South Carolina Law Review

Volume 46 | Issue 5 Article 2

Summer 1995

Introduction

Herbert A. Johnson
University of South Carolina

Introduction

Herbert A. Johnson[*]

While federalism has been explored in innumerable contexts, few scholars have chosen to look at the court systems of federated or confederated nations as a key to understanding particular views of the federal-state relationship. Arguably, however, governmental power most closely touches the lives of citizens through the exercise of judicial authority. The allocation of court jurisdiction between a central government and its component states results from an intentional decision concerning the manner in which justice can be effectively administered in a federal nation. Those decisions, or series of decisions, eloquently reveal national needs and public perceptions of the proper role of federal and state courts.

There are readily apparent historical similarities among the federal nations considered in this Symposium the United States, Canada, and Australia. All three have historical connections to the ancient English constitution and share the same common-law heritage. Even the Canadian province of Quebec shares a common Canadian criminal law shaped by English precedent, and much of its public law is similarly rooted. When Canada and Australia laid the foundations for their federal unions, both drew upon the United States's constitutional experience. As a consequence, there are many similarities among these three federal systems. On the other hand, the three nations' implementation of federalism differs significantly, as illustrated by the striking variations in the structure of court systems and the way that federal and state courts relate to each other.

The first group of articles highlights the way in which constitutional theory, expedience, and fiscal economy played roles in the establishment of federal courts. These articles explain how those influences, present at unification or shortly thereafter, caused differentiation among these three federal systems. One of the deep-seated causes for these divergences was the sequence of legal and political events leading to nationhood. By its Declaration of Independence, the United States found itself simultaneously independent of the British Crown, sovereign within its borders, and accountable in the diplomatic community of nations. As a consequence admiralty jurisdiction, which then included prize litigation, continued to be a federal concern. Even under the Articles of Confederation, provision was made for federal review of state prize court decisions. Under the Confederation Congress, the United States found it impossible to protect foreign ministers and consuls from indignities at the hands of American citizens. The new federal Constitution and

* A.B., M.A., Ph.D., LL.B., Ernest F. Hollings Professor of Constitutional Law, University of South Carolina School of Law.

early decisions of the Supreme Court, therefore, emphasized federal authority to implement international treaties and diplomatic custom.

Canada and Australia achieved domestic sovereignty in 1867 and 1901 respectively, but full international status and independence from Privy Council judicial review was achieved intermittently throughout the twentieth century. This gradual evolution of de facto independence, standing in sharp contrast to the abrupt American revolution of 1775-76, provided opportunities for a more leisurely approach to the establishment of federal courts. Except for a federal Supreme Court (Canada, 1875) and a High Court (Australia, 1903) no comprehensive approach was taken to institute lower federal court jurisdiction until 1971 in Canada and 1975 in Australia.

Population distribution and geography also affected the establishment of federal courts. Until American territorial expansion reached the Great Plains, settlement was contiguous and population concentrations were spotted rather evenly throughout the rural landscape. Under the Judiciary Act of 1789, each state formed a federal district for judicial purposes. The first state admissions west of the Appalachians were accommodated by establishing a statewide district court that was authorized to execute circuit court jurisdiction. Later, as it became necessary for state districts to be divided, one of the districts within a state was designated as the site of the circuit court of appeals that would hear appeals from all federal district and circuit courts within the state. With this sort of occasional fine-tuning, American lower federal courts functioned relatively efficiently until the major reform of the 1891 Evarts Act relieved the Supreme Court justices of circuit-riding duties.

In contrast to this orderly American population pattern, Canada and Australia have a few centers of dense population and large rural or wilderness areas that are virtually uninhabited. Economy dictated that neither should institute a system of comprehensive, territorially sited, lower federal courts. Canadian provincial courts provided nearly all of the original jurisdiction facilities in the confederation, subject to general overview by the Supreme Court, which belatedly appeared in 1875. Australia adopted its "autochthonous expedient," based upon the Commonwealth Constitution's permitting the federal Parliament to vest federal judicial power in state supreme courts. However, the influence of American federal court structure may be found in the High Court of Australia's authority to exercise diversity of citizenship jurisdiction, and in the fact that Canada's Supreme Court justices received concurrent appointments to the Exchequer Court, under which they rode circuit to try Crown cases and revenue matters.

Early Canadian and Australian dependence upon state and provincial tribunals should not be considered an uncontrolled abandonment of federal judicial power to the provinces and states. Both the Supreme Court of Canada and the High Court of Australia may accept appeals from all matters decided in state and provincial courts, regardless of whether state or federal jurisdiction is involved. This general appellate review provides the highest federal

court with sweeping authority to review state judgments and stands in sharp contrast to the limited "federal question" appellate jurisdiction of the Supreme Court of the United States.

Neither Canada nor Australia observes the rather rigid American division between federal and state judicial power. In Canada provincial court judges are appointed by the Dominion government, but Australia follows the American pattern of having the states choose their own judges. The Australian Commonwealth Constitution permits state Parliaments to refer state powers to the Commonwealth. Recently this authority has been used to transfer certain state family law jurisdiction to the Family Court of Australia. Additionally, in its exercise of diversity jurisdiction and in certain federal matters, the High Court of Australia may remit cases for trial either to a state supreme court or to one of the lower federal courts. Undoubtedly the most striking Australian example of state-federal judicial interdependence is the so-called "cross vesting" of jurisdiction implemented in 1988.

On the level of constitutional theory, the unusual fluidity of Canadian and Australian judicial arrangements may be attributable in part to a concept of sovereignty long eclipsed by American republicanism. In Canada and Australia sovereignty of federal and state governments continues to reside in the Crown, and distinctions between state and federal authority are less objectionable constitutionally when both are exercised by virtue of the Queen's commission. In contrast, American constitutionalism rests upon sovereignty of the people. Since each government derives legitimacy from the consent of a separate body of the people, each government is precluded from transferring its constitutional powers to any other state or to the federal government.

To the degree that judicial review is an inevitable accompaniment of a written constitution and an essential part of supremacy in a federal system, the courts in each nation have performed that function. However, Canada's 1982 adoption of the Charter of Rights and Freedoms has opened possibilities for expansion of the judicial role in Canadian public law. Traditionally Canadian courts have been unwilling to consider the wisdom of governmental action, but the Charter provides new grounds, both specific and general, for citizens to challenge purported breaches of Charter guarantees. The likelihood exists that individual liberties litigation may well rise to the quality, if not the quantity, of individual liberties constitutional challenges under the United States Constitution. As yet Australia has remained content with non-constitutional formulations of rights and liberties. The High Court has not hesitated to defend fundamental rights as they are defined in Australian precedent and as they can be found in unwritten constitutional principle. A recent example is the Court's 1992 recognition of aboriginal land rights in *Mabo v. Queensland.*[**]

** 175 C.L.R. 1 (1992).

There may well be a convergence of judicial practices of the three nations in the years ahead.

Since it is in the operation of these court systems that most difficulties arise, some attention must be given to the interrelationships between federal judiciaries and those of the states or provinces. The third group of articles addresses the impact of bankruptcy upon the conduct of litigation in the three nations. All three countries structured their federal arrangements to facilitate trade among the states and provinces, and in keeping with that goal bankruptcy became a matter of federal concern. For a variety of historical reasons the United States delayed enactment of a federal bankruptcy law until the end of the nineteenth century. In the interim the states expanded their relief to insolvent debtors so that the relief included elements of debt discharge. However, during the twentieth century federal bankruptcy has become dominant in the American debtor relief system, and recent amendments to federal law have sanctioned suspension of state court proceedings in matrimonial and probate matters until final resolution of issues in the federal bankruptcy courts. This division of jurisdiction between federal and state tribunals dealing with the same case is know as "split jurisdiction."

Early Australian efforts to establish federal bankruptcy courts were frustrated by geographical and population factors. Bankruptcy courts functioned in the population centers of Sydney and Melbourne, but throughout most of the continent this federal judicial authority was exercised as necessary by state supreme courts. In Canada until the establishment of the Federal Court of Canada, the provincial courts provided the judicial tribunal in which bankruptcy cases were litigated. As a consequence only within the past two decades have Canada and Australia had to face problems of split jurisdiction between federal and state courts when bankruptcy concerns touch upon cases that otherwise would be within the jurisdiction of state courts.

Another shared intrasystem difficulty involves what has become known as "forum shopping," which occurs when a divergence of law available in courts exercising concurrent jurisdiction gives a litigant an unfair advantage in one of those courts. Examples include different bases for liability in tort, variations in statutes of limitation, and different formulae for computing damages. To the extent that choice-of-law rules can minimize these differences, the opportunities for forum shopping can be limited if not eliminated.

The use of choice-of-law rules to control forum shopping is closely related to the presence of litigant sensitivity to local jury or judicial prejudice against out-of-state parties. This sensitivity was the initial justification for conferring upon United States federal courts diversity-of-citizenship jurisdiction. The suspicion does not seem to have been present either in Canada or Australia, although as we have noted in the Australian court structure, a diversity-of-citizenship jurisdiction is exercised by the High Court of Australia. Despite agitation for its abolition in the United States, diversity jurisdiction survives.

The consideration of forum shopping also includes attention to the manner in which constitutional mandates control the application of one jurisdiction's substantive and procedural rules to a case regardless of the place of trial. Although common-law choice-of-law rules play a large role in this connection, the constitutional principles of full faith and credit and due process are also significant. In addition, the manner in which service of process and enforcement of judgments operate in a federal state have a major impact upon the way in which interstate law can be made more uniform and more uniformly applied.

Attitudes toward the common law played a formative role in shaping court jurisdiction and practice. Specifically, the question is whether one common law is shared by the federal government and all of the states, or whether there are several distinct systems of common law that apply either only to the federal government or only to each individual state. The presence of one High Court or Supreme Court empowered to review the decisions of federal and state courts would suggest that Australia and Canada are inclined toward a unitary common law. However, in the United States, a limited appellate jurisdiction in the United States Supreme Court, coupled with the early rejection of federal common law, points to a variegated system of common law throughout the nation. This American situation poses additional difficulties in controlling forum shopping and in assuring fair trial throughout the union.

The articles that follow were delivered in slightly different form at an invitational Conference on Courts and Jurisdiction in Federal Systems: The United States, Canada, and Australia, held at the University of South Carolina School of Law under the auspices of the Constitutional Law Resource Center. The Conference was held on November 17 through November 19, 1994. Additional funding was provided by the Federal Judicial Center, Washington, D.C., and the State Justice Institute, Alexandria, Virginia. The views expressed in these articles are those of the authors and do not represent the positions of the Federal Judicial Center or the State Justice Institute.

In addition to authors represented in this Symposium the following individuals played a significant role in the Conference, and their valued contributions are acknowledged: The Hon. Mark R. MacGuigan, Justice of the Federal Court of Canada; Keith Mason, Q.C., Solicitor-General of New South Wales; Professor Daniel J. Meador, University of Virginia School of Law; The Hon. Coulter Osborne, Judge of Appeal for Ontario; and Professor Howard B. Stravitz, University of Carolina School of Law.