too easy with the public’s money.”). In 1995, newly minted U.S. Senate majority leader Robert Dole declared, “If I have one goal for the 104th Congress, it is this: that
In other words, federalism and international trade regulation issues are important national concerns. Such issues are also often interrelated, especially as the importance of international trade to the U.S. economy has grown in recent decades. What is surprising, however, is that federalism and international trade matters are often addressed separately, rather than as interrelated subjects. Even when they share a strong nexus, such as with the current foment about non-resident aliens (a matter of trade in services)\(^6\) and state laws concerning them,\(^7\)

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\(^5\) “We, the members of The Tea Party Patriots, are inspired by our founding documents and regard the Constitution of the United States to be the supreme law of the land. We believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent. Like the founders, we support states’ rights for those powers not expressly stated in the Constitution. As the government is of the people, by the people and for the people, in all other matters we support the personal liberty of the individual, within the rule of law.” About the Tea Party Patriots, http://www.teaparty911.com/info/locations/tea_party_patriots.html (last visited Apr. 11, 2012) [hereinafter Tea Party Mission Statement]. See also About Tea Party Patriots, TEA PARTY PATRIOTS, http://www.teapartypatriots.org/about/ (last visited Apr. 11, 2012) (setting forth the Tea Party movement's core principle of constitutionally limited government).

\(^6\) For a general discussion of this nexus, see William Thomas Worster, Conflicts Between United States Immigration Law and the General Agreement on Trade in Services: Most-Favored-Nation Obligation, 42 TEX. INT'L L.J. 55, 64 (2006).


While Alabama’s H.B. 56 has proven problematic because it has adversely affected Alabama’s economy, the federalism-related aspects of Arizona’s S.B. 1070 have remained a central bone of
or with the state procurement laws in Crosby v. National Foreign Trade Council, the discussion and analysis is typically more about foreign affairs generally than about the regulation of international trade specifically.

A closer look at the relationship between international trade regulation and federalism is therefore warranted. International trade has become a central part of international law since World War II, and the fact that international trade has grown rapidly in recent decades means that efforts to regulate (in-


11 See RICHARD A. EASTERLIN, GROWTH TRIUMPHANT: THE TWENTY-FIRST CENTURY IN HISTORICAL PERSPECTIVE 40–41 (1998) (noting rapid growth in international trade since World War II; WORLD BANK, WORLD DEVELOPMENT REPORT 1987, at 43 (1987) (“By the mid-1950s . . . the world economy entered a period of unprecedented output and trade expansion . . . .”)). U.S. and Canadian trade statistics dramatically illustrate the importance of international trade to those two countries. For example, in 1960, U.S. Gross Domestic Product (GDP), adjusted for inflation (to 2009 dollars), was US$3.815 billion, of which about 9.5% consisted of imports and exports of goods and services (the unadjusted figures were US$526.4 billion and US$49.8 billion, respectively). By 2005, U.S. GDP had grown more than three-fold to US$13,587 billion (again
cluding to liberalize) international trade are a central part of modern foreign relations (as both a means to increase national power and a way to exercise it). How, then, do states and provinces fit into this framework? International Law is largely unitary in nature, meaning that subnational units (i.e., states and provinces) are not recognized as international actors in their own right. If subnational units do act, they therefore must do so either through their country’s national governance structure, or they must act independently, with tacit consent or benign neglect by their national government. And when subnational units do take actions pertaining to international trade, what is the effect? Does federalism sometimes impede the development of coherent national policies and positions on international trade regulation? If so, could that not only prevent effective national regulation of international trade, but also hinder a country’s involvement in the development of International Law concerning international trade? What might that suggest about the role of federalism in a world increasingly

adjusted for inflation to 2009 dollars), and U.S. international trade in goods and services (also adjusted for inflation to 2009 dollars) had grown an astonishing ten-fold in volume to US$3,661.5 billion and comprised 26.9% of U.S. GDP (the unadjusted figures were US$12,368 billion and US$3,333 billion, respectively). Four short years later, in 2009 (in the midst of the global financial crisis), U.S. GDP was US$14,256 billion, and U.S. imports and exports of goods and services totaled US$3,521 billion, or 24.7% of U.S. GDP. See BUREAU OF ECON. ANALYSIS, NATIONAL ECONOMIC ACCOUNTS, http://www.bea.gov/national/nipa_web (last visited Mar. 21, 2012). The adjustment for inflation was made using the U.S. Department of Labor’s Consumer Price Index (CPI) inflation calculator, which is available online at http://data.bls.gov/cgi-bin/cpicalc.pl and http://www.bls.gov/data/inflation_calculator.htm.

Canadian international trade data for years prior to 2005 is somewhat more difficult to obtain, but in 2005 Canadian GDP (adjusted for inflation to 2009 dollars) was CDN$1,326 billion, and Canadian imports and exports of goods and services for that year totaled CDN$1,054 billion, or 79% of Canadian GDP (the unadjusted figures were CDN$1,240 billion and CDN$985 billion, respectively). By 2009 (in the midst of the global financial crisis), Canadian GDP had increased to CDN$1,368 billion, and Canadian imports and exports of goods and services totaled CDN$900.5 billion, or 65.8% of Canadian GDP. See Gross Domestic Product, at Basic Prices, by Industry, STATISTICS CAN., http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ41-eng.htm (last visited Apr. 8, 2012); Canada’s Balance of International Payments (Current Account), STATISTICS CAN., http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econo1-eng.htm (last visited Apr. 8, 2012). The 2005 and 2009 figures in the latter table are chained 2002 (inflation-adjusted) figures that have been un-chained here using Statistics Canada’s CPI indices for 2005 and 2009. See The Consumer Price Index for Canada tbl.5, STATISTICS CAN., http://www.statcan.gc.ca/pub/62-001-x/2010005/040-eng.htm (last visited Apr. 8, 2012).

David Baldwin conceptually classifies “economic techniques” as a subset of statecraft generally. See DAVID A. BALDWIN, ECONOMIC STATECRAFT 15–16 (1985). The upshot is that as international trade levels have increased in the post-World War II era, international trade has become ever more central to foreign relations.

The term “subnational” is sometimes used as well, and in a sense that term is more accurate, given that a country (or state, in International Law parlance) is not the same thing as a “nation.” This Article, however, will use the term “subnational” to avoid confusion between U.S. states and states at the international level.

See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”).
characterized by high levels of international trade and economic interdependence?

These are important questions. The purpose of this Article, therefore, is to consider more fully the relationship between the regulation of international trade and federalism. While the subject could be addressed from a number of perspectives, this Article will focus on two. First, this Article will compare U.S. federalism and Canadian federalism, in order to better appreciate how differences between the two systems—which share common colonial origins—affect these countries’ regulation of international trade. Second, this Article will examine U.S. and Canadian federalism through the lens of traditional regional trade theory. Both approaches offer useful insights.

With respect to the first perspective, a comparative analysis of U.S. and Canadian federalism demonstrates that despite their common colonial origins, the U.S. and Canadian federal systems of government are characterized by significant differences in form and effect regarding their regulation of international trade. In the United States, federal power over international trade matters is presumptive, although not absolute, and it extends to activities that are intrastate in nature. In Canada, by contrast, while the federal government holds the authority to make international trade decisions, the federal government’s implementation and enforcement of these decisions is far more restrained by provincial authority over intra-provincial matters. In other words, the Canadian federal government has much less ability to preempt provincial actions or laws in the international trade arena, and this has resulted in a far different approach in Canada to the regulation of international trade.

With respect to the second perspective, regional trade agreements and federal systems of government share important similarities that make the application of regional trade theory to national federal systems a useful exercise. Regional trade agreements are, by definition, concerned with the regulation of cross-border trade. Also, and more importantly, both federal systems and regional trade agreements consist of separate political units that have been combined into a larger whole, and both are characterized by decisions about the allocation of decision-making power between a lower level (the separate political units that comprise the federal system or the regional trade agreement) and a higher level (the federal government or some sort of regional trade agreement authority, such as the European Commission within the European Union). In some regional trade agreements or organizations there actually may be little or no “higher level” authority, and the agreement may be largely or entirely hori-

zontal between the countries involved— but that too is a decision about the allocation of power.

Thus, in a very basic and important sense, the degree of allocation (and degree of retention) of sovereignty is the central difference between federal systems of government—in which there is a significant ceding of sovereignty from the lower level to the higher level—and regional trade agreements—in which typically there is far less (and perhaps no) sovereignty ceded. In light of this commonality, application of regional trade theory to the federal structures of government in Canada and the United States yields interesting insights into how these two countries regulate their international trade, and also suggests how differences between U.S. and Canadian federalism might affect these countries’ abilities to both effectively regulate their own international trade and to influence the future development of international trade law at the multilateral level. In other words, regional trade theory can help us not only explain the differences between U.S. and Canadian federalism and international trade regulation, but also predict what difficulties each country may face in formulating unified positions on international trade matters and advancing its national interests within the multilateral trade community.

This Article is organized as follows. Part II sets the definitional stage by explaining what is meant in this Article by the term “international trade regulation.” The term is too often undefined, which can hinder meaningful analysis. Part III places the discussion of modern federalism and international trade in historical context by considering Baron de Montesquieu’s remarks about federalism and international trade in his seminal work, The Spirit of Laws. Montes-
quieu’s work profoundly influenced the drafters of the U.S. Constitution and the resulting U.S. government’s federal structure, and his thinking on the promotion of peace through trade has become a core tenet of international trade regulation in the post-World War II era. Part IV discusses the federal structures of government in the U.S. and Canada and considers how international trade regulatory powers are allocated in each country between the federal (national) government and subnational governments (those of the U.S. states and Canadian provinces). Part V then provides an overview of certain aspects of regional trade theory that are relevant to this Article and applies these theoretical features to the relationships between the U.S. federal government and U.S. states and between the Canadian federal government and Canadian provinces. Part VI offers concluding observations.

II. “INTERNATIONAL TRADE REGULATION” DEFINED

In order to meaningfully discuss international trade regulation in Canada and the United States (or anywhere else, for that matter), it is important to first define what is meant by the term “international trade regulation.” Perhaps surprisingly, this definitional step is too often skipped in international trade literature, possibly because the term “international trade regulation” is seemingly self-defining. Yet ambiguity lurks beneath such facial clarity. On the one hand, the term is sometimes used as a synonym for “international economic law”—that is, those multilateral (primarily WTO) legal rules concerning cross-border trade in products, services, and capital. On the other hand, the term “international trade regulation” is also used to describe any and all domestic efforts to regulate cross-border trade, be they steps to implement multilateral rules, set up regional trade agreements or bilateral investment treaties, or take some unilateral action to regulate cross-border trade (such as unilateral trade sanctions). In still other cases, the term “international trade law” is used broadly to refer to any and all governmental efforts to regulate or govern cross-border trade, whether multilateral, regional, or unilateral in scope.

Clearly, some tighter definitional focus is beneficial. Because this Article concerns the legal architecture and policy aims of U.S. and Canadian cross-border trade, the term “international trade regulation” is defined herein as governmental activity to develop and implement the legal rules and policy goals for

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20 See infra text accompanying notes 34–36.
21 See KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION: READING, CASES, NOTES AND PROBLEMS, at xxiii (2008). It is also worth noting, for readers less familiar with the subject of international trade regulation, that “international economic law” is not the same thing as “international economics.” ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 1–8 (2d ed. 2008).
22 LOWENFELD, supra note 21, at 1–8.
cross-border trade. This definition is similar to the definition of “international trade law” set forth above, but it is also broader, because it also embraces the formulation of policy.

Similarly, the term “international trade regulatory power” is defined for purposes of this Article as the scope and allocation of authority to regulate cross-border trade. This authority is best thought of as a subset of each country’s foreign affairs power. Indeed, thinking of international trade regulation as a subset of foreign affairs helps clarify how international trade fits into each country’s brand of federalism for two reasons. First, international trade can be both the means through which foreign policy goals are achieved, as well as the foreign policy goals themselves. Second, in other instances international trade may serve only as the means for implementing other foreign policy goals. This is a distinction that is not always made in international trade law literature, and in the context of federalism it is an important distinction to bear in mind.

The first point is well-illustrated by NAFTA. NAFTA was intended to promote greater U.S., Canadian, and Mexican economic prosperity, and it was generally considered to be the end goal in and of itself. The second point—international trade regulation as a means or tool of foreign policy, not an end—is well-illustrated by efforts of the George W. Bush Administration to establish a Middle East Free Trade Area (“MEFTA”) with various countries in that region—many of them quite small. The primary purpose of MEFTA was not to promote U.S. economic growth by establishing deeper integrative ties with relatively small economies in the Middle East; rather, the purpose of MEFTA was to foster support in that region for U.S. foreign policy and economic goals.


25 Ranko Shiraki Oliver, In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact On Mexican Immigration into the United States, 10 HARV. LATINO L. REV. 53, 57–58 (2007) (“The signatories hoped that, over time, the regional economic integration established by NAFTA would create a market similar to that of the European Union and the European Free Trade Association combined, and that it would permit the economies of the three countries to work together with the goal of increasing international competitiveness, employment, and income throughout the region.”). Specifically, the NAFTA states, “The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: STRENGTHEN the special bonds of friendship and cooperation among their nations; CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation.” NAFTA, supra note 24, at 297.

Von Clauswitz famously stated that war is diplomacy by other means; we can also observe (as noted in the Introduction above) that trade is diplomacy by other means. And given the importance of international trade to the U.S. and Canadian economies—in 2009, for example, imports and exports of goods and services represented approximately 25% of U.S. GDP and 72% of Canadian GDP—international trade regulation is a centrally important part of U.S. and Canadian economic and foreign policy activities.

III. MONTESQUIEU, FEDERALISM, AND INTERNATIONAL TRADE

International trade issues and questions concerning federalism are by no means new subjects. Charles de Secondat, Baron de Montesquieu, addressed both topics in 1748’s *The Spirit of Laws* (“De l’esprit des lois”), but he did not explore the links between the two. Instead, Montesquieu separately discussed the benefits of federalism and the promotion of peace through international trade. On the subject of federalism, Montesquieu concluded, in Book IX of *The Spirit of Laws*, that a federal republic—a “society of societies” —was a desirable and viable means to balance local (subnational) interests in good governance with national interests of self defense. This thought deeply influenced the American founding fathers and, by extension, the founding fathers of Can-

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28 In 2009, U.S. GDP was US$14,256 billion, and U.S. imports and exports of goods and services totaled US$3,521 billion. See BUREAU OF ECON. ANALYSIS, supra note 11.

29 In 2009, Canadian GDP was CDNS1,368 billion, and Canadian imports and exports of goods and services totaled CDNS900.5 billion. See Gross Domestic Product, at Basic Prices, by Industry, supra note 11; Canada’s Balance of International Payments (Current Account), supra note 11. The figures in the latter table are chained 2002 (inflation-adjusted) figures that have been un-chained here using Statistics Canada’s CPI index. See The Consumer Price Index for Canada, supra note 11.


31 Id. at 131. The original French “une société de sociétés” was first translated into English in 1750 by translator Thomas Nugent as an “assemblage of societies.” See BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. IX (Thomas Nugent trans., Cosimo Classics 2011).

32 THE FEDERALIST NO. 9 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“The definition of a CONFEDERATE REPUBLIC seems simply to be ‘an assemblage of societies,’ or an association of two or more states into one state.”); Matthew P. Bergman, Montesquieu’s Theory of Government and the Framing of the American Constitution, 18 PEPP. L. REV. 1, 31–32 (1990) (“What is significant here is that Madison envisioned the federal system as an ideological confederation; a unity of ideas. Federalism is based on a common principle shared among the states. By urging citizens to adopt the proposed Constitution, Madison urged them to accept certain principles of republican governance and acknowledge certain socio-cultural uniformity amidst their disparate state interests. Thus, while states were free to differ over the implementation of republican government, the principle of republican government, as described by Montesquieu, provided that the unitary whole be greater than the sum of the disparate parts.”). For a careful application of how
With respect to international trade, Montesquieu famously stated, in Book XX of *The Spirit of Laws*, that international trade can promote peace between countries—a notion that remains highly prevalent today and serves as a normative core of the global trading system and its manifold efforts at trade liberalization.

His theory was specifically applied, see Scott D. Gerber, *The Court, the Constitution and the History of Ideas*, 61 Vand. L. Rev. 1067, 1109–12 (2008).


Montesquieu, *supra* note 30, at bk. XX, ch. 2 (“The natural effect of commerce is to bring peace. Two nations that negotiate between themselves become reciprocally dependent, if one has an interest in buying and the other in selling. And all unions are based on mutual needs.”). As Howse has observed, Montesquieu drew a distinction between “economic” trade, which could lead to beneficial gains from trade and an interdependency that could promote peace, and “luxury” trade, which he viewed as not beneficial and leading to instability and aggression. Howse, *supra* note 19, at 9–13. A discussion of this normative distinction, while interesting, is beyond the scope of this Article.

See Marrakesh Agreement, *supra* note 17 (“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], available at [http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”).

This ideal appears in statements made at the national level as well. See, e.g., *National Security Strategy*, [8–9, 28–29 (2010), available at](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) “[A] growing and open global economy serves as a source of opportunity for the American people and a source of strength for the United States. This new foundation must underpin and sustain an international economic system that is critical to both our prosperity and to the peace and security of the world.”; [*The National Security Strategy of the United States of America* 4, 32–33 (2006), available at](http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/) (“America’s national interests and moral values drive us in the same direction: to assist the world’s poor citizens and least developed nations and help integrate them into the global economy. . . . Development reinforces diplomacy and defense, reducing long-term threats to our national security by helping
The liberalization of international trade was not a signature issue of Montesquieu’s era; indeed, it did not truly come into vogue until about sixty years ago at the dawn of the GATT-WTO era. So it is no surprise that Montesquieu was silent on that matter. Yet if we link Montesquieu’s two points about federalism and international trade and consider them in the context of a world characterized by international trade liberalization, several interesting and highly relevant questions come into focus. And it is particularly appropriate to address these questions in the context of U.S. and Canadian federalism, in light of Montesquieu’s profound influence on these countries’ federal structures.

An important initial question is whether it is possible to develop a taxonomy of international trade matters that remain solely (or at least primarily) of national concern, versus those that are of significant local concern. Or to state matters differently, the question is whether any factual distinction between local and national interests in international trade matters is (largely or wholly) a false dichotomy.

Can a bright-line test based on form be used to draw an accurate factual distinction between “national level” and “local level” activity? That is, is an activity clearly “national level” activity if it relates in some way to cross-border activity? Conversely, is an activity clearly “local level” activity if it pertains in some way to local concerns? Or can some sort of “substantial impact” test be employed—i.e., an activity can be considered a “national level” matter if it has a substantial impact on national concerns, or be considered a “local level” activity if it has a substantial impact on local concerns? Or do such distinctions break down because so many activities have substantial national and local dimensions to build stable, prosperous, and peaceful societies.”

36 See Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 5–6 (2d ed. 1989) (“The postwar design for international trade policy was animated by a single-minded concern to avoid repeating the disastrous errors of the 1920s and 1930s. . . . The first lesson, of course, was the conclusion that the policy of trade restriction and discrimination had once and for all been proven wrong.”).

37 The substantial impact test was a judicial test used by U.S. courts, for a time, to determine the procedural adequacy of certain federal agency actions. The essence of the substantial impact test was that when an agency took a particular action (such as implementing a policy, procedure or rule of some sort), it had to follow certain procedural requirements—namely, “notice and comment” rulemaking—if the action in question would have a “substantial impact” on affected parties. This of course was not a terribly bright-line test, and courts ceased using it after the U.S. Supreme Court’s decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), because the test was seen as adding requirements for agency informal rulemaking beyond those authorized by Congress. See generally William Funk, A Primer on Nonlegislative Rules, 53 ADMIN. L. REV. 1321, 1322–23 (2001).

The point here is that the substantial impact test was an exercise in line-drawing based on impact, not on form, and that a similar approach could be employed in attempting to distinguish between domestic and international matters.
sions? Moreover, even if such distinctions can be made on a static basis (i.e., at a given point in time), do the distinctions change dynamically over time—and if they do, is the rate of change so rapid as to render the exercise largely futile?

It is my view, at least for developed countries that are heavily involved in international trade, that any efforts at drawing clear factual distinctions between local and national concerns pertaining to international trade will not be terribly fruitful (in both static and dynamic terms), and that the local-national dichotomy is an increasingly false one. As the volume of international trade in the U.S. and Canadian economies continues to grow, any domestic-international distinction promises to become ever more factually arbitrary, and ultimately unworkable.

The fact that factual distinctions cannot be readily made, however, does not mean that policy choices cannot be made regarding the allocation of international trade regulatory power within a country. There would seem to be three primary policy choices for allocating international trade regulatory power within a country: 39

38 This observation also jibes quite well with academic discussion of the domestic-foreign distinction set forth by the U.S. Supreme Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In that famous case, Justice Sutherland engaged in historical analysis to conclude that the federal power over international affairs (which in the context of that case concerned international trade regulation in the form of a U.S. export embargo) descended directly to the federal government from the British Crown, and thus was extra-constitutional. Id. at 316–17.


The great irony of Curtiss-Wright is that even its seemingly bright-line distinction between domestic and foreign matters was not really that bright-line at all: the export sale in question was a sale by a domestic U.S. party, Curtiss Wright Export Corp. How the Court characterized that transaction (domestic or foreign) essentially affected the outcome of the case. Cf. Jack Goldsmith, Statutory Foreign Affairs Preemption, 2000 Sup. Ct. Rev. 175 (2000) (discussing how characterization of issues as state law matters (e.g., family law) versus federal law (e.g., immigration) affects what law applies and the outcome of the case); see also Curtis A. Bradley & Jack L. Goldsmith, The Abiding Relevance of Federalism to U.S. Foreign Relations, 19 Am. J. Int’l L. 675 (1995) (“Conventional wisdom tells us that [the United States’] federal structure is irrelevant to the national Government’s exercise of its foreign relations powers.”).

39 That is, if this dichotomy is fully false, a country has three choices regarding the allocation of this power—whereas if the dichotomy is partly false, these three choices apply to those areas of governance for which a domestic-versus-international distinction cannot be made.
• **Under the first option**, all international trade-related matters are considered *national* matters, and the deeper penetration of international trade into the daily lives of local residents acts to constrain or eliminate subnational government power over international trade matters—even when the effect of international trade is felt locally (which, I believe, it almost always is).

• **Under the second option**, all international trade matters are considered *local* matters, a result that acts to significantly constrain federal government power to regulate international trade in a coherent way.

• **Under the third option**, power over international trade matters is *shared* between federal and subnational governments, and thus some measure of consensus is required to regulate international trade. Such a need for consensus might give subnational units more power over international trade activities that affect them, but also might constrain national regulation of international trade in significant ways.

The first two options do look very much like the first two methods considered above for factually taxonomizing “national level” versus “local level” activity. That is because they indeed are similar. The point made here is that even if we cannot draw clear factual distinctions between “national level” activity and “local level” activity, these approaches could be used as policy choices for allocating the international trade regulatory power between the federal and subnational levels.

This sort of thinking about international trade and federalism is not merely a hypothetical thought exercise: it is what countries with federal systems of government must do—whether they do it intentionally or not. In fact, it is exactly what the United States and Canada have done, and their respective answers about balancing federalism and international trade regulation have led them down quite different paths. In fact, as discussed in Part IV of this Article, U.S. federalism has trended toward the first approach (international trade as a national matter), and Canadian federalism has trended toward the third approach (power sharing). These paths were not foreordained, however—and the great irony of modern U.S. and Canadian international trade regulation is that both countries have developed international trade regulatory regimes that are significantly at odds with their original constitutional structures.

**IV. RELEVANT ASPECTS OF CANADIAN AND U.S. FEDERALISM**

As the following discussion illustrates, Canadian provinces have significantly more legal authority in international trade regulatory matters than their U.S. state counterparts. In the United States, the U.S. Constitution places re-
sponsibility for the regulation of foreign commerce, and in fact a greater comparative degree of regulatory control over domestic commerce, in the hands of the U.S. federal government. In contrast, under the Canadian constitution the Canadian provinces retain authority over “intra-provincial” matters, even when those intra-provincial matters affect or pertain to international trade.

The result is that U.S. states are far less directly involved than the Canadian provinces in the development of national policies and federal laws concerning international trade. This result is more than a little ironic. The U.S. federal system was originally intended to establish a relatively more powerful government than existed under the Articles of Confederation, but state power was still meant to be protected against federal encroachment. By contrast, the founders of the Canadian federal system sought to create a federal government that was stronger than that in the United States. That nearly the exact opposite result has come to pass has important implications for international trade regulation in the United States and Canada.

A. U.S. Federalism

1. U.S. Constitutional Structure Generally

Various provisions in the U.S. Constitution address the balance of power between the federal government and the states. Indeed, the Constitution itself was an attempt to strengthen the national government vis à vis the states, as compared to the more state-centric balance under the Articles of Confederation. The powers of the federal government are addressed in a number of provisions in the Constitution—perhaps most notably in Article VI, Clause 2 (the Supremacy Clause), which states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”

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40 This Article does not delve into the contentious originalism-versus-functionalism debate that generates so much attention in the American legal academy. Rather, the basic (and I think relatively uncontentious) point made here is that the founders were wary of overly centralized federal power and were attempting to make their new federal government “just strong enough” to work, but not so strong as to eviscerate state power.

41 The proper balance between federal and state power is currently the topic of intense political and academic debate in the United States. See Gerald A. Ashdown, Federalism’s Floor, 80 Miss. L.J. 69, 69–74 (2010) (discussing different perspectives on this balance and asserting the existence of a “judicial leveling phenomenon” that has constrained judicial efforts to limit federal power).

42 See Arthur R. Landever, Those Indispensable Articles of Confederation—Stage in Constitutionalism, Passage for the Framers, and Clue to the Nature of the Constitution, 31 Ariz. L. Rev. 79, 90 (1989) (“[O]ne cannot deny an overriding fact of the time: the Congress essentially played an advisory role and was at the mercy of the states for general implementation.”).

43 U.S. Const. art VI, cl. 2. See Gibbons v. Ogden, 22 U.S. 1 (1824). It is interesting to note that the Articles of Confederation also contained a supremacy clause. ARTICLES OF CONFEDERATION OF 1781, art. XIII, cl. 1 (“Every State shall abide by the determination of the
In addition to this general pronouncement of federal supremacy, other provisions in the U.S. Constitution allocate, or prohibit, certain powers to the federal government and to the states. In particular, Articles I and II delineate the federal power in certain respects. Congress’s stated powers in Article I include the power to collect import duties,\(^\text{44}\) which pertain to international trade and can be used as foreign policy tools (such as under U.S. trade remedy laws\(^\text{45}\)); the power “to borrow money on the credit of the United States”;\(^\text{46}\) the power “to regulate commerce with foreign nations”;\(^\text{47}\) the power to regulate immigration;\(^\text{48}\) and the power to “define and punish . . . Offences against the Law of Nations” (that is, International Law).\(^\text{49}\) Article II then enumerates certain powers of the Executive:\(^\text{50}\) Article II, Section 2 grants the president the power to make treaties (with the concurrence of two-thirds of the Senate members present) and the power to appoint ambassadors (with the advice and consent of the Senate).\(^\text{51}\) Article II, Section 3 gives the president the power to receive ambassadors,\(^\text{52}\) which has been interpreted to include the right to refuse to receive ambassadors.

\(^{44}\) U.S. Const. art. I, § 8, cl. 1.

\(^{45}\) For a discussion of U.S. trade remedy laws in a comparative context, see Bowman et al., supra note 17.

\(^{46}\) U.S. Const. art. I, § 8, cl. 2.

\(^{47}\) Id. cl. 3.

\(^{48}\) Id. cl. 4.

\(^{49}\) Id. cl. 10.

\(^{50}\) The vesting clause of Article I (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”) is, textually speaking, more limited than the vesting clause for Article II (“The executive Power shall be vested in a President of the United States of America.”). This has been the subject of considerable discussion. See, e.g., David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 177 (1997); Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 46–48 (2004). It is not the purpose of this Article to get embroiled in the long-running debate about the meaning (if any) of this difference in language. Rather, the point here is that the foreign affairs power is largely vested in the federal government, and that many of these powers are expressly listed in the U.S. Constitution.

\(^{51}\) U.S. Const. art. II, § 2.

\(^{52}\) Id. § 3.
as well as the power to not recognize foreign governments (a formidable power indeed). 53

In stark contrast to these enumerated federal powers, Article I, Section 10 addresses what the states cannot do: states are constitutionally prohibited from entering “into any Treaty, Alliance, or Confederation”; 54 from taxing imports or exports without congressional consent (although fees pertaining to inspections are permitted); 55 and from entering into any “Agreement or Compact with another State, or with a foreign Power” without congressional consent. 56 The qualifying language “without the Consent of Congress” in Clauses 2 and 3 is significant, in that it recognizes that states might play a role in the regulation of international trade, but only in a subsidiary role. U.S. Supreme Court jurisprudence further points to federal supremacy as a key purpose underlying the Compact Clause: in Virginia v. Tennessee, 57 in which the Supreme Court introduced implicit congressional consent into the State Compact equation, the Court concluded that congressional consent was only required for compacts that might "encroach upon or interfere with the just supremacy of the United States." 58

The broad counterpoint to these federal restrictions on state power is the Tenth Amendment, which states that “[i]nherent powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” 59 Numerous scholars have debated the meaning of this rather cryptic amendment, 60 which textually can be read as a

54 U.S. CONST. art. I, § 10, cl. 1.
55 Id. cl. 2.
56 Id. cl. 3.
57 148 U.S. 503 (1893).
58 Id. at 519.

Whether implicit congressional approval is possible remains a somewhat open question. The U.S. Supreme Court’s decision in Virginia v. Tennessee applied implicit consent reasoning to an interstate compact. Most commentators have assumed the same logic applies to state compacts that cross national boundaries, but there is room for debate. See Duncan B. Hollis, Unpacking the Compact Clause, 88 Tex. L. Rev. 741, 761–96 (2010) (discussing the debate and arguing that foreign state compacts should be analyzed differently than interstate compacts for implicit consent purposes); Sonya F. Palay, Comment, Muddy Waters: Congressional Consent and the Great Lakes–St. Lawrence River Basin Water Resources Compact, 36 Hastings Const. L.Q. 717, 734–36 (2009) (arguing that the Great Lakes Compact, which concerns trans-boundary matters, has been implicitly consented to by Congress via legislation).
59 U.S. CONST. amend. X.
broad savings clause in favor of state power. In recent history, of course, it has not worked quite that way: Supreme Court jurisprudence since the 1930s has substantially expanded the power “delegated to the United States” and concomitantly reduced the powers reserved to the states.\textsuperscript{61} Even without this broad expansion, however, the Constitution’s express delegation of the foreign relations power to the federal government, combined with the prohibitions against state involvement in foreign affairs, strongly indicates that the foreign affairs power (and thus the power to regulate international trade) rests at the federal level.\textsuperscript{62} The possibility that the federal government might exercise its foreign affairs power via treaty, even beyond Congress’s legislative powers, further underscores this view.\textsuperscript{63}

All in all, then, the U.S. Constitution clearly envisages an allocation of certain powers to the federal government and certain other powers to the states, and it envisages the power to regulate international trade as resting largely at the federal level. Stated differently, the Constitution establishes a division of powers between the federal and state levels. How the line should be drawn between federal/international concerns and state concerns heavily depends on preemption doctrine, which is discussed below.

\textsuperscript{61} See generally Boris I. Bittker, Bittker on the Regulation of Interstate and Foreign Commerce § 5.01 (1999).

\textsuperscript{62} See id. § 10.02 (discussing Congress’s broad powers to regulate foreign commerce and the Supreme Court’s pronouncements in support of that power). See also Henkin, supra note 14, at 66 (positing that the foreign commerce power “might be sufficient to support virtually any legislation that relates to foreign intercourse, i.e., to foreign relations”); Ronald D. Rotunda & John E. Nowak, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.2 (4th ed. 2007) (“The Constitution as originally framed seems . . . to recognize a virtually unlimited power of Congress over commerce with foreign nations.”).

\textsuperscript{63} See Missouri v. Holland, 252 U.S. 416 (1920). For discussion of an alternative interpretation of the treaty power, see Lawson & Seidman, supra note 50, at 5 (arguing that the treaty power “does not give the national government jurisdiction beyond its other enumerated powers”), and Gary Lawson & Guy Seidman, The Jeffersonian Treaty Clause, 2006 U. ILL. L. REV. 1, 1 (2006). It is worth noting that in Bond v. United States, 131 S. Ct. 2355 (2011), the U.S. Supreme Court held that a criminal defendant did have standing to challenge her conviction under a federal statute implementing an Article II chemical weapons treaty, on the basis that Congress had exceeded its authority under that statute in violation of the Tenth Amendment. While the issue of standing in that case hinged somewhat on whether the state in question had opposed the federal action (it had not), it is nonetheless interesting that a statute implementing a ratified treaty might be considered to fall within the scope of the Tenth Amendment—that is, perhaps outside the powers of Congress—in contravention to Missouri v. Holland, which also concerned legislation enacted by Congress to implement a ratified treaty. See Holland, 252 U.S. at 430–31.
2. Preemption Generally

Under the U.S. Constitution, states have an inherent right to regulate their “internal commerce,” but they have no power to regulate interstate or foreign commerce where such regulation would amount to “a direct and substantial interference” with federal law. With respect to foreign affairs, the U.S. Supreme Court has stated that “[w]hen a State enters the Union, it surrenders certain sovereign prerogatives. . . . [and, for example,] cannot negotiate . . . [a] treaty with China or India.”

Federal preemption of state law can take various forms, and the case law on preemption is not exactly a model of clarity. Over time, however, a taxonomy of federal preemption has been developed that includes several primary types of federal preemption: “express” preemption, under which a federal law expressly overrides state law; “field” preemption, under which the federal government’s “clear and manifest intent” results in its “occupy[ing] the field” to the exclusion of state law; “conflict” preemption, under which a state law is preempted if compliance with it would require violation of the (preempting) federal law; and “obstacle” preemption, under which federal law preempts state law because the state law stands in the way of the “full objectives and purposes of Congress.” These types of federal preemption can occur not only via federal statute, but also through federal regulations that implement these federal statutes—an outcome that is a logical effect of Congress’s broad powers of delegation under the non-delegation doctrine. Presidential Executive Agreements (which are common in U.S. international trade regulatory activity) also can be the basis for federal preemption of state law, both on the basis of congressional delegations of authority to the president and as an exercise of the president’s own Article II executive powers.

With respect to the Foreign Commerce Clause (Article I, Section 8 of the U.S. Constitution), that clause has been interpreted to include “dormant” restrictions on state law, in generally the same manner as the dormant Commerce Clause—that is, “self-executing limitations” that prevent state action,

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67 See Funk, supra note 66, at 1234.

even absent any direct action by Congress.\footnote{Brannon P. Denning & Jack H. McCall, International Decisions: Crosby v. National Foreign Trade Council, 94 AM. J. INT'L L. 750, 751 (2000).} The preemptive scope of the Foreign Commerce Clause is arguably even broader than its domestic counterpart, because when a commercial activity has a foreign dimension to it, this may effectively pull the activity into the category of “foreign commerce,” regardless of how much domestic (or indeed intrastate) impact the activity may have. The same is not as clearly true for domestic commerce governed by the Commerce Clause; in fact, recent U.S. Supreme Court jurisprudence has more narrowly interpreted what qualifies as domestic “interstate commerce” under the Commerce Clause.\footnote{See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (invalidating the federal Violence Against Women Act civil remedy provisions on Commerce Clause and Fourteenth Amendment grounds); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the federal Gun-Free Zones Act, which criminalized firearm possession in school zones, on Commerce Clause grounds). For general discussion, see Lash, supra note 60, at 165–75 (concerning the Rehnquist Court’s “Federalism Revolution” and the Tenth Amendment) and Garrick B. Pursley, Federalism Compatibilists, 89 TEX. L. REV. 1365, 1388–90 (2011) (reviewing ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009)) (discussing Commerce Clause jurisprudence of the Rehnquist Court).}

3. Preemption, Foreign Commerce, and Foreign Affairs

When the aforementioned statement regarding state surrender of sovereignty over foreign affairs\footnote{See supra text accompanying note 61.} is combined with the expansive nature of the Foreign Commerce Clause, as well as with concern over foreign affairs (and remember that I am classifying international trade regulation as a subset of foreign affairs), it becomes clear that in the United States, power over foreign policy and foreign commerce-related matters is heavily weighted in favor of the federal government.

Perhaps the zenith of federal preemptive power in foreign affairs was Zschernig v. Miller,\footnote{389 U.S. 429 (1968).} which was decided at the height of the Cold War. In that case, the U.S. Supreme Court struck down an Oregon state law that prohibited non-resident aliens from inheriting property unless certain conditions were satisfied—including that the inheritance would not be subject to confiscation abroad.\footnote{Id. at 431–32 (majority opinion).} That Oregon statute was clearly aimed at restricting inheritance by residents of Communist countries (the non-resident aliens in question were East German citizens). The Court concluded that because the statute in question “affect[ed] international relations in a persistent and subtle way” and directly affected U.S. foreign relations,\footnote{Id. at 440–41.} it was preempted.\footnote{Id. at 440–41.}
An interesting aspect of Zschernig is that the U.S. Department of State asserted that the Oregon statute in question did not interfere with U.S. foreign policy, and yet the Supreme Court still concluded otherwise on the basis of broad foreign policy considerations. In other words, the Court exercised the power to make this determination, and did not leave that foreign policy determination to the Executive Branch. In other words, Zschernig was decided on the basis of constitutional structure, i.e., on the basis of federal supremacy in foreign relations and policy, even in the absence of any express federal action to the contrary.

In the years following Zschernig, that decision came to be regarded as a relic of its time. Louis Henkin characterized Zschernig as “a unique statement” and “a judicial reaction to a state’s contribution to the Cold War,” and in the ensuing years the Court appeared increasingly reluctant to invoke Zschernig’s dormant foreign affairs preemption reasoning. In fact, a key feature of the U.S. Supreme Court’s decision in Crosby v. National Foreign Trade Council in

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75 Id. at 432. See also id. at 443 (Stewart, J., concurring) (characterizing the state law as improperly “launch[ing] the State upon a prohibited voyage into a domain of exclusively federal competence”).

76 Specifically, the Zschernig Court noted that “[i]n its brief amicus curiae, the Department of Justice states that: ‘The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States’ conduct of foreign relations.’” Id. at 434 (majority opinion). However, the Zschernig Court also concluded that “[i]t seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation’s foreign policy. . . . Even in absence of a treaty, a State’s policy may disturb foreign relations.” Id. at 440–41 (citations omitted).


77 Justice Harlan’s concurrence in Zschernig, however, did rest on such reasoning: Justice Harlan asserted that the state law in question was preempted by a 1923 federal treaty with Germany and that a broader, foreign affairs-based approach was not necessary. Zschernig, 389 U.S. at 442–44 (Harlan, J. concurring).

78 Henkin, supra note 14, at 165.


80 530 U.S. 363 (2000). In Crosby, the Court found that the state of Massachusetts’ Burma statute ran afoul of the U.S. Constitution’s Supremacy Clause in three ways. First, the act interfered with the authority delegated by Congress to the president to decide on the implementation and scope of sanctions against Burma. Id. at 376. Second, the act interfered with Congress’s decision to limit economic sanctions against Burma’s government to a relatively narrow range of options. Id. at 378–81. Specifically, the federal sanctions against Burma were primarily to be limited to new investment activities, whereas the Massachusetts act imposed a secondary boycott on a wider range of activity (that is, a boycott not just directly on Burma, but also on companies doing business with Burma). Third, the act was “at odds with the President’s intended authority to speak for the United States among the world’s nations in developing a ‘multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.’” Id. at 380.
2000 was the narrowness of the Court’s holding: the *Crosby* decision was based on a conflict preemption rationale, as opposed to following the broader preemption analyses of the lower courts in that case. Given that *Crosby* concerned a Massachusetts state law that crossed into international trade sanctions territory—the law in question imposed trade sanctions on Burma (now Myanmar)—it is quite notable that the Court consciously struck such a narrow pose. More recently, in *American Insurance Association v. Garamendi*, the Court also suggested that “[statutory] field preemption might be the appropriate [preemption] doctrine” to apply in foreign affairs cases.

Despite this trend, broad foreign affairs preemption is by no means dead. It was, for example, discussed and relied on by the U.S. Court of Appeals for the Ninth Circuit in *Von Saher v. Norton Simon Museum of Art at Pasadena*. In that case, a California statute provided a state cause of action for persons seeking recovery of Holocaust-era artwork stolen by the Nazis and currently in the possession of museums and galleries. Despite the laudable goal of that statute—there certainly was no federal statute or regulation directly in favor of precluding claims for stolen Nazi goods—the Ninth Circuit held the statute unconstitutional on foreign affairs preemption grounds. Citing *Zschernig* and the Ninth Circuit’s 2003 decision in *Deutsch v. Turner Corp.* the *Von Saher* court stated that “[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers.”

U.S. jurisprudence on preemption and foreign affairs thus shows that the U.S. federal preemption power is substantial, although not limitless, and that a central issue is whether the foreign affairs power is implicated. Moreover,
while most of the time preemption has been found (and likely will continue to be found) where a state law is in conflict with a particular federal law or action, the possibility does remain that a state law will be preempted on raw federal foreign affairs power grounds, as was the case in *Zschernig*.

4. Implications for U.S. International Trade Regulation

There are several basic international trade regulation consequences that follow from the current state of U.S. federal preemption doctrine. First, U.S. state activities that directly or indirectly affect U.S. international trade likely will be preempted if they infringe on matters of significant federal concern. The converse is also true: state activities that affect international trade nonetheless may be permitted (or at least not be objected to), provided that these state activities are not seen as infringing on or conflicting with matters of significant federal concern. In other words, state activity that is considered ancillary to federal concerns might be permitted, even if the state activity seemingly is in direct contravention of federal power, but state activity that centrally affects federal concerns generally will not be permitted, even if the activity is seemingly far removed from international trade regulation per se.

For example, U.S. states do engage regularly in activities that directly concern and affect international trade—such as trade missions and trans-border agreements of various types. As discussed above, under the Compact Clause, states may not enter into compacts with foreign powers without the consent of Congress—and yet despite this prohibition, some trans-border agreements or compacts entered into by states have not received express congressional consent. The point is that these overt trans-border state activities have not raised significant federal concern or ire, and in some cases may be considered to have received implicit congressional consent. By contrast, some U.S. state laws that have only indirectly pertained to international trade regulation have been found to infringe impermissibly upon the foreign policy power of the U.S. government—and efforts by U.S. states to directly influence the course and

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88 Denning & McCall, supra note 69, at 751. Henkin makes the same basic point in the narrower context of state compacts. *Henkin, supra* note 14, at 155.

89 Hollis, *supra* note 58, at 749.

90 See *id.* at 761; Palay, *supra* note 58, at 734–36 (concerning implicit congressional approval of the Great Lakes–St. Lawrence River Basin Water Resources Compact).

91 See *supra* text accompanying notes 54–58.
scope of U.S. national policies and federal laws concerning international trade regulation have been generally unsuccessful.\(^92\)

The second consequence is that the federal government generally possesses the power to preempt state action if it so chooses. That is, the power to decide what is ancillary to foreign affairs and what is not ultimately rests somewhere within the federal government—either with Congress via statute; with the Executive Branch pursuant to constitutional authority delegated to the executive by Congress or executive action pursuant to the Constitution; with the Judicial Branch via litigation;\(^93\) or with the president and Senate via treaty.\(^94\) In the case of questions of preemption resolved by the judicial branch via litigation, it is also possible that the trump card of federal legislation could be used to overcome the result (at least prospectively) if Congress does not like the litigated outcome.\(^95\)

The third consequence follows from the first two, and it is central to a comparative analysis of U.S. federalism to Canadian federalism: despite the aggregation of international trade regulatory power at the federal level, U.S. states are not entirely powerless in the international trade arena. That is, while states have little direct legal authority concerning international trade, they can and do influence U.S. international trade regulatory activity in important ways. State representatives in Congress are the ones responsible for drafting and passing federal international trade legislation, and because members of the House of Representatives and the Senate are beholden to their local constituencies by constitutional design,\(^96\) this gives states an important means to influence U.S. international trade regulatory activities.\(^97\) As the old saying, goes, “all politics is local.”\(^98\) Largely as a result of this (and also as a matter of comity), the U.S. federal government may consult with state governments (and state representa-


\(^95\) Indeed, this approach could be used both when Congress wants federal power to preempt state power and, conversely, when Congress wants state power to not be preempted.

\(^96\) See U.S. CONST. art. I, §§ 2–3; U.S. CONST. amend. XVII.

\(^97\) One might even suggest that the aggregation of power at the federal level has contributed to the contentiousness of the current political climate in the United States and the move by the political right to reduce the size of the federal government and enhance state power: if there are few other official avenues for states to express displeasure or oppose federal government actions, then the avenue of congressional debate and decision-making will take on a centrally important role.

tives in Congress) when considering particular actions and developing particular policies, and the federal government may take state interests and concerns into consideration.\textsuperscript{99}

This third consequence notwithstanding, the fact remains that U.S. states have severely limited legal power to regulate U.S. international trade. As the following discussion illustrates, this stands in significant contrast to the legal powers of Canadian provinces that pertain to the regulation of international trade.

\subsection*{B. Canadian Federalism}

\subsubsection*{1. Overview}

Canadian federalism is markedly different from U.S. federalism. Canada of course has a parliamentary system of government, and there is also the fact that Canada did not have an original “constitutional moment” like the United States did. Instead, the creation of an independent Canadian federation was a far more gradual process, and in fact Canada did not obtain full independence from Great Britain until 1982.\textsuperscript{100}

As a result of this and other factors discussed below, in Canada the scope of the federal government’s international trade regulatory powers is quite different than in the United States. In addition, the degree of Canadian provincial power generally has trended in the opposite direction as compared to U.S. state power. That is, while the Canadian federal government exercises primary authority over foreign affairs\textsuperscript{101} and interprovincial affairs, the Canadian provinces exercise significant authority in the realm of intraprovincial affairs, including when those intraprovincial affairs pertain to foreign affairs matters. Moreover, whereas the United States’ constitutional structure has evolved from a federal system of fairly disparate states into a more deeply integrated economic and political whole, Canada’s federal system has transformed from one with greater centralized federal power—even sometimes described as “quasi-federal”\textsuperscript{102}—

\textsuperscript{99} The federal government also may fortuitously take actions that comport with state desires. While that itself would not be dialogue, it would preclude contentious state-federal dialogue on the matter in question—which, in effect, would amount to tacit state consent with and support for these federal actions.


\textsuperscript{101} In Canada, the term “external affairs” is typically used in lieu of the term “foreign affairs.” This practice arose from the fact that in the British Empire, the term “foreign affairs” was reserved to the British Crown. Daniel Dupras, \textit{Can., Library of Parliament, Iss. BP-324-E, NAFTA: Implementation and the Participation of the Provinces n.3} (1993), \textit{available at} http://publications.gc.ca/Collection-R/LoPbdP/BP/bp324-e.htm. For the sake of clarity, however, this Article uses the term “foreign affairs.”

\textsuperscript{102} Watts, \textit{supra} note 15, at 772.
into one in which the provinces play a more direct and vibrant role, at the expense of centralized federal power.\(^{103}\)

The role and power of Canadian provinces is strengthened by the fact that “interprovincial” commerce in Canada (that over which the federal government clearly has regulatory power) is defined far less broadly than “interstate commerce” for U.S. Commerce Clause purposes.\(^{104}\) The result is that there is a far different delineation in Canada between what we might call “national-level activity” (that is, interprovincial activity in Canada or interstate commerce in the United States) and “subnational” (intraprovincial or intrastate) activity. The demarcation of federal versus provincial authority in Canada over international trade matters is also sharper than in the United States, and some of the powers clearly allocated to the provinces have grown in importance since the establishment of the Canadian federation in 1867.\(^{105}\) As such, it seems fair to say, at least in broad terms, that the Canadian approach bears some resemblance to the narrower conception of interstate commerce in pre-New Deal U.S. jurisprudence,\(^{106}\) in the sense that it limits federal power to regulate internal provincial activity that pertains (perhaps even significantly) to inter-provincial commerce, and that this delineation of federal and provincial powers also applies to the regulation of Canada’s foreign commerce. The following Part traces the evolution of this current state of affairs.

2. **Historical Considerations**

The original European settlement (and governance) of Canada by both France and Great Britain, and the resulting split between English-speaking Protestants and French-speaking Catholics, directly and deeply influenced the development of modern Canadian federalism. In 1840, the provinces of Upper Canada (now southern Ontario) and Lower Canada (portions of modern-day Québec, Newfoundland, and Labrador) were combined under the Act of Union, 1840, to create a new province called the Province of Canada.\(^{107}\) This new province—which like its predecessors was a colony—was formed primarily to unify the St. Lawrence region and facilitate commercial activity.\(^{108}\) Cultural tensions

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\(^{103}\) *Id.* at 772–73. Watts also discusses the impact of the fusion of federalism with a parliamentary form of government. *Id.*


\(^{105}\) See infra text accompanying notes 149–151.

\(^{106}\) For a discussion of U.S. Supreme Court pre-New Deal Commerce Clause jurisprudence (as well as the New Deal Commerce Clause jurisprudence that followed it), see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 247–59 (3d ed. 2006).


between the English/Protestant and French/Catholic populations, however, ultimately rendered this effort unworkable, and a new approach to Canadian governance was sought. During this same time period, interest in westward expansion also grew, as did the desire to develop closer commercial ties between the Province of Canada and the eastern Maritime Provinces. Concern also existed about commercial and political relations with the United States: reciprocal trade relations with the United States were scheduled to (and did) cease in 1866, which raised pressures for greater Canadian commercial development; and there was some unease about poor U.S.-British relations (as a result of the American Civil War) and the possibility of American military aggression toward Canada.

As a result of these disparate trends and pressures, in the 1860s, leading Canadian leaders sought to establish a stronger and larger Canadian federal union. In 1867, that goal was achieved via the British North America Act, 1867, which in 1982 was renamed the Constitution Act, 1867. For purposes of convenience, this Article refers to this statute as the “1867 Act.” In addition to providing for political union along federal lines, the 1867 Act also granted Canada limited independence from Great Britain. It took more than a century for Canada to attain complete and total independence: the Statute of Westminster, 1931, granted Canada independence over its foreign affairs, and full independence was achieved five decades later pursuant to the Constitution Act, 1982, which was passed in parallel by the British Parliament.

The 1867 Act thus was the initial grant of partial sovereignty to Canada, and it is centrally important to a discussion of Canada’s regulation of international trade. Facialy speaking, the 1867 Act could be read broadly as providing the Canadian federal government with “omnibus trade power” over all Canadian trade and commercial activity, and that may be how it was read at the out-

109 Hodge, supra note 33, at 611; Watts, supra note 15, at 770–71.
110 Id.
111 Id.
113 British North America Act § 3 passim.
116 Hodge, supra note 33, at 619; see also W.J. Waluchow, Democracy and the Living Tree Constitution, 59 DRAKE L. REV. 1001, 1016 (2011). For a succinct account of Canada’s gradual acquisition from the British Crown of control over Canadian foreign affairs, see DUPRAS, supra note 101, at 3.
117 Monahan, supra note 104, at 19.
In fact, the drafters of the 1867 Act (and thus the architects of Canada’s governmental structure) consciously chose the approach of stronger centralized economic regulation. They did so in part to ensure that the federal government would be strong enough to withstand the centripetal cultural forces (English/Protestant versus French/Catholic) that had rendered the Province of Canada an ultimately unworkable union. These Canadian leaders were, in fact, keenly aware that the U.S. Constitution (at the time) significantly limited the scope of U.S. federal power, and they believed that those limits had contributed to the outbreak of the American Civil War. Even 150 years later, it is easy to imagine their desire to chart a different course than their continental neighbors.

Several provisions of the 1867 Act are particularly salient. First, section 132 of the 1867 Act states that “[t]he Parliament and Government of Canada shall have all Powers necessary or Proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.” Essentially, this means that the federal government holds the foreign affairs power, to the exclusion of the provinces. Second, section 91 of the 1867 Act states that “The Regulation of Trade and Commerce” is a federal power held by the Parliament of Canada, and not by the provinces. Section 91 drives the point home further in its last line, which states that “any Matter coming within any of the Classes of Subjects enumerated in this section shall not be

The situation has been characterized by one commentator as one in which it “is very clear [per] the Canadian constitution . . . that international trade is a federal matter,” that “[t]here was no ambiguity about this,” and that the provinces never contested that state of affairs. Carl Grenier, States, Provinces, and Cross-Border International Trade, 26 CAN.-U.S. L.J. 175, 175 (2000).

The architects of the 1867 Act were led by Sir John MacDonald, Canada’s most influential politician of that age. See E. B. Biggar, ANECDOTAL LIFE OF SIR JOHN MACDONALD 92 (1891); Sir John MacDonald, 1815–1891, in V EMINENT PERSONS: BIOGRAPHIES REPRINTED FROM THE TIMES 90, 93 (1896).

Russell, supra note 100, at 23. Hodge observes that “[t]he Canadians, assessing the American system in 1864–65, were understandably distressed at what they saw as federal-state tensions run amuck,” and that in order to prevent a similar “paroxysm of state's rights, they deliberately and expressly oriented their constitution around the center, following the New Zealand model of executive control of provincial legislative capacity.” Hodge, supra note 33, at 601. Watts similarly notes that “a strong concentration of central powers” in a “highly centralized federation” was a hallmark feature of the 1867 Act, and that unlike under the U.S. Constitution, in Canada all residual power was to be held by the federal government (as opposed to states or “the people” in the United States pursuant to the Tenth Amendment to the U.S. Constitution). Watts, supra note 15, at 771.


Id. § 91(2). Specifically, Section 91 states, in pertinent part, as follows:

1. It is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—. . . .

2. The Regulation of Trade and Commerce.

Id.
deemed to come within the Class of Matters of a local or private Nature [enumerated elsewhere in the Act]." In other words, matters are either local in nature, or they are not, with no dual provincial-federal jurisdiction—and the power to regulate trade and commerce is a federal power.

Third, section 92 of the 1867 Act lists the exclusive powers held by each provincial legislature, which include, among other things, the power to make laws concerning “Property and Civil Rights in the Province.” Fourth, section 91 of the 1867 Act reserves for the federal government all powers not expressly granted to the provinces—the very opposite of the U.S. Constitution’s Tenth Amendment. In other words, only those powers listed in section 92 are provincial powers; all powers not listed are federal powers. Again, the intent was that there would not be dual provincial-federal jurisdiction—and as one commentator has aptly described it, “The whole range of legislative powers within the new Dominion [of Canada] was exhausted by the [scheme of sections 91 and 92].”

Section 91 contained a twist, however, in that it gave not only the Parliament, but also the Canadian Crown, some authority over provincial matters. Specifically, the introduction to section 91 stated (and still states) as follows:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality

123 Id. § 91.
124 Id. § 92. Specifically, Section 92 states, in pertinent part, as follows:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say— . . .

13. Property and Civil Rights in the Province.

125 Id. § 91. Sections 91 states as follows:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated . . . .

of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated . . . .

In other words, in addition to establishing a strong centralized government and placing the residual powers with the federal government, the 1867 Act also allowed the British Crown to retain not insignificant authority over the provinces, because some provinces—most notably what is now Québec—had successfully pressed for this as a means to protect their provincial interests against the new Canadian federal government. These provisions of the 1867 Act, when read in combination, point to a clear desire for a strong federal government—but they also demonstrate a clear desire by at least some provinces (most notably Québec) to protect against federal encroachment on provincial power. Further, these provisions illustrate the importance of drawing a definitional line between local matters and national matters, and they clearly show that the line was supposed to be a clear one, not blurry and plagued by overlapping federal and provincial power. As explained below, however, Canadian constitutional jurisprudence has drawn this line in a way that has led to the bifurcation of the commerce power (including the foreign commerce power) between the federal government and the provinces. This bifurcation may not have been intended, but it is now entrenched as a key feature of Canadian federalism.

The bifurcation began in 1881, when the broad commerce power of the Canadian federal government was narrowed by the decision of the Judicial Committee of the Privy Council in *Citizens Insurance Co. v. Parsons*. In that case out of Ontario, Parsons had an insurance contract for his hardware store with Citizens Insurance Co. When his store was damaged by fire, he sought to collect on his policy, but the insurance company refused, citing an exclusion clause in the contract. Parsons argued that the exclusion clause violated the terms of a provincial statute (the Ontario Fire Insurance Policy Act); the insurance company argued that this was a matter of “Trade and Commerce,” and thus

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127 1867 Act § 91 (emphasis added).
128 See, e.g., Lawrence, supra note 66, at 1260; Pollack, supra note 112, at 35.
129 Lawrence, supra note 66, at 1260–61.
130 For a more detailed historical discussion concerning the 1867 Act and the political landscape of the time, including the central role of tensions between the French-speaking and English-speaking populations of Canada in the forging of the Canadian state and constitutional structure, see Watts, supra note 15, passim.
132 Id. at 219–20.
solely within the federal government’s power—which meant that the provincial statute was *ultra vires.*

The Privy Council (an imperial court that served as Canada’s highest tribunal until 1949—a fact that illustrates the gradual transfer of power from the British Crown to Canada) decided in favor of Parsons. In doing so, the Council narrowly interpreted the federal government’s section 91(2) power to regulate “Trade and Commerce,” and broadly interpreted the provinces’ section 92(13) powers concerning “Property and Civil Rights in the Province.” Specifically, the Council opined that the federal power to regulate trade and commerce was limited to international trade, interprovincial trade, and trade that affected the entire Dominion of Canada. Intraprovincial trade and business agreements were not covered and remained under the authority of the provinces. To interpret section 91(2) broadly, the Council believed, would subsume the power of the provinces within the federal power in a way not intended under the 1867 Act.

The narrow result in *Parsons* was that the particular insurance contract at issue was considered intraprovincial commerce that was outside federal government jurisdiction. The broader (and more important) effect, however, was that the trade and commerce power in Canada became bifurcated between the federal government and the respective provincial governments—and the federal government’s power to regulate trade and commerce did not extend to matters within the provinces. Given the size and economic activity of the larger Canad-

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133 *Id.*
135 *Parsons,* 4 S.C.R. at 227–32.
136 *Id.*
137 *Id.*
138 Specifically, the Council stated:

> The words “regulation of trade and commerce,” in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of [Section 91(2)] with classes of subjects of national and general concern [in Section 91] affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring the power on the dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary . . . .

*Id.* at 257.
139 *Id.*
an provinces—in 2008, Ontario alone accounted for nearly 37% of Canadian GDP, and Québec accounted for nearly 19%—this was a significant development indeed. Parsons continues to be the leading case on point, and it is regularly cited for this proposition of Canadian constitutional law.

A little more than 50 years later, in 1937, the Privy Council further constrained Canadian federal power in the Labour Conventions case. In that case—also out of Ontario—the Canadian federal government had signed international labour conventions that pertained to, among other things, working hours, time off, and minimum wages for workers. In Canada, as in the United Kingdom, treaties are not self-executing, which means that any international agreement entered into by Canada must be implemented into Canadian domestic law by statute. The government of Canada sought to implement Canada’s obligations under the treaty via federal legislation, and Ontario objected.

In deciding in favor of Ontario, the Privy Council stated that while the power to conclude treaties and other international agreements squarely rests with the federal government, the implementation of treaties into Canadian law must comport with the constitutional divisions of power between the federal government and provinces. Specifically, the Privy Council ruled that although the Statute of Westminster (1931) had granted Canada full power over Canadian foreign affairs, the Canadian federal government nonetheless could not infringe upon the provinces’ intraprovincial powers (under section 92 of the 1867 Act) in implementing treaty obligations. Writing for the Privy Council, Lord Atkin described this division of power between the Canadian federal government and the provinces as a system of “watertight compartments.”

This view has been roundly condemned, but the Labour Conventions decision was and remains good law—although it is true that Canadian courts since the 1960s have seemed more willing to permit some “necessarily incidental” federal regulation of intraprovincial activity under schemes to regulate interprovincial or interna-

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143 COUNCIL OF EUROPE, TREATY-MAKING: EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY 93 (2001).
145 Id. at 354.
146 See, e.g., FREDERICK LEE MORTON, LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA 427 (3d ed. 2002).
147 See Monahan, supra note 104, at 24.
tional trade, as well as to permit some provincial laws despite their incidental effect on interprovincial trade.

The effect of the Labour Conventions decision, therefore, is that treaties may need to be implemented in parallel by both the Canadian federal government and various provincial governments—at least to the extent that they concern both intraprovincial and federal-level matters. Labour Conventions also means that provinces can effectively refuse to cooperate with the implementation of federal treaties—something that sounds astonishing to American readers—and that to the extent a treaty has intraprovincial effects, the federal government likely will need to seek consensus and cooperation from the various Canadian provinces.

A high profile example of this bifurcated implementation approach is NAFTA, aspects of which the provinces had to implement into provincial law in order for NAFTA to be executed in Canada. In contrast, while there were serious objections in the United States to NAFTA, including at least one constitutional challenge, the constitutional argument against NAFTA in the United States was that NAFTA was implemented via federal legislation (i.e., as a congressional-executive agreement), rather than as an Article II treaty. No serious arguments were made that U.S. states did not have to abide by the NAFTA Implementation Act because of intrastate effects.


149 Carnation Co. v. Quebec Agric. Mktg. Bd. [1968] S.C.R. 238, 254 (Can.) (“In the present case, the orders under question were not . . . directed at the regulation of interprovincial trade. . . . The most that can be said of them is that they had some effect upon the cost of doing business in Québec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.”).


151 Id. Canada has entered into a number of other free trade agreements in recent years. See Negotiations and Agreements, FOREIGN AFF. & INT’L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx (last visited Apr. 4, 2012). It is standard practice of the Canadian federal government to consult with the provinces concerning international trade agreements, so as to avoid situations in which the federal government has made commitments it cannot honor—which would be both damaging to the federal government’s reputation and perhaps a breach of Canada’s international legal obligations. See DUPRAS, supra note 101, at 4; see also infra text accompanying note 170.

152 See Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1317–23 (N.D. Ala. 1999), vacated, 242 F.3d 1300 (11th Cir. 2001).

A more recent example of the impact of Labour Conventions is the Canadian Supreme Court’s decision in Thomson v. Thomson,¹⁵⁴ which concerned a transnational child custody dispute. In Thomson, a young Scottish couple had an infant son.¹⁵⁵ After their marriage collapsed, the mother gained interim custody of the child and took the child with her to Manitoba, Canada, to visit her emigrant parents.¹⁵⁶ Once there, she decided that she (and her son) should stay there permanently.¹⁵⁷ Her actions clearly violated the Scottish court’s orders (issued before her departure from Scotland) that the father have interim access to the child and that the child remain in Scotland pending further proceedings.¹⁵⁸ Her actions also violated the terms of the Hague Convention on the Civil Aspects of International Child Abduction,¹⁵⁹ which had been signed and ratified by the Canadian federal government.¹⁶⁰ Further hearings in Scotland resulted in the father being awarded custody of the child, and he sought the child’s return.¹⁶¹

The Hague Convention in question had been implemented into Manitoban law by provincial legislation, but that provincial legislation actually expanded on the provisions of the Convention so as to promote the best interests of the child.¹⁶² In other words, it was consistent with the Convention, but went further in certain respects. The Court, therefore, had to determine whether the case should be resolved on the basis of the Convention itself, or instead on the basis of provincial law implementing the Convention in Manitoba. In holding that Manitoban law applied, the Court relied directly on the Labour Conventions case, explaining that while the Canadian federal government exercised “exclusive treaty-making powers,” the power “[was], nonetheless, limited by the constitutional division of powers” in Canada, and that per the Labour Conventions case, “‘the obligations imposed by treaty may have to be performed, if at all, by several [provincial] [l]egislatures.’”¹⁶³ The child was therefore ordered returned to Scotland in accordance with Manitoban law.¹⁶⁴ While the same result (return of the child to Scotland) most likely would have been reached under the Con-

¹⁵⁴ [1994] 3 S.C.R. 551 (Can.).
¹⁵⁵ Id. at 559.
¹⁵⁶ Id.
¹⁵⁷ Id.
¹⁵⁸ Id. at 605.
¹⁵⁹ 1983 Can. T.S. No. 35.
¹⁶¹ Id. at 561.
¹⁶² Id. at 556.
¹⁶⁴ Id. at 605. It is worth noting that the same basic result would have been reached under the Convention. Id.
vention, the point here is that even when the result was the same, and even though international child abduction can be characterized (without too much effort) as international in nature, Manitoban law was still applied under a *Labour Conventions* analysis.

3. Recent Developments

This dual role of the Canadian federal government and provincial governments has taken on greater importance in recent decades, as Canadian federal and provincial views of international trade have begun to diverge in certain respects. In the early years of post-World War II trade liberalization (up to the early 1970s), the Canadian provinces and Canadian federal government were all generally in favor of GATT efforts to liberalize international trade, and in any event the early GATT efforts focused on tariff reductions, which were clearly a federal matter. In Canada, the result was that provincial non-involvement essentially amounted to provincial consent.

With the Tokyo Round of GATT in the 1970s, however, multilateral trade liberalization efforts began to address more difficult topics such as non-tariff barriers, and no longer were the Canadian provinces necessarily in favor of all trade liberalization efforts supported by the Canadian federal government. It is important to note that this Canadian provincial concern grew over the same time period that GATT and WTO trade liberalization efforts themselves became more contentious and drawn-out. Thus, the declining consensus among Canadian provinces regarding international trade liberalization generally coincided with the declining consensus on the same topic at the international level. Since the 1970s, then, Canadian provincial governments have become more active participants in Canadian international trade regulation, and this has had a constraining effect on the Canadian federal government in the field of international trade regulation.

In recognition of these limitations on federal power, and as a means to facilitate internal consensus on Canadian international trade policy, the Canadian federal government has established various committees, such as the Joint Working Group on International Trade and the Federal/Provincial/Territorial Committee on Trade (“C-Trade”), which are tasked with soliciting and receiving input on trade policy matters from various constituencies, including the provinces, territories, municipalities, companies, trade associations, and NGOs. The-

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165 See Grenier, *supra* note 118, at 175–76; Schaefer, *Pareto Gains, supra* note 9, at 450–51.
166 Grenier, *supra* note 118, at 176.
167 Schaefer, *Pareto Gains, supra* note 9, at 450–51.
169 *Id.*
These mechanisms have been established not just to encourage consensus: they have been established because the Canadian provinces play a key legal role in the development of Canadian trade policy, and their role cannot be bypassed.\footnote{See supra discussion accompanying notes 100–170.}

4. Implications for Canadian International Trade Regulation

The results regarding Canadian international trade regulation—and the important points for purposes of this Article—are the following. First, Canadian provinces, unlike their U.S. state counterparts, exercise important legal power concerning international trade regulation, to the extent that trade has intraprovincial effects. Second, Canadian federal concerns do not trump or preempt such provincial concerns in international trade matters, as they often do in the United States. Stated differently, the exercise of line-drawing between federal and state/provincial power in Canada plays out quite differently than it does in the United States. Third, the power of Canadian provinces to regulate international trade has, if anything, increased in the decades since the \textit{Labour Conventions} decision, both because international trade has become more important to the Canadian economy (and thus has greater intraprovincial effects), and because there is now less consensus between the federal government and the provinces (and between the provinces themselves) concerning what Canadian trade policy and international trade regulation should look like. Fourth, and perhaps ironically, this expansion of Canadian provincial power has occurred over the very same time period that U.S. state power has been eroded by the growing regulatory power of the U.S. federal government. The situation in Canada, therefore, stands in significant contrast to the situation in the United States, where federal preemption of state power in foreign affairs is largely presumptive.

V. REGIONAL TRADE THEORY

The legal differences between U.S. and Canadian federalism in the area of international trade regulation are interesting in their own right, but the application of regional trade theory to U.S. and Canadian federalism highlights important broad themes about how the federal structures of these countries affect their regulation of international trade. This Part, therefore, briefly summarizes relevant aspects of regional trade theory and considers the implications thereof for U.S. and Canadian federalism.

In terms of regional trade theory, the Canadian federal union is less fully centralized—or less deeply integrated, if you will—than the U.S. federal system, in which federal power by and large trumps subnational state power whenever it chooses. This fundamental difference holds important implications for
how international trade policy and regulations are developed in the U.S. and Canada; what conclusions are reached in each country regarding which trade regulations and policies are desirable; and how rapidly and effectively those decisions can be made and implemented. That, in turn, can directly affect the ability of each country to influence the development of International Law concerning the regulation of international trade—and that, in turn, can affect how much each country might benefit from future developments in that area of International Law. The international legal order remains predominantly unitary in nature, with countries (and some international organizations) as the recognized actors—and because of this, the national process for developing and promulgating international trade regulations and policy can greatly affect (for good or for ill) the ability of a country to have a meaningful voice in the development of the international legal system’s rules for international trade. This is a matter of considerable significance for the United States and Canada, given that the U.S. economy is increasingly based on international trade, and that international trade represents a substantial majority of Canadian GDP. Furthermore, embedded in all of this are considerations of due process and democratic governance, and whether a more centralized approach to international trade regulation—one in which the federal government is less obliged to take subnational concerns into account—might subvert these principles.

A. The Basics of Regional Trade Theory

Preferential Trade Agreements (“PTAs”)—also known as “Preferential Trading Areas,” “Regional Trade Agreements,” “Regional Trade Arrangements” and other similar permutations—are preferential trading arrangements entered into by two or more countries in the interest of promoting greater eco-

172 See HENKIN, supra note 14, at 150.
173 This point remains valid regardless of how these national decisions are made. For example, Anne-Marie Slaughter, in her seminal work, NEW WORLD ORDER, argues (quite convincingly) that transnational inter-governmental networks exist—so that, for example, decisions concerning the regulation of exports and imports, or concerning the coordination or interplay of countries’ corporate securities laws, are made by respective officials in different countries who are charged with these matters and are regularly in communication with one another. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1–6 (2004). Through these “networks,” common policies, solutions and means of coordination are developed and implemented. Id.

That may be true, but the point here is that these national officials are responsible for carrying out (or at least not acting inconsistent with) their countries’ clearly established international trade policies. An export control official, for example, exercises discretion within this framework, not outside it. And to the extent that no clear national policies exist, national officials dealing with international matters either will be hamstrung into inaction, or be free to act as they choose. Under both scenarios, the ability of a country to advance its interests at the international level may be impaired: through inaction in the first scenario, and through “rowing in different directions” in the second scenario.

174 See supra Part III.
175 Portions of this Part are excerpted, in modified form, from Bowman, supra note 26.
nomic ties and/or achieving certain foreign policy goals. Traditional PTA taxonomies have focused on PTAs’ levels of internal economic integration and cooperation. The taxonomies range from less integrated PTA forms, such as free trade agreements (“FTAs”) like NAFTA—which are characterized by internal trade liberalization but no coordination of monetary policy or a common external tariff (“CET”)—to more integrated forms such as customs unions with CETs, to even more integrated common markets like the EU that feature broader elimination of internal trade barriers, to economic unions that coordinate economic policies, and perhaps even share a single currency or tightly peg their currencies (again, like the EU). The penultimate stage is complete economic integration with monetary union, and the final stage is political union as well. While there are variations in the taxonomies employed by various scholars, the main point is that PTA taxonomies are preferentialist and can progress from less integrated to more integrated forms. This preferentialist view of PTAs is so well established, in fact, that it is embodied in GATT.

B. Deepening Versus Broadening

In a recent law review article, I posited “that decisions regarding PTA formation . . . membership, and the sectoral scope of PTAs are, at their core, decisions about deepening existing economic relationships versus broadening to form new ones.” Specifically, I stated that:

PTA decisions operate within a larger framework in which each PTA decision is, ultimately, a choice between deepening a state’s existing, formal international ties to make them more fully integrative, versus broadening a state’s formal international

176 See David A. Gantz, Regional Trade Agreements: Law, Policy and Practice 5–7 (2009); Bhalia, supra note 23, at 371, 383 (defining “Preferential Trading Agreement” or “Preferential Trading Area,” as well as “Regional Trading Arrangement”).


178 Balassa, supra note 177, at 2; Robson, supra note 177, at 123–30.

179 See, e.g., Arvind Panagariya, Preferential Trade Liberalization: The Traditional Theory and New Developments, 38 J. Econ. Literature 287 (2000) (listing preferential trade arrangements, free trade areas, and customs unions); Appleyard et al., supra note 177, at 393–94.

180 See GATT, supra note 35, at art. XXIV.

181 Bowman, supra note 26, at 498.
economic ties to include new ties that are less deep, in an integrative sense.  

This distinction between deepening versus broadening at this macro-economic level is not exactly the same thing as vertical versus horizontal integration at the micro-economic level. Vertical integration concerns the coordination (and integration within a single entity or among related entities) of different stages of production; horizontal integration concerns the consolidation of companies in a single market (at the same stage of production).  

This approach helps explain important differences between European regional integration and U.S. regional trade initiatives. A primary difference between EU and U.S. regional trade/PTA efforts is that EU internal efforts have been aimed at greater political and economic integration, whereas U.S. efforts have been largely foreign policy-driven. Specifically, the overall EU trend since the 1960s (and especially since the 1980s) embraced both coterminous deepening (of internal economic and legal integration) and broadening (to include an ever-greater number of state participants). In contrast, the United States’ approach has been far less integrative. Since 1985, when the U.S. entered into its first FTA with Israel, nearly all U.S. PTA efforts have been bilateral PTAs, usually with small countries—often ones such as Morocco or Peru that offer little commercial benefit to the United States. The U.S. objectives for such PTAs have been less economically integrative and more security—or foreign policy—driven.

182 Id. at 498–99.
183 Paul J.J. Welfens & Michael Vogelsang, Concepts and Theory, in Internationalisation of European ICT Activities: Dynamics of Information and Communications Technology 6, 71 (Huub Meijers et al. eds., 2008).
C. Deepening Versus Broadening and International Trade Regulation in the United States and Canada

Viewing integration through the conceptual lens of deepening versus broadening provides an interesting lens through which to view international trade regulation in the United States and Canada. It suggests several points, which are discussed below.

1. Sovereignty, Consensus, and International Trade Regulation

It is interesting to consider how the bifurcated structure of Canadian international trade regulation has resulted in a modern governmental structure in Canada that, regarding international trade, tends to treat provinces as separate and somewhat independent sovereigns, rather than as fully subordinate units. Given that discussions of regional or multilateral trade integration are brimming with concerns over the cession of sovereignty (indeed, this is a key theme in U.S. domestic debates over international trade policy), the greater power of Canadian provincial governments means that in effect, if not intent, Canadian trade policy more closely resembles consensual negotiations among regional trading partners than it does the top-down approach in the United States, which reflects the supremacy of the U.S. federal government in foreign affairs. Concerted Canadian action in the international trade arena is broad and consensus-based; it is not centralized.

The power of provinces in Canadian international trade regulation, and thus the need for consensus, is exacerbated by some non-legal factors as well. The demographics of Canada are different than those of the United States: the Francophone population of Québec can make itself heard through Québec’s provincial government precisely because it is a large and concentrated popula-

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187 See, e.g., JEREMY RABIN, WHY SOVEREIGNTY MATTERS 34 (1998) (“Global governance, then, does not threaten to replace the American government, but it does threaten to distract and confuse and, ultimately, to weaken it.”); Claude E. Barfield, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization, 2 INT’L. L. 403, 403 (2001) (“In a world of increasing technological and economic integration, [the United States] must continue to balance and rebalance a defense of national sovereignty against grants of authority over economic and social policy to international organizations such as the WTO.”); Ronald A. Brand, Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century, 25 Hastings Int’l. & Comp. L. Rev. 279, 288–89 (2002) (“International organizations that began primarily for purposes of economic cooperation have an impact on sovereignty because they have evolved to levels of cooperation that affect political relationships. The best example is the European Union . . . .”); Kal Raustiala, Sovereignty and Multilateralism, 1 INT’L. L. 401, 402 (2000) (“This notion of sovereignty—sovereignty as formal control—is not seriously in doubt. The important question is instead a subtler one: whether the development and expansion of multilateral institutions are systematically altering our customary modes of domestic law and politics. Put differently, the question is: have we delegated away a significant part of our capacity for, and manner of, self government in the process of international cooperation?”).
tion located in an influential province.188 To the extent the Francophone population has different views on the intraprovincial aspects of international trade regulation (or any other subject, for that matter), the federal structure in Canada allows them to be heard in a muscular way. The same is not true for minority populations in the United States that are spread across various states.189 That is one reason, in fact, that civil rights advances in the United States largely took place at the federal level, and not through the states.190

By the same token, Canadian commercial interests tend to be concentrated in Ontario and Québec.191 This means that the various Canadian provinces have different economies with different dominant economic interests—and it also means that dominant economic actors in these provinces can work through provincial channels to promote or protect their interests. The result is that the provinces can play a key role in discussions about international trade policy and other matters that have intraprovincial effects, and that progress, which requires consensus, cannot be achieved without the involvement and agreement of the provincial populations and key economic actors.

In important ways, then, modern Canadian national sovereignty is less deep than modern U.S. national sovereignty. U.S. national sovereignty has deepened far beyond what the founders envisioned when they replaced the Articles of Confederation with the U.S. Constitution, and it outstrips the depth of Canadian sovereignty, at least in terms of international trade regulation. The result is that Canadian international trade regulation is far more driven by, and dependent on, consensus than U.S. activities in the area of international trade.

2. The Effectiveness of International Trade Decision-Making

The greater provincial power in Canada bodes well for bottom-up participation of various constituencies in the formulation of Canadian international trade regulatory policy. Rather than developing international trade regulations and policies and obliging the provinces to abide by these federal decisions, the Canadian federal government must obtain provincial support for any international trade regulations and policies that have an intrastate effect. As noted above, the way to do that is to seek provincial consensus.192

188 Watts, supra note 15, at 778 (“In Canada, the most significant minority group, the francophones [French-speaking Canadians] . . . are particularly strongly concentrated in one province, Québec. . . . They form [eighty] percent of that province’s population.”).
189 Id. (“A significant social difference between the United States and Canada is the degree of territorial concentration of their most significant minority groups. . . . The result of the differing patterns of territorial diffusion has been a differing dynamic in the processes for the protection and maintenance of minority rights.”).
190 Henkin, supra note 14, at 150.
191 Watts, supra note 15, at 780 (“Historically, industry and wealth have tended to be concentrated in the two large central provinces of Ontario and Québec, particularly the former.”).
192 See supra Part IV.B.
On the other hand, greater provincial power in Canada also could augment ill for future international trade regulation in Canada. Public choice theory is useful for tracking and predicting decision-making processes, and without getting into too much detail here, it is apparent that any particular province’s interests could be at odds with the greater interests of Canada as a whole. The ability of the larger provinces to effectively block changes in Canadian international trade regulation, via refusal to incorporate necessary aspects of those regulatory changes into provincial law, could mean that the current “broad” international trade regulatory structure in Canada might limit the Canadian federal government’s ability to regulate international trade effectively, and thus chart the future course of Canadian international trade. For a country that is so highly dependent on international trade for its economic well-being, that would be a serious concern.

To date, the Canadian approach has worked, in significant part because of the relatively small number of Canadian provinces (compared to fifty-plus U.S. states and territories) and the fact that most Canadian trade is with the United States (which reduces the variables that need to be considered when setting international trade policies). Past success, however, does not ensure future success. Cultural tendencies can change over time (witness the decline of consensus in modern U.S. politics), and the nature of the international trade landscape is certain to change as well. For example, Canadian trade with countries other than the United States might increase, leading the provinces to have more divergent international trade interests and concerns, and the Canadian predisposition for consensus might wane. Were those things to happen, Canada’s


194 See supra note 11 (providing Canadian government GDP and international trade statistics).

195 See Watts, supra note 15, at 786.

196 See Trade Data Online: Canadian Trade by Industry (NAICS Codes), INDUSTRY CAN., http://www.ic.gc.ca/sc_mrkts/tdst/dto/dto.php?tag (select “Canada” under “Trader,” then select “United States” under “Trading Partner,” then click the “Run Report” hyperlink). The most recent data available indicates that well over eighty percent of Canada’s international trade is with the United States.
future ability to develop and implement viable international trade policies could be seriously hindered. In other words, the very breadth that to date has encouraged greater provincial participation might turn into a serious weakness.

In contrast, developments akin to the hypothetical scenario just presented have taken place in the United States—namely, U.S. trade patterns are more diversified, and in the United States’ current political climate, compromise (which is necessary to consensus) is often characterized as weakness. Despite these developments, the U.S. federal government has been able to develop and implement international trade policies and regulatory structures with relatively little state interference or objection. This is due to the nature of U.S. federalism and preemption doctrine, which means that federal power over international trade matters extends quite deeply into state activities.

Moreover, the U.S. federal government’s ability to take international trade regulatory actions is further enhanced by the fact that U.S. international trade regulatory matters are, with notable exceptions, less visible to the American public than other issues, such as healthcare or the federal deficit. One reason for this is that international trade is a less prominent feature of the U.S. economy than of the Canadian one; as a result, local and congressional politicians may not need to respond to international trade issues in order to appease their local constituencies. Another reason is that procedural notice requirements, which apply to much U.S. federal regulatory activity (such as under the Administrative Procedure Act) are truncated or simply do not apply to international trade regulatory activities by the federal government, because these actions pertain to foreign affairs. The effect is that states are presented with a fait ac-


198 This is not to say it is not vitally important—it is. Rather, it is to say that international trade makes up a smaller percentage of the U.S. economy than of the Canadian economy. See supra text accompanying notes 28–29.


200 See, e.g., Sudanese Sanctions Regulations; Iranian Transactions Regulations, 76 Fed. Reg. 63, 197–201 (proposed Oct. 12, 2011) (to be codified at 31 C.F.R. pts. 538, 560) (stating, regarding the amendment of U.S. trade sanctions against Sudan and Iran, that “[b]ecause the amendments of [these trade sanctions programs] involve a foreign affairs function, the provisions of Executive Order 12866 of September 30, 1993 [setting forth executive branch guidelines for regulatory decision-making], and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable”); Wassenaar Arrangement 2010 Plenary Agreements Implementation: Commerce Control List, Definitions, Reports, 76 Fed. Reg. 29, 610–701 (proposed May 20, 2011) (to be codified at 15 C.F.R. pts. 734, 740, 742–43, 772, 774) (“The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). . . . If this rulemaking was delayed
complied, rather than a proposed federal action that could at least be objected to, and perhaps opposed by the state’s representatives in Congress prior to implementation.

Thus, the U.S. federal government is far less constrained than the Canadian federal government by subnational interests, and the result is that the U.S. federal government is more able to alter its national scheme of international trade regulation and policies. From the perspective of sheer governmental power and flexibility in international trade regulatory matters, the deep nature of U.S. federal government control over international trade activities within states (that is, intrastate) gives it substantially freer rein than the Canadian federal government has in such matters.

3. Due Process and International Trade Regulation

Finally, from the perspective of democratic governance and due process, the current Canadian approach has much appeal. It is worth noting that some U.S. scholars have raised due process concerns over U.S. governmental activities in the arena of international trade regulation, although these objections have been to little avail.201 A detailed discussion of due process (or the general lack thereof) in the administration of U.S. international trade regulatory laws is beyond the scope of this Article, but it is worth pointing out that concerns over detrimental reliance when trade policies suddenly shift, or concerns over the inconsistent enforcement and predictability of U.S. international trade regulation, or concerns over favoritism to (or prejudice against) particular regions or industries, are legitimate concerns. If U.S. federal government power over international trade matters is relatively unconstrained, and if seemingly intrastate matters fall within the bounds of the federal power to regulate international trade, any challenge to perceived wrongs will be an uphill battle.

A related issue is the definition of “international trade” itself (as opposed to domestic activity), and who gets to define it. As discussed above in Part IV.A of this Article, in the United States if a matter is “international,” then the federal government generally holds the power; if it is not, then a closer federalism analysis is necessary. And while the power to define something as international or domestic does not expressly lie with the federal government, a federal agency (or the president) that has been delegated power over a particular area

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201 See, e.g., Peter L. Fitzgerald, Smarter “Smart” Sanctions, 26 PENN ST. INT’L L. REV. 37, 48 (2007) (“In comparison to the substantive and procedural safeguards commonly found surrounding the imposition of penalties and the deprivation of property in civil or criminal proceedings, there is very little oversight or judicial review exercised when these same sorts of governmental actions are styled as ‘foreign policy’ measures as part of a sanctions program.”); Michael Wallace Gordon, The Conflict of United States Sanctions Laws with Obligations Under the North American Free Trade Agreement, 27 STETSON L. REV. 1259, 1284–85 (1998) (“Perhaps of most importance is the question of due process by an action in the United States . . . .”)
of international trade would be given significant deference (such as _Chevron_ deference)\(^{202}\) in deciding what activity is (and is not) “international” in nature.

In contrast, in Canada the question is whether there is an intraprovincial element to the commercial activity in question, regardless of whether the activity in question is international trade-related or not.\(^{203}\) If there is an intraprovincial aspect, then the provinces would have legal authority concerning the regulation of that activity. From a due process perspective, the Canadian approach has much to commend it, and offers far greater assurance that local concerns will be taken into account. The larger question, as already noted above, is what happens to Canadian international trade regulation and policy if federal-provincial consensus cannot be reached. In a system that relies on consensus, a lack of consensus would at best result in a rigid and unchanging status quo—decision by indecision—and at worst a complete breakdown of Canadian international trade regulation and policy. As with most things, the truth probably lies somewhere in between—but it is clear that Canadian international trade regulation and policy would be seriously impaired, and Canada would be much more at the mercy of decisions made by other countries and international organizations without meaningful Canadian involvement. For multilateral decisions that require Canadian approval, such Canadian indecision actually might preclude agreement and the active multilateral regulation of international trade.

VI. CONCLUSIONS

The Canadian federal system is characterized by greater decentralization than the U.S. federal system, especially in the arena of international trade, and over the past fifty or sixty years the two countries in fact have been trending in opposite directions regarding the regulation of international trade—with the U.S. becoming more centralized, and Canada less so. In regional trade theory terminology, Canadian integration in international trade regulation is becoming less deep, and U.S. integration has become more deep. Canada’s trend may well be exacerbated by the fact that the larger Canadian provinces represent a far larger percentage of Canadian economic (and political) activity than any one U.S. state does in the United States. Moreover, because those who have power are generally reluctant to cede it, we might expect that Canadian provinces—in particular Ontario and Québec—will continue to play key roles in international trade regulation in Canada.

In addition, there is the risk that cooperation among the Canadian provinces might erode in areas where consensus ceases to exist. The pattern in Canada to date has been for consensus (albeit in possibly watered-down form) to be reached among the provinces and the federal government—but what if consen-

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203 See _supra_ discussion accompanying notes 132–149.
sus cannot be reached? In such cases, certain aspects of Canadian international trade policy could be immobilized, much in the way that WTO trade liberalization has ground to a halt because sufficient consensus cannot be reached.

In the United States, the opposite is likely true. Despite current Tea Party rumblings about smaller government,204 the federal government seems unlikely to cede significant power to the states, and certainly it will not in the area of international trade regulation, with its national security overtones and the constitutional supremacy of the federal government. This also raises interesting questions about how to define U.S. international versus domestic matters, for the allocation of federal power in the area of U.S. international trade regulation is, as discussed above, a matter of definition. For now, the federal government seems to have a greater say than states as to what constitutes international trade-related activity, and what does not.

Ultimately, the desirability of the U.S. approach or the Canadian approach, or of some other balance of subnational versus federal power in international trade, would seem to come down to what is more valued: the ability to rapidly develop and implement a country’s international trade regulatory schemes (which is facilitated by deeper federal control over such matters), or greater involvement of various constituencies in international trade decision-making (which is facilitated by a broader allocation of international trade legal authority to states or provinces, and less federal ability to preempt state or provincial decisions regarding international trade). This, in essence, is a question of whether international trade decisions largely should be a federal prerogative or not. That is a centrally important policy question that goes to the very heart of federalism—and because of differences in constitutional structure, jurisprudence, demographics, and history, the question has been answered in the United States and Canada in very different ways. It will be interesting in coming years to see whether current political pressures in the United States lead to any greater state involvement in foreign affairs and international trade regulatory matters, and whether the challenges of continually achieving federal-provincial consensus in Canada lead to less provincial involvement in Canadian international trade regulation.

204 See Tea Party Mission Statement, supra note 5.