Constitutional Interpretation in an Age of Anxiety: A Reconsidcration of the Local Prohihition *Case*

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The author argues that late-nineteenth century judicial review of the *British North America Act, 1867* was not limited solely to the task of determining which level of government was entitled to jurisdictional authority in division of powers disputes. Rather, he contends that the judiciary had serious concerns about the potentially unlimited exercise of legislative power under the Canadian Constitution. The design of the Constitution facilitated "energetic federalism", a concept which holds that, together, both levels of government possess plenary and unbounded legislative power.

The prevailing view in the late-nineteenth century, shared by legal thinkers on both sides of the Atlantic, was that governmental power ought to he circumscribed in deference to the primacy of private property and for the sake of the greater productivity of society. Drawing on the work of Locke and Blackstone, Anglo-American legal thought condoned interference with property only when it was in the "public interest", for the good of society as a whole, and not partial or "special interest" legislation.

The author argues that one aspect of Lord Watson's judgment in the *Local Prohibition* case is best explained in light of this idcology. By carefully restricting the federal government's trade and commerce power to the regulation of trade and by disabling it from prohibiting trade, Lord Watson exhibited a preference for leaving local governments with the ability to interfere with productivity. This meant that productivity could be impaired primarily on a local, rather than a national, scale.

In conclusion, the author points out that the economic ideology of productivity remains relevant to modern Canadian constitutional discourse, most notably in regard to the issue of aboriginal title. The recent trial decision in *Delgamuukw* v. *British Columbia (A.G.)* illustrates the judiciary's use of the Lockean conceptions of labour, property, and productivity to deny land title to aboriginal peoples.

Dans cet article, l'auteur affirme qu'au tournant du siècle, la révision judiciaire de l'*Acte de l'Amérique du Nord britannique* de 1867 ne se limitait pas exclusivement à la détermination de la compétence des paliers de gouvernement dans des litiges touchant la division constitutionnelle des pouvoirs. L'auteur estime plutôt que les tribunaux étaient sérieusement préoccupés par l'exercice potentiellement illimité du pouvoir législatif que conférait la Constitution canadienne. Le fonctionnement de la Constitution a facilité le «fédéralisme énergique» — notion selon laquelle les deux paliers de gouvernement possèdent, ensemble, un pouvoir législatif entier et illimité.

Vers la fin du dix-neuvième siècle, le consensus que partageaient les juristes des deux côtés de l'Atlantique voulait que le pouvoir gouvernemental soit circonscrit afin de respecter la notion de primauté de la propriété privée et d'accroître le niveau de productivité de la société. S'appuyant sur l'œuvre de Locke et Blackstone, la pensée juridique anglo-américaine a accepté l'ingérence dans les droits de propriété, uniquement dans les cas où cela était dans l'intérêt public, c'est-à-dire pour le bien-être social.

L'auteur maintient qu'un aspect du jugement de Lord Watson dans l'arrêt *Local Prohibition* s'explique clairement à la lumière de cette idéologie. Lord Watson, en restreignant le pouvoir fédéral en matière commerciale et en l'empêchant d'interdire le commerce, a démontré qu'il préférait allouer aux gouvernements locaux la capacité de s'ingérer en matière de productivité.

Finalement, l'auteur signale que l'idéologie économique de la productivité demeure pertinente à la discussion constitutionnelle canadieane notamment en ce qui a trait à la question des droits des peuples autochtones. La décision récente de *Delgamuukw* c. *Colombie-Britannique (P.G.)* illustre l'utilisation qu'a fait la Cour des notions de travail, de propriété, et de productivité tel qu'exposées par Locke, afin de nier le droit de propriété aux peuples autochtones.

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Synopsis

When was age so cramm'd with menace?
madness? written, spoken lies?[1]
Alfred, Lord Tennyson

Introduction

Bill Lederman has written that the "heart of Canada's constitution is the distribution of legislative powers that is made by the British North America Act between the central Parliament on the one hand and the provincial legislatures on the other".[2] In general, the point at issue in disputes about federalism is the distribution of authority between these two levels of government, which share full and plenary powers of jurisdiction.[3] These disputes concern the classification of laws, and the object of judicial review is to determine which authority has the power to enact them. They do not, it has been argued, extend to a consideration of the normative questions raised by the use of political authority. Thus, argues Patrick Monahan, there "is no attempt to grapple in any serious manner with the central liberal dilemma, that is, the 'contradiction' between individual and community". Federalism presupposes a near absolutism in which, "there is no sphere of human life that is immune from the intervention of the community. The fear is not the tyranny of the majority as such; federalism's concern is simply to ensure that the proper community is exercising dominion."[4]

Others have made similar claims about Canadian constitutionalism under the terms of the *Constitution Act, 1867*[5] — state power, while divided, is potentially unbounded.[6] It is a constitution of the "flexible" type as opposed to the "rigid" structure of U.S.

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[1] Alfred, Lord Tennyson, "Lockstey Hall Sixty Years After" in A. Day, ed., *Alfred Lord Tennyson: Selected Poems* (London: Penguin Books, 1991) 332 at 336.

[2] W.R. Lederman, "The Classification of Laws Under the British North America Act" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964) at 177.

[3] See: *Fredericton (City of)* v. *R.*, [1880] 3 S.C.R. 505, 2 Cart. B.N.A. 27 [hereinafter *Fredericton* cited to S.C.R.]; *Bank of Toronto* v. *Lambe* [1887] 12 A.C. 575, 4 Cart. 7 (J.C.P.C.) [hereinafter *Lambe*].

[4] P. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47 at 84. Presumably, the reference to "contradiction" is to Kennedy's "fundamental contradiction" between our "feelings of dependence on and integration into groups, and our feelings that we are isolates and that the collective is a threat" (D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 209 at 257).

[5] (U.K.), 30 & 31 Vict., c. 3 [hereinafter B.N.A. Act].

[6] See *e.g.*: Oliver Mowat in argument in *Severn* v. *R.* (1878), 2 S.C.R. 70 at 81, 1 Cart. B.N.A. 414 [hereinafter *Severn* cited to S.C.R.]; A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book, 1897-98) at 244; W.R. Riddell, "The Constitutions of the United States and Canada" (1912) 32 Can. L. T. 849. Peter Hogg writes: "The Constitution Act, 1867 for the most part limited legislative power only to the extent necessary to give effect to the federal principle" (P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 303).

constitutionalism.[7] Like the form of British constitutionalism described by Dicey, Canada's Parliament and legislatures together have "the right to make or unmake any law whatever" under the B.N.A. Act.[8] They possess expansive powers within the spheres of their assigned jurisdictions, a regime I characterize as one of "energetic federalism."[9]

Such conceptions of constitutionalism have been of chief concern to both conservative and libertarian political theorists, such as Edmund Burke[10] and Friederich von Hayek,[11] who chide the necessity for unlimited legislative power. This need is based, they argue, upon a false construction of political institutions as the product of some deliberate act of "will", rather than as the product of an organic morality shared by all,[12] a morality associated with the ancient constitution.[13] The urge for unfettered power is the scourge of our "pseudo-democratic" age, argued Hayek, which encourages assemblies to serve special interests in order to preserve their power. Only by depriving these assemblies of unlimited power could we be assured of government by "rule of law".[14]

In this paper, I propose to inquire into the question of whether energetic federalism was also of concern to the late-nineteenth century judiciary. Even if we were to assume, in partial accord with Monahan, that the antinomy between authority and liberty was largely circumvented in the institutional design of confederation, it may not have

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[7] J. Bryce, ed., "Flexible and Rigid Constitutions" in *Studies in History and Jurisprudence*, vol. 1 (Oxford: Clarendon Press, 1901) at 200-202; J. Bryce, *Canada: An Actual Democracy* (Toronto: Macmillan, 1924) at 7-9, 41.

[8] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 39-40. But, as Dicey noted, the Canadian Constitution was not entirely flexible for Canadian legislative power was subject to the supremacy of the Imperial Parliament. Even today, Canada's Parliament and legislatures do not have both legislative and constitutive powers. Rather, they are bound by the terms of the *Constitution Acts* (see: B.N.A. Act, *supra* note 5; *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), and it is the conflicting scope of that constitutional language which continues to be the basis for judicial review.

[9] D. Schneiderman, "Constitutional Limits and Economic Interests: A Search for the Purposes for Economic Constitutionalism" (LL.M. Thesis, Queen's University, 1993) Part 1.

[10] See E. Burke, *Reflections On the Revolution in France*, ed. by C.C. O'Brien (Harmondsworth: Penguin Books, 1969).

[11] Hayek cites R. Wollheim: "[T]he modern conception of democracy is a form of government in which no restriction is placed on the governing body" (R. Wollheim, "A Paradox in the Theory of Democracy" in P. Laslett & W.G. Runciman, eds., *Philosophy, Politics and Society (Second Series), a Collection* (Oxford: Basil Blackwell, 1962) at 72, cited in F.A. von Hayek, *Law, Legislation and Liberty: A New Statement of Liberal Principles of Justice and Political Economy*, vol. 3 (London: Routledge & Kegan Paul, 1979) at 3).

[12] Hayek, *ibid.* at 33. Also, see Burke: "[I]t has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers ..." (Burke, *supra* note 10 at 119). On Burke's equating the foundation of political liberty to principles of property law, see J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* (New York: Atheneum, 1971) at 211-12.

[13] See Burke, *ibid.* at 118-19.

[14] Hayek, *supra* note 11 at 12ff.

been avoided in subsequent judicial deliberations.[15] It is the aim of this paper to show that this antinomy was not avoided, even in the guise of disputes over federalism. The focus for this discussion will be the pivotal decision of the Judicial Committee of the Privy Council in *Ontario (A.G.)* v. *Canada (A.G.)*.[16]

The decision in *Local Prohibition* has undergone considerable scrutiny. Scholars have questioned the impetus for Lord Watson's decision in that case, which narrowly defined the scope of the federal government's power under the "peace, order, and good government" clause ("P.O.G.G.") of the Constitution.[17] The Privy Council's interpretation of that residual clause will not, however, be the primary focus here. Rather, I am concerned with the Privy Council's narrowing of the federal government's trade and commerce power to include only the regulation, and not the prohibition, of trade.[18] This aspect of the decision has received less consideration than others, and this may explain why little attention has been paid to the economic ideology that may have been operating in the case.

Employing a conception of productivity largely traceable to John Locke's "Second Treatise of Government",[19] I will argue that *Local Prohibition* can be understood as a manifestation of judicial anxiety about the potential implications of energetic federalism for property and productivity, anxieties which were prevalent in late-nineteenth century legal thought. Locke explicated the naturalistic bases of property, founded on the command of both God and reason, that humankind be productive. While one of the objectives of energetic federalism was to facilitate productivity, it also enabled legislative intrusions into the realm of property rights. For the most part, the nineteenth-century judiciary was content to leave such normative concerns to the appropriate legislative body. There were, however, "common principles"[20] grounded in both the

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[15] K. Swinton, then, is correct to argue in reply to Monahan that his view of Canadian federalism is overly narrow and selective (see K. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 170-73). See also the helpful discussion in P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.

[16] [1896] A.C. 348, 5 Cart. B.N.A. 295 (P.C.) [hereinafter *Local Prohibition* cited to S.C.R.].

[17] B.N.A. Act, *supra* note 5 at s. 91. See *e.g.*: B. Laskin, "'Peace, Order and Good Government' Re-Examined" in Lederman, ed., *supra* note 2 at 66; F.R. Scott, ed., "Centralization and Decentralization in Canadian Federalism" in *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 251; "Report Pursuant to the [1939] Resolution of the Senate to the Honourable Speaker by Parliamentary Counsel Relating to the British North America Act, 1867" by W.F. O'Connor (Ottawa: Queen's Printer, 1961).

[18] This part of the ruling in *Local Prohibition* has been the subject of some critical commentary (see: B. Laskin, "The Supreme Court of Canada: A Final Court Of and For Canadians" in Lederman, ed., *ibid.*, 125 at 135; A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 66-68).

[19] J. Locke, "The Second Treatise of Government" in *Two Treatises of Government*, Student ed. by P. Laslett (Cambridge: Cambridge University Press, 1988) [hereinafter *Two Treatises of Government*].

[20] V.B. Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council" (1922-23) 1 Cambridge L.J. 143 at 154. See also the revealing discussion in Lord Watson, "Recent Legal Reform" (1901) 13 Jurid. Reform 1 at 16.

Common law and political economic theory which counselled against unbounded legislative energy. The *Local Prohibition* decision, in this context, becomes an exemplar of the judicial fear of energetic federalism. This line of argument is consonant with one made by James Mallory about the late-nineteenth century cases.[21] Though largely discredited,[22] Mallory made the claim that, during this period, the Privy Council was animated by something more complex than merely a desire to whittle away the powers of the federal government. Rather, Mallory suggested that what was at work was a "judicial hostility" to legislative inroads into the *laissez-faire* economy.[23] While Mallory's claim goes much further than my own arguments about the concept of productivity, the two are consistent to the extent that they both identify an economic ideology as a motivating force behind these decisions.

I begin with a brief outline of Locke's conception of property and productivity, based largely on his "Second Treatise of Government", and its subsequent inscription into the Common law by William Blackstone. I then situate the discussion more concretely within the context of the late-nineteenth century, examining influential constitutional thinkers such as John Stuart Mill, Dicey, and Thomas Cooley, all of whom articulated a version of legalism that would check legislative energy. Next, I discuss the late-nineteenth century cases concerning the liquor trade, primarily as a backdrop to *Local Prohibition*. A number of theories have been offered to explain Lord Watson's decision in that case. I discuss a few of them and then offer my own, which is tied to a general fear of class rule which pervaded nineteenth-century liberal legal thought. I conclude with a number of suggestions for future work in constitutional law where the productivity concept may have application.

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[21] See: *Parsons* v. *Citizens Insurance Co.* (1881), 7 A.C. 96, 1 Cart. B.N.A. 265 (P.C.) [hereinafter *Parsons*]; *Lambe*, *supra* note 3; *Maritime Bank of Canada* v. *New Brunswick (A.G.)*, [1892] A.C. 437 (P.C.); *Local Prohibition*, *supra* note 16. See also: J.R. Mallory, *Social Credit and Federal Power in Canada* (Toronto: University of Toronto Press, 1954) [hereinafter *Social Credit*]; J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Can. J. Econ. & Pol. Sci. 165.

[22] See F.M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s" (1975) 9 U.B.C. L. Rev. 244. Mallory's thesis has been described favorably as an "hypothesis" (F. Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation" (1986) 19 Can. J. Pol. Sci. 495). Unfortunately, Vaughan writes, the thesis "requires more support than is provided" by Mallory and "no one has yet attempted to provide this ideological explanation with the requisite support" (Vaughn, *ibid.* at 513).

[23] *Social Credit*, *supra* note 21 at 34.

I. Productivity and Democracy in Classical Legal Thought: Genesis and Manifestations

A. *Locke and Blackstone on the Productivity of Property*

1. Between God and Reason in Locke

One of the main themes of Locke's "Second Treatise of Government" is the idea that individuals act productively through their labour.[24] Locke saw that it was labour which "*makes the far greatest part of the value* of things, we enjoy in this World."[25] If, wrote Locke, "we will rightly estimate the things as they come to our use ... what in them is purely owing to *Nature* and what to *labour*, we shall find, that in most of them 99/100 are wholly to be put on the account of *labour*."[26] Locke offered justifications for a form of government that would nurture this industriousness.

It is that discourse, which valorizes labour and productivity — the productive capacity of labour acting through property — that I wish to engage. James Tully has described it as a "workmanship model", which combines the role of labour both in fulfilling God's purpose and in improving and adding value to things through activity.[27] Similarly, Charles Taylor describes it as the Protestant affirmation of the "ordinary life", conjoining the requirements: (1) that we work hard and bring about "improvement", and (2) that this work be for the common good.[28] I will characterize it as a discourse of "productivity".

In Locke's state of nature, mankind appropriates through labour: "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."[29] By taking the pains of using my labour to improve what was previously in a state of nature, I have appropriated that property as exclusively my own. This is accomplished without the consent of others, for "[i]f such consent as that was necessary,

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[24] See A. Rapaczynski, *Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke and Rousseau* (Ithaca, N.Y.: Cornell University Press, 1987) at 216.

[25] Locke in *Two Treatises of Government*, *supra* note 19 at 2:42, 297; 2:40, 296.

[26] *Ibid.* at 2:40, 296.

[27] J. Tully, *A Discourse on Property: James Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980) at 5. See also: S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Oxford University Press, 1991) at 151; I. Shapiro, "Resource, Capacities, and Ownership: The Workmanship Ideal and Distributive Justice" in J. Brewer & S. Staves, eds., *Early Modern Conceptions of Property* (London: Routledge, 1995) c. 2.

[28] C. Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989) at 237-38.

[29] Locke in *Two Treatises of Government*, *supra* note 19 at 2:27, 285.

Man had starved, notwithstanding the Plenty God had given him."[30] The world, then, is carved up and appropriated by the industrious on a first come, first served basis.[31]

Because Locke is vague about property rights in political society, scholars are divided on the limits he may have placed on those rights once persons are united into commonwealths.[32] On the one hand, C.B. Macpherson argues that Locke condoned the unlimited appropriation of private property both in the state of nature and in political society, and that consequently, individual property rights are absolute and override any moral claims of civil society.[33] On the other hand, argue Tully and others, the original rules of natural property are superseded by the rules of the commonwealth.[34] Tully contends that the "priority of natural law renders all rights as means to this end [the duty to God], and therefore Locke's account is a limited rights theory".[35] Surrendering one's person and possessions to government, then, does not mean unconstrained enjoyment of the fruits of one's labour. Rather, by joining together in society, one becomes subject to the laws that regulate that society, including laws regulating property.[36]

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[30] *Ibid.* at 2:28, 288; 2:32, 291.

[31] Two restrictions are expressly identified by Locke. The first has been called the "spoilage limitation": we can take no more property than that which will not spoil or be destroyed (Locke in *Two Treatises of Government, ibid.* 2:31, 290). Thus, natural products which we grow ourselves will perish if not consumed promptly. "Whatever is beyond this" is more than our share "and belongs to others" (*ibid.*). The second has been called the "sufficiency limitation": we can only appropriate as much as leaves "enough and as good" for others to use (*ibid.* 2:33, 291). Otherwise, we invade our neighbour's share "[f]or he had no right, farther than his Use called for any of them" (*ibid.* 2:37, 295). Thus, one could not appropriate from the state of nature more than one could reasonably use (see *e.g.* C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (London: Oxford University Press, 1962) at 201-202, 214-20). Jeremy Waldron argues that the sufficiency limitation is not a limitation in its own right but "is spoken of as *an effect* of the early operation of the Spoilation proviso" (J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 210-11). See also J. Waldron, "Enough and As Good Loft for Others" (1979) 29 Philosophical Q. 319.

[32] See the helpful discussion in A.J. Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992) at c. 6.

[33] See Macpherson, *supra* note 31 at 221.

[34] A version of this latter position is articulated by Richard Ashcraft who emphasizes that money for Locke is not the genus of a "natural right" but the product of a tacit agreement amongst men, in other words, a matter of "convention". Positive law controls the acquisition, use, and alienation of property even though natural law obligations continue to operate. Positive law confines property rights, making property rights "subject to *and not determinative of* the rights of political power" (R. Ashcraft, "The Politics of Locke's *Two Treatises of Government*" in E.J. Harpham, ed., *John Locke's Two Treatises of Government: New Interpretations* (Lawrence, KS.: University Press of Kansas, 1992) 4 at 32).

[35] J. Tully, *supra* note 27 at 131. See also J. Tully, "Locke" in J.H. Burns, ed., *The Cambridge History of Political Thought 1450-1700* (Cambridge: Cambridge University Press, 1991) 616 at 628-29.

[36] See Locke in *Two Treatises of Government, supra* note 19 at 2:120, 348.

Locke's government is capable, then, of a great deal of legislative energy.[37] According to Peter Laslett, even "the minutest control of property ... can be reconciled with the doctrine of the *Two Treatises*."[38] But Locke is concerned that government serve the interests of the governed, for this was the very reason for joining together into a commonwealth.[39] Hence, legislative power "is *limited to the publick good* of the Society. It is a Power, that hath no end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects ... Thus the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others."[40] Public power, for Locke, has no purpose other than to secure the conditions in which wealth is preserved — to destroy the product of labour is contrary to the rule of God and reason, binding both legislators and their subjects.

For our purposes, it is sufficient to identify the role Locke foresaw the state having in encouraging productive labour and providing conditions of security within which the fruits of one's labour could be enjoyed. While Locke's idea of property departed from the classical, republican conceptions of landed property as the means of a virtuous citizenry,[41] his doctrine "if not universally accepted, was perfectly congenial to the dominant ideologies, not to mention the realities of the English economy, in the eighteenth century".[42] It was sufficiently agreeable to be appropriated by eighteenth-century thinkers, including the Oxford legal scholar, William Blackstone.

2. Between Natural and Sovereign Law in Blackstone

Locke's theory of labour value, if not already an element of legal ideology in the eighteenth century,[43] came to be an acknowledged component of the Common and statute law of England by William Blackstone. In his *Commentaries on the Laws of England*,[44] Blackstone contended that labour was the source of the right to property. Tracing the historical genesis of that right, Blackstone wrote: "[B]odily labour, bestowed upon any subject which before lay in common to all men, is universally al-

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[37] See: D. Epstein, *The Political Theory of the Federalist* (Chicago: University of Chicago Press, 1984) at 35-36; I. Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge: Cambridge University Press, 1986) writes: "Locke does in fact sanction significant state intervention" (*ibid.* at 81).

[38] P. Laslett, "Introduction" in *Two Treatises of Government*, *supra* note 19, 3 at 105.

[39] See Locke in *Two Treatises of Government*, *ibid.* at 2:134, 355.

[40] *Ibid.* at 2:135, 357-58 [underlining added; italics in original].

[41] See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

[42] E. Meiksins Wood, *The Pristine Culture of Capitalism: A Historical Essay on Old Regimes and Modern States* (London: Verso, 1991) at 141.

[43] On the hegemony of the Lockean paradigm in Common law contract doctrine, at least until the early-nineteenth century, see J. Bergeron, "From Property to Contract: Political Economy and the Transformation of Value in English Common Law" (1993) 2 Soc. & Legal Stud. 5. On its hegemony well into the nineteenth century, see P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

[44] W. Blackstone, *Commentaries on the Laws of England*, vol. 1, by S.G. Tucker (New York: W.E. Dean, 1845) [hereinafter *Commentaries*].

lowed to give the fairest and most reasonable title to an exclusive property therein."[45] As does Locke, Blackstone subscribes to the fiction that these rights were obtained originally in a state of nature and came to be secured through political society. It was, then, the "principle aim of society ... to protect individuals in the enjoyments of those absolute rights",[46] which he reduced to three: "the right of personal security, the right of personal liberty and the right of private property."[47]

When Blackstone uses the epithet "absolute", he means that rights are absolute in the sense of being "primary", belonging to persons "whether out of society or in it".[48] Those rights, however, have been substantially diminished by rights-bearers having entered into civil society, for "every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase." In sum, the rights and liberties of Englishmen are "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public".[49]

Despite the suggestion that there has been a diminution of rights, Blackstone argues that there is no incongruity between the laws of England and natural liberties.[50] Property rights become, therefore, subsumed almost entirely by statute. Although the origin of the right to private property "is probably founded in nature ... the modifications under which we at present find it ... are entirely derived from society."[51] This is because of the limited scope Blackstone attributes to natural law, generally, and to the natural law of property, in particular. It is difficult for human laws to offend the law of nature as the former are, for the most part, measures in regard "to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws".[52]

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[45] *Ibid.*, Book 2 at [*5]. See also: Kennedy, *supra* note 3 at 313-14; H. Storing, "William Blackstone" in L. Strauss & J. Cropsey, eds., *History of Political Philosophy*, 3d ed. (Chicago: University of Chicago Press, 1987) 622.

[46] *Commentaries*, *ibid.*, Book 1 at [*124].

[47] *Ibid.* at [*129].

[48] *Ibid.* at [*123].

[49] *Ibid.* at [*125].

[50] Although those rights may have been repressed from time to time by "overbearing and tyrannical princes", writes Blackstone, "the balance of our rights and liberties has settled to its proper level" (*ibid.* at [*127]).

[51] *Ibid.* at [*138]. Frederick Whelan believes that Blackstone disagreed profoundly with Locke on the matter of a natural right to property. He relies on the fact that Blackstone lists "life and liberty" but not property (*ibid.* at [*54]). But, Blackstone cites life and liberty only as examples "such as are life and liberty". Whelan is correct, however, to argue that Blackstone downplays the origin of a right to property founded in nature and emphasizes its regulation in civil society. But, even here, there is less difference than Whelan will admit. Locke writes: "The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer" (Locke in *Two Treatises of Government*, *supra* note 19 at 2:135, 358). See F. Whelan, "Property as Artifice: Hume and Blackstone" in J.R. Pennock & J.W. Chapman, eds., *Property* (New York: New York University Press, 1980) 101 at 116-17.

[52] *Commentaries*, *ibid.* at [*43]. These rights paralleled the concept of offenses *mala in se*, which are natural duties, and offenses *mala prohibita*, which concern matters forbidden by human law and

Consequently, Blackstone takes up much of Book 2 of the *Commentaries* with an exposition of the Common and statute law to which divine law is generally "indifferent". Should the laws of England touch on matters about which natural law is not indifferent — for example, the right of property — then English laws are "in point of honour and justice, extremely watchful in ascertaining and protecting" them.[53]

It is not that government cannot legislate in regard to absolute rights,[54] only that laws should be conducive to, rather than subversive of, those rights. Blackstone accepts Locke's edict that "where there is no law there is no freedom," but he also believes that the best constitution or system of laws is that "which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."[55] For Blackstone, then, productive labour can be prohibited by the state if it is for the purpose of furthering other productive enterprise — in short, legislation for the public good.

Blackstone's *Commentaries* provide us with a textually identifiable moment at which private property and productivity are negotiated expressly into the terms of the Common law. The negotiation steers between a privileged, natural right of property and the authority of an omnipresent state which, acting at its best, promotes productivity. In order to situate the *Local Prohibition* case within that narrative about the Common law, we must turn to the period in which the Judicial Committee of the Privy Council operated as chief interpreter of the Canadian Constitution.

B. The Nineteenth-Century Fear of Class Rule

The valuing of productivity through labour continued to dominate political economy well into the nineteenth century,[56] but it was coupled with growing anxieties asso-

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"in themselves indifferent" (see the valuable discussion in H.L.A. Hart, "Blackstone's Use of the Law of Nature" (1956) Butterworths S. Afr. L. Rev. 169 at 171). See also D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge: Cambridge University Press, 1989) at 46-47.

[53] *Commentaries*, *ibid.* at [*138].

[54] This would conflict too starkly with Blackstone's notion of sovereignty, akin to Dicey's which is discussed in the text accompanying note 7. See also discussion in Lieberman, *supra* note 52.

[55] Blackstone offers, as an example of legislation which is conducive to liberty, a statute of King Charles II which prescribed that the dead were to be buried in woolens. This was "a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation" (*Commentaries*, *supra* note 44, Book 1 at [*126]).

[56] See: J.S. Mill, ed., "On the Words Productive and Unproductive" in *Essays on Economy and Society* (Toronto: University of Toronto Press, 1967) 280: "Labour and expenditure, of which the direct object or effect is the creation of some material product useful or agreeable to mankind" is always productive (*ibid.* at 286); A. Marshall, *The Economics of Industry*, 2d ed. (London: MacMillan, 1886): "Labour is *Productive* when it produces wealth, whether personal or material" (*ibid.* at 31); A. Marshall, *Principles of Economics*, 8th ed. (London: Macmillan, 1962): "All labour is directed towards producing some effect ... it would be best to regard all labour as productive except that which failed to promote the aim towards which it was directed, and so produce no utility" (*ibid.* at 54).

ciated with the expansion of the franchise and popular democracy. It was feared that majoritarian politics could have the effect of impairing, or destroying altogether, propertied interests. Moreover, those anxieties were trans-Atlantic in scope. Blaine Baker has concluded that nineteenth-century lawyers drew heavily upon "the common, trans-Atlantic stock of ideas that one might loosely label 'classical' political economy" exemplified by John Stuart Mill.[57] The convergence of American and British constitutional thought in the period after the Civil War to the end of the century was illustrated in Thomas Cooley's *A Treatise on Constitutional Limitations*,[58] which drew heavily on shared Anglo-American, Common law principles and judicial opinions, such as the influential dissents in the *Slaughter-House* cases.[59]

I propose to trace this anxiety by examining the political and constitutional thought of several influential nineteenth-century thinkers. I will commence with an overview of John Stuart Mill's work on representative democracy and his fear of class rule. Links can then be drawn between U.S. jurisprudence, best exemplified by the work of Thomas Cooley, and that of British legal thinkers, such as Albert Venn Dicey and James Bryce, both of whom educated the British public in the United States's Constitution. U.S. constitutionalism emerged as an efficacious model with which to curb majoritarian democracy in Britain. According to Hugh Tulloch, it appealed to the British élite's "profound yearning for immutability and permanence in a world of accelerated change

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The discourse of productivity, as reflected in the literature of the period, was "not technical, and it was dominated by large, accessible policy questions" (H. Hovenkamp, "The Political Economy of Substantive Due Process" (1987-88) 40 Stan. L. Rev. 379 at 399). For example, a widely-read American college textbook by F. Wayland, entitled *The Elements of Political Economy*, asserted that the "'*exertion of labor establishes a right of Property in the fruits of labor*, and the idea of *exclusive possession* is a necessary consequence'" (quoted in J. May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918" (1989) 50 Ohio St. L.J. 257 at 270). Henry Wood, argued that both reason and revelation dictated that "[l]abour is normal; idleness, abnormal" (H. Wood, *The Political Economy of Natural Law* (Boston: Lee and Sheppard, 1894) at 51). Labour was the means by which the goal of production could be attained and the object of government was to facilitate that productivity (see *ibid.*).

[57] G.B. Baker, "Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 L. & Hist. Rev. 219 at 290. See also: R.C. Vipond, "Alternative Pasts: Legal Liberalism and the Demise of the Disallowance Power" (1990) 39 U.N.B.L.J. 126 at 142; P. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven: Yale University Press, 1992) at c. 4.

[58] T.M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (New York: Da Capo Press, 1972) [hereinafter *Treatise on Constitutional Limitations*].

[59] *Butchers' Benevolent Assoc. of New Orleans* v. *Crescent City Live-Stock Landing and Slaughter House Co.*, 83 U.S. 36, 21 L. Ed. 394 (1872) [hereinafter *Slaughter House* cited to U.S.], concerned a Louisiana state charter which gave one company control over the slaughtering of live-stock in New Orleans. See the dissents of Justice Field: "The common law of England is the basis of the jurisprudence of the United States" (*ibid.* at 104); and Justice Bradley: "The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history" (*ibid.* at 114).

and political flux, a yearning reinforced by a sharper appreciation of a potentially permanent state of parliamentary revolution".[60]

1. J.S. Mill and the Fear of Class Rule

Mill was immensely influential in recasting the terms of law and political economy in the nineteenth century,[61] building upon the utilitarianism of Jeremy Bentham and the classical political economy of Adam Smith.[62] Mill's liberalism, exemplified in his essay *On Liberty*,[63] outlined the boundaries within which state intervention was considered to be justifiable.[64] Mill maintained: "[The] sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection."[65] Mill, during this period, preferred governments which respected *laissez-faire*. He would condone, however, such action as was expedient for the government to undertake,[66] primarily, in order to prevent harm to others.[67] "Letting alone," wrote Mill, "should be the general practice; every departure from it, unless required by some great good, is a certain evil."[68] Mill, thus, contemplated an important role for government in legislating for the greater good.[69]

While Mill condoned protective measures, he did not depart significantly from classical economics.[70] He had the same belief "in the fundamental motive of self-interest as the generator of all economic activity".[71] Thus, security of property was of

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[60] H.A. Tulloch, *James Bryce's American Commonwealth* (Woodbridge, U.K.: Boydell Press, 1988) at 113.

[61] H.J. Hanham writes that the "most widely accepted statement of the underlying theory of the constitution was that contained in John Stuart Mill's *Representative Government*" (H.J. Hanham, ed., *The Nineteenth-Century Constitution 1815-1914* (Cambridge: Cambridge University Press, 1969) at 1).

[62] "It is widely agreed among economic historians that classical economics largely died with Mill in or around 1873" (Atiyah, *supra* note 43 at 602).

[63] J.S. Mill, *On Liberty and Considerations on Representative Government*, ed. by R. McCallum (Oxford: Basil Blackwell, 1946).

[64] On the influence of Mill on the legal formalism of the nineteenth century, see D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 Mod. L. Rev. 102.

[65] J.S. Mill, *Utilitarianism, Liberty & Representative Government* (London: J.M. Dent & Sons, 1910) at 72-73 [hereinafter *Utilitarianism*].

[66] See E.F. Paul, *Moral Revolution and Economic Science: The Demise of Laissez Faire in Nineteenth Century British Political Economy* (Westport: Greenwood Press, 1979) at 187-88.

[67] See *Utilitarianism*, *supra* note 65 at 73.

[68] J.S. Mill, *Principles of Political Economy* (London: Longman's Green, 1895) Book 5 at 573.

[69] For example, of those workers who may be displaced by technological improvements, Mill maintained: "[T]here cannot be a more legitimate object of the legislator's care than the interests of those who are thus sacrificed to the gains of their fellow citizens and of posterity" (*Principles of Political Economy, ibid.*, Book 1 at 62).

[70] See C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

[71] Atiyah, *supra* note 43 at 320. See also Macpherson, *ibid.* at 91.

some concern as was the adverse effect government conduct could have when it acted to provide for that security. Legislative and bureaucratic power, wrote Mill, were the only factors "altogether paralyzing to the active energies of producers."[72] While he did not disregard the prevailing unequal distribution of wealth, Mill advocated laws that equitably secured the fruits of one's labour in proportion to the benefit produced, since such laws generated the most productivity and efficiency. He condemned laws, however, "which favor one class or sort of persons to the disadvantage of others; which chain up the efforts of any part of the community in pursuit of their own good, or stand between those efforts and their natural fruits". Such legislative interventions were "violations of the fundamental principle of economic policy; tending to make the aggregate productive powers of the community productive in a less degree than they would otherwise be".[73]

As the franchise began to spread widely in Britain — a development which both Mill and his father, James, encouraged — he also took seriously the threat of class rule:

> One of the greatest dangers ... of democracy, as of all other forms of government, lies in the sinister interest of the holders of power: it is the danger of class legislation; of government intended for (whether really effecting it or not) the immediate benefit of the dominant class, to the lasting detriment of the whole. ... [T]he desirable object would be that no class, and no combination of classes likely to combine, should be able to exercise a preponderant influence in the government.[74]

By the mid-nineteenth century, Britain itself was going through a constitutional revolution, of a sort.[75] With the passage of the *Second Reform Bill*[76] of 1867, extending the franchise to all British householders, the fear of majority rule began to be felt among Britain's conservative élite. Even members of the liberal élite, exemplified by Mill, remained anxious about the unbounded legislative energy available to the newly-enfranchised public. This anxiety was heightened by the passage of the *Third Reform Bill* of 1884,[77] when working-class representatives were finally able to constitute a majority in Parliament.[78] The traditional liberal élite joined in this escalating anxiety

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[72] *Principles of Political Economy, supra* note 68, Book 1 at 70.

[73] *Ibid.*, Book 1 at 71.

[74] *Utilitarianism, supra* note 65 at 254. Consequently, Mill was compelled to recommend that class rule be avoided through a system of plural voting, with increased weight granted to those "of individual mental superiority" (*Principles of Political Economy, ibid.*). For a more detailed discussion, see Macpherson, *supra* note 70 at 56-59. This resembled Coleridge's "clerisy": "a nationally endowed class 'for the cultivation of learning, and for diffusing its results among the community'" (quoted in R. Williams, *Culture and Society* (London: Hogarth Press, 1990) at 56-57).

[75] See H.S. Maine, *Popular Government* (London: John Murray, 1909) at ix.

[76] *Representation of the People Act, 1867* (U.K.), 30 & 31 Vict., c. 102 [hereinafter *Second Reform Bill*].

[77] *Representation of the People Act, 1884* (U.K.), 48 & 49 Vict., c. 3 [hereinafter *Third Reform Bill*].

[78] For an expression of that anxiety, see Maine, *supra* note 75. See generally H. Perkin, *The Rise of Professional Society: England Since 1880* (London: Routledge, 1989) at 41. The elections in 1885 were the first in which landowners were outnumbered.

about popular democracy.[79] Dicey spoke for these liberals when he identified the problem as how "'to give to constitutions resting on the will of the people the stability and permanence which has hitherto been found only in monarchical or aristocratic states'".[80] Solutions to that problem could be found, it was suggested, in the constitutionalism of the United States. It would be appropriate, then, to turn to developments in the late-nineteenth century United States in order that we better understand the intellectual movement which was afoot in Great Britain which Dicey coined "Americomania".[81]

2. Thomas Cooley and the Appeal to Impartiality

The fear of legislative tyranny, or class rule, had animated U.S. constitutional thought since the *Federalist Papers*[82] — how could a politically democratic country avoid the threat of coerced economic levelling?[83] The Madisonian constitution was designed to circumvent such possibilities, but judicial review also emerged as a check on class rule with the encouragement of legal scholars such as Cooley and Chistopher Tiedeman.[84] For U.S. constitutional law scholars in the late-nineteenth century a primary preoccupation was the effect of the social necessity for legislative power.

According to Cooley, "equal rights" was the watchword, and any statute that subjected a particular class to particular rules, solely for "opinion's sake", was unconstitu-

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[79] See B.J. Hibbits, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) Anglo-American L. Rev. I at 14.

[80] A.V. Dicey, "Democracy in Switzerland - II" (1886) 41 The Nation 494, quoted in H.A. Tulloch, "Changing British Attitudes Towards the United States in the 1880s" (1977) 20 Hist. J. 825 at 834-35.

[81] See: A.V. Dicey, "Americomania in English Politics" (1886) 42 Nation 52 [hereinafter "Americomania"]; A.V. Dicey, "Can the English Constitution be Americanized?" (1886) 42 Nation 73.

[82] A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, ed. by C. Rossiter (New York: New American Library, 1961).

[83] See M.J. Horwitz, *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1993) at 9.

[84] Cooley's thought, as well as the *Lochner*-era jurisprudence, can well arguably be traced back to the concern of the American founders in the eighteenth century with factional politics. Howard Gillman argues that the *Lochner* era "represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law — the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other — during a period of unprecedented class conflict" (H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993) at 10). Gillman argues that courts would uphold legislation that had a "public purpose" (*ibid.* at 59) and strike down that which was special-interest legislation. The latter was detectable if the law offended the principle of "equal rights and privileges" (*ibid.*). A concern for equality does not quite explain Cooley's vehemence against prohibitory laws, such as those regarding the liquor trade, which clearly had a "public purpose". Gillman accepts that "[w]e are still in need of ... illustration and elaboration of the way in [which] nineteenth-century lawyers and judges conceptualized the differences between invalid class politics and valid public purposes" (*ibid.* at 9-10).

tional.[85] "Special privileges are obnoxious," wrote Cooley. "Equality of rights, privileges, and capacities unquestionably should be the aim of the law."[86] Cooley's innovation was to depart from the original intention of the U.S. framers and to trace the source of constitutional law in the United States from its English Common law roots. For Cooley, writes Kahn, "the common law operates as the background against which grants of state authority must be understood and, more decisively, as a limit on state authority."[87] Cooley found in the Common law "those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of domestic relations, and the acquisition, control, and transfer of property from time immemorial".[88]

The Fourteenth Amendment to the Constitution of the United States prohibited states from enacting laws that deprived persons of their life, liberty, or property without "due process of law". States, however, could regulate property under their "police power" — a rather vague nineteenth-century concept, known to both U.S. and Canadian lawyers[89] — which permitted the regulation of property in the interests of health, safety, or morality. But, the police power exception could not be exercised purely for the promotion of private interests. Drawing on the jurisprudence under state constitutions, Cooley wrote that it was available only "to insure to each the uninterrupted enjoyment of his own [rights], so far as is reasonably consistent with a like enjoyment of rights by others".[90]

That antipathy to class rule was also reflected prominently in post-Reconstruction judicial opinions in the United States,[91] culminating in the famous *Lochner*[92] decision

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[85] Cooley, *supra* note 55 at 390-91. See also A.R. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* (New York: Garland, 1987) at 158 [hereinafter *Constitutional Conservatism*].

[86] Cooley, *ibid.* at 393.

[87] P.W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven: Yale University Press, 1992) at 75 [hereinafter *Legitimacy and History*].

[88] *Treatise on Constitutional Limitations, supra* note 58 at 21. On Cooley's joining the Common law with American constitutionalism, see *Legitimacy and History, ibid.* at 73-77.

[89] On the use of the concept in Canadian jurisprudence, see *Hodge* v. *R.* (1883), [1883-84] 9 A.C. 117, 3 Cart. B.N.A. 144 (P.C.) [hereinafter *Hodge*]. It suggested local regulation about social order, health, and morals. See discussion in R.C.B. Risk, "Canadian Courts Under the Influence" (1990) 40 U.T.L.J. 687 at 693-94.

[90] *Treatise on Constitutional Limitations, supra* note 58 at 572. On Cooley's influence during this period, see: C.E. Jacobs, *Law writers and the courts; the influence of Thomas M. Cooley, C.G. Tiedeman, and J.F. Dillon, upon American constitutional law* (New York: Da Capo Press, 1973) at 162; B.R. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (Princeton: Princeton University Press, 1942) at 18; *Constitutional Conservatism, supra* note 85; A. Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism'" (1967) 53 J. of Amer. Hist. 751 at 755; M.L. Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism" (1985) 3 L. & Hist. Rev. 293 at 330.

[91] See the helpful discussion in J. May, "Antitrust in the Formative Era: Political Economic Theory in Constitutional and Antitrust Analysis, 1880-1918" (1989) 50 Ohio St. L.J. 257 at 277ff.

[92] *Lochner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937 (1905).

which struck down limitations on the hours of work of bakery employees in New York State.[93] While the *Lochner*-era courts did not invalidate all legislative measures that interfered with freedom of contract,[94] they did put up a fierce struggle against legislation that moved the base line for the existing distribution of wealth. According to David Sugarman, this fixation was not confined to republican scholarship: "Lawyers on both sides of the Atlantic were obsessed with the need for constitutional restraints on 'hasty and ill-conceived' change."[95] Exemplified in the work of Dicey, "[l]iberal legal scientists sought to construct a more orderly world ... [where] civilised societies were governed by laws not people, and judges owed their allegiance to the law and their conception of the 'public interest'."[96]

3. A.V. Dicey and the Response to "Collectivism"

It is useful to begin this part of the discussion in 1867. This was not only the year of the federation of the Canadian provinces, but also the year of passage of the *Second Reform Bill*, which expanded the franchise to every householder in Britain. Fearful of the consequences of the 1867 electoral reform, Walter Bagehot revised the introduction to the second edition of *The English Constitution* in 1872 to include cautious advice by which to thwart the new threat posed to the "dignified parts" of the British constitution.[97] These reforms could cause representatives to raise "questions which, if con-

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[93] See: B. Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991) who argues that it is hard to fault the *Lochner* Court for it was "exercising a preservationist function, trying to develop a comprehensive synthesis of meaning of the Founding and Reconstruction out of the available legal materials" (*ibid.* at 101); Horwitz, *supra* note 83: "The Supreme Court after the Civil War promulgated doctrines not very different from those that had been developed under, for example, the contracts clause or state-just compensation provisions" (*ibid.* at 158).

[94] See Hovenkamp, *supra* note 56:

> [T]he Court sometimes upheld statutes that interfered quite substantially with the contractual relationship between employers and employees. Further, although some of the better known substantive due process decisions involved conflicts between industry and labor, most cases cannot be so characterized. For example, many statutes creating entry or licensing restrictions for various occupations or professions were overturned (Hovenkamp, *ibid.* at 388).

See also: C. Warren, "A Bulwark to the State Police Power—The United States Supreme Court" (1913) 13 Colum. L. Rev. 667 at 669; C. Warren, "The Progressiveness of the United States Supreme Court" (1913) 13 Colum. L. Rev. 294.

[95] D. Sugarman, "'A Hatred of Disorder': Legal Science, Liberalism and Imperialism" in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991) 62 [hereinafter "Hatred of Disorder"]. See also O.W. Holmes, "The Path of the Law" in O.W. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace, 1921) 167:

> When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer (Holmes, *ibid.* at 184).

[96] "Hatred of Disorder", *ibid.* at 62.

[97] W. Bagehot, *The English Constitution*, 2d ed. (London: Kegan, Paul, Trench, Trubner, 1900). The "dignified parts" were those which excited and preserved the reverence of the population.

tinually agitated, would combine the working men as a class together". Popularly-elected representatives could suggest "topics which will excite them against the rich",[98] for "it must be remembered that a political combination of the lower classes ... is an evil of the first magnitude."[99] Bagehot recommended a strategy of caution, namely, that the House of Lords exercise its power to overrule the Commons "timidly"[100] in order that it not excite the "ignorant multitude" into class revolt.[101]

Bagehot's anxiety was not widely shared in 1867.[102] Dicey and Bryce, for example, wrote enthusiastically in support of the *Second Reform Bill*.[103] By the 1880s, however, "respectable" opinion had turned against representative democracy and was looking to the United States for instruction in the "methods by which the rising flood of democracy may best be guided into safe channels".[104] No longer was the Victorian élite perfectly secure in its confidence that domestic politics would be maintained within acceptable bounds, and that the state would be loyal to the interests of property.[105] Indeed, late-nineteenth century society exhibited characteristics that engendered fear in the Victorian élite: large disparities of wealth leading to class conflict and the rise of socialistic organizations and parties.[106] Coupled with the expansion of labour strife, the "1870s and early 1880s were seething with attacks on landed property".[107]

Those he contrasted with the "efficient parts" which concern the use of political authority (*ibid.* at 4-5). See the discussion in C. Harlow, "Power from the People? Representation and Constitutional Theory" in P. McAuslan & J.F. McEldowney, eds., *Law, Legitimacy and the Constitution* (London: Sweet & Maxwell, 1985) 62.

[98] Bagehot, *ibid.* at xx.

[99] *Ibid.* at xxiii.

[100] *Ibid.* at xxxiv.

[101] *Ibid.* at xxix.

[102] Dicey wrote: "The truth is that at that date [1848 — during the period of the *First Reform Bill, 1832* (U.K.), 2 & 3 Will. 4, c. 45] there was not a friend of the progress of freedom throughout Europe who did not believe that the extension of representative institutions of one kind or another throughout the civilized world would confer the greatest benefit on mankind" (A.V. Dicey, "Will the Form of Parliamentary Government be Permanent?" (1899) 13 Harv. L. Rev. 10 at 74 [hereinafter "Parliamentary Government"]).

[103] See the essays assembled in *Essays on Reform* (1867), reproduced in *A Plea for Democracy*, W.L. Guttsman, ed. (Bristol: MacGibbon & Kee, 1967), which included contributions from Dicey, "The Balance of Classes" (*ibid.* at 60), and James Bryce, "The Historical Aspect of Democracy" (*ibid.* at 167).

[104] A.V. Dicey, "A Review of *American Constitutions; The Relations of the Three Departments as Adjusted by a Century*, ed. by H. Davis (Baltimore: Johns Hopkins University Series, 1885)" (1886) 2 L. Q. Rev. 88 at 88-89. See also "Parliamentary Government", *supra* note 102.

[105] On the confidence of the mid-Victorian middle class, see E.P. Thompson, ed., "The Peculiarities of the English" in *The Poverty of Theory and Other Essays* (London: Merlin Press, 1978) 245 at 264.

[106] For example: "Despite the enormous rise in the national income and in average living standards during the Industrial Revolution," writes Harold Perkin, "inequality was probably at its height between 1880 and 1914" (Perkin, *supra* note 78 at 28). Socialistic ideas were being promulgated by new organizations such as the Social Democratic Federation, the Socialistic League and the Fabian Society (see *ibid.* at 39). Labour strikes flourished in this period; collective action to increase wages were undertaken in the match girls', gas workers', and dock workers' strikes in the one year period

According to Perkin, "[t]he two most salient features of the decline of Liberal England were the drift of large and increasing numbers of landowners and business men from the Liberal to the Conservative Party and the rise of Labour as an independent political force."[108] Dicey, who enthusiastically supported the reforms of 1867, exemplified this turn away from traditional liberalism in the late-nineteenth century and toward conservatism.[109] For Dicey, the experience of the last twenty years had shown that "[t]he barriers which used to limit the exercise of unbounded authority by a Parliamentary majority are all broken down. What is more serious, change has become the order of the day."[110] Summing up the tenor of late-nineteenth century legislation as collectivist, Dicey bemoaned the course of popular government unrestricted by those safeguards available to avowedly democratic polities such as the United States and Switzerland.[111] It was, according to Dicey, the "declining belief in the doctrine of *laissez-faire* [that] connect[ed] naturally with the fall in the credit and moral authority of Parliament".[112]

Once a democratic form of government was established in England "English Conservatives as naturally turn[ed] their eyes toward the United States, to ... borrow from the other side of the Atlantic devices for guiding democratic progress in an orderly and conservative direction."[113] According to Dicey,

> The plain truth is that educated Englishmen are slowly learning that the American republic affords the best example of a conservative democracy; and now that England is becoming democratic, respectable Englishmen are beginning to consider whether the Constitution of the United States may not afford means by which, under new democratic forms, may be preserved the political conservatism dear and habitual to the governing classes of England.[114]

Dicey also saw in United States's constitutionalism the realization of Common law principles familiar to English lawyers. In the *Law of the Constitution*,[115] which first appeared in 1885, he wrote:

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between 1888 and 1889 (see: J. Clapham, *An Economic History of Britain: Free Trade and Steel, 1850-1886,* vol. 2 (Cambridge: Cambridge University Press, 1952) at 390ff; Perkin, *ibid.* at 39).

[107] Perkin, *ibid.* at 49.

[108] *Ibid.* at 42.

[109] See: *ibid.*; Tulloch, *supra* note 80.

[110] A.V. Dicey, "Ought the Referendum to be Introduced into England?" (1890) 57 Contemp. Rev. 489 at 506 [hereinafter "Referendum"].

[111] See *ibid.* at 506.

[112] "Parliamentary Government", *supra* note 102 at 78-79. Dicey later would expand on this anxiety in A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century,* 2d ed. (London: Macmillan, 1948) [hereinafter *Law and Public Opinion*], a course of lectures which he delivered at Harvard Law School at the close of the eentury.

[113] "Americomania", *supra* note 81 at 53.

[114] *Ibid.*

[115] A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* reprint of 8th ed. (Indianapolis: Liberty Fund, 1982) [hereinafter *Law of the Constitution*].

> [W]hile the formal differences between the constitution of the American Republic and the constitution of the English monarchy are, looked at from one point of view, immense ... the institutions of America are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England ... in every other respect the institutions of the English people on each side of the Atlantic rest upon the same notions of law, of justice, and of the relation between the rights of individuals and the rights of the government, or the state.[116]

For example, the doctrine of federalism, as it developed in the United States, was comparable to the circumscribed limits available to delegated power under British legal doctrine. "Every legislative assembly existing under a federal constitution is merely a subordinate law-making body," wrote Dicey, "whose laws are of the nature of bye-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority." In this way, he could find comparable the power of the legislature of the United States and that of an English railway company or a municipal corporation, for they are "in truth each of them nothing more than subordinate law-making bodies".[117] According to Dicey, in a federal regime "no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but bye-laws."[118] This is familiar to the Common lawyer: "[A]n English lawyer can easily see that the fathers of the republic treated Acts of Congress as English Courts treat bye-laws, and in forming the Supreme Court may ... have had in mind the functions of the Privy Council."[119]

In drawing favorable comparisons between constitutionalism in the United States and the British Common law, Dicey was supported by learned opinion at home (for example, from his brother Edward Dicey),[120] by his visits to the United States with his friend and colleague James Bryce, and while a visitor at Harvard Law School.[121] But

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[116] *Ibid.* at 74.

[117] *Ibid.* at 82. See also A.V. Dicey, "Federal Government" (1885) 1 L.Q. Rev. 80 at 85.

[118] *Law of the Constitution*, *ibid.* at 100.

[119] *Ibid.* at 92. See also, Dicey's earlier article "Federal Government," *supra* note 117, where he writes that the American founders "probably" had in mind the Privy Council (*ibid.* at 93).

[120] See E. Dicey, "The New American Imperialism" (1898) 44 The Nineteenth Century 487 [hereinafter "New American Imperialism"]:

> To speak the plain truth, the *magnum opus* of Washington and his colleagues is nothing more nor less than an attempt to paraphrase in writing the unwritten Constitution of the mother country, the place of the constitutional King being replaced by that of President and the House of Lords by the Senate ... ("New American Imperialism", *ibid.* at 492)
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> ...
>
> [I]f I were asked what in my opinion is the greatest work England has accomplished, I should say the United States of America (*ibid.* at 501).

[121] See A.V. Dicey, "The Teaching of English Law at Harvard" (1899-1900) 13 Harv. L. Rev. 422 [hereinafter "English Law"]:

Dicey was skeptical about importing the principles of U.S. constitutionalism into Great Britain; for Dicey "to frame a written and rigid Constitution is not the work of a day or of a year."[122] Instead, he developed the notion of the "rule of law" as the foundational principle of British constitutionalism.[123] He reconceptualized the Common law in order that it play a greater role in stemming the transition toward socialism[124] — the rule of law enforced by judges emerged as a prophylactic to class rule. According to Bernard Hibbits, Dicey believed that "judicial decisions could themselves suggest which policies were legitimate and which were not, and could thereby contribute in an important manner to the national ideological debate."[125]

While it is difficult to prove conclusively, through historical methodology, the politico-theoretical concerns that animated judicial ideology in the late-nineteenth century, it is fair, perhaps, to surmise that its legal philosophy was, indeed, shaped by the general intellectual culture of that period.[126] Baker concludes:

> [W]hile judges and élite lawyers were not themselves sophisticated political theorists, they were comparatively well-educated gentlemen whose social backgrounds and legal training caused them to be sympathetic to the paradigms offered by contemporary ethics and political economy rather than those of business administration or mercantilism.[127]

The prevalence of the discourse of productivity in the general intellectual culture of the North Atlantic countries coupled with the shared anxiety of class rule suggest a connection, only beginning to be explored, between Canadian constitutional life and an ideology that favoured productivity.[128]

I will argue that an ideology of productivity influenced judicial interpretation of the Canadian Constitution in the latter part of the nineteenth century. While its traces

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> The teachers at Harvard are saved from the unreality and vagueness which are apt to infect speculative jurists, not only by their knowledge that they are educating their students for a definite professional purpose — namely, success as lawyers — but also by their intense enthusiasm for the Common Law of England, or rather of the English people. They are apostles of English law ("English Law", *ibid.* at 429).

[122] "Referendum", *supra* note 110 at 506.

[123] Dicey also flirted with the idea of adopting Swiss-style referenda: "The Referendum ... supplies the very kind of safeguard which all true democrats feel to be required" ("Referendum", *ibid.* at 507).

[124] See Sugarman, *supra* note 64 at 109.

[125] Hibbits, *supra* note 79 at 18.

[126] See: S.A. Seigel, "Historism in Late Nineteenth-Century Constitutional Thought" (1990) Wis. L. Rev. 1431 at 1544; M. Lerner, "The Supreme Court and American Capitalism" (1933) 42 Yale L.J. 668 at 696ff.

[127] Baker, *supra* note 57 at 290. On the social-class origins of the senior judiciary in Britain from 1820 to 1968, see the now classic study by J. Griffith, *The Politics of the Judiciary* (London: Fontana, 1977) at 633.

[128] In this respect, I agree with Baker that "[n]ineteenth-century legal culture is *terra incognita*" (Baker, *ibid.* at 233). See also Consultative Group on Research and Education in Law, *Law and Learning* (Ottawa: Department of Supply & Services, 1983) at 63.

are few, it is discernible in one of the crowning judicial achievements of the provincial-rights movement, namely, Lord Watson's opinion in the *Local Prohibition* case. While the Privy Council did not employ the rhetoric of productivity, the underlying premise of the decision promoted the objectives, to paraphrase Locke, of confining federal legislative power to no end but the preservation of property and to limit its ability to impede productivity. To refine this argument, I will turn now to a discussion of the series of cases concerning liquor prohibition which traced the boundaries of legislative jurisdiction under the Canadian Constitution.

II. Constitutional Developments in the Courts

A. *Energetic Federalism in the Courts of the Late-Nineteenth Century*

The judiciary was not inclined to explicitly limit the ability of governments at either level to control or regulate the economy. The federal government had, in the opinion of Chief Justice Ritchie, plenary powers of legislation "as large and of the same nature as those of the Imperial Parliament itself".[129] The Privy Council later included the provincial governments in this formulation.[130] It is the story of this shift toward the recognition of provincial autonomy that has been recounted many times.[131] Recent studies, influenced by the turn to "contextualism" in Canadian political thought,[132] have offered new insights into the line of cases that began shortly after confederation.[133] I have had the benefit of building on those studies, although my focus will be somewhat different. My primary objective will be to identify the economic subtext which may have been operating in late-nineteenth century cases.

In general, the courts of the late-nineteenth century would not concern themselves with the prudence, morality, or legitimacy of the legislation in question.[134] Nor were the

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[129] *Fredericton*, *supra* note 3 at 529.

[130] See *Hodge*, *supra* note 89.

[131] In sum, wrote Lefroy in 1897, the provinces had "authority as plenary and as ample ... as the Imperial Parliament ... possessed and could bestow" and so did the Dominion Parliament have powers "as large and of the same nature, as those of the Imperial Parliament itself" (Lefroy, *supra* note 6 at 244). See also R.C.B. Risk, "A.H. Lefroy: Common Law Thought in Late Nineteenth Century Canada: On Burying One's Grandfather" (1991) 41 U.T.L.J. 307.

[132] See *e.g.* J. Rayner, "The Very Idea of Canadian Political Thought: In Defence of Historicism" (1991) 26 J. Can. Stud. 7.

[133] See: R. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University Press of New York, 1991) [hereinafter *Liberty and Community*]; Risk, *supra* note 89; P. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: University of Toronto Press, 1986) [hereinafter *Mr. Attorney*]; P. Romney, "The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the *British North America Act*" (1992) 25 Can. J. Pol. Sci. 3 [hereinafter "The Nature and Scope"]; P. Romney, "Why Lord Watson Was Right" in J. Ajzenstat, ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992) 177.

[134] See Monahan, *supra* note 4.

questions of economic efficiency or the avoidance of externalities determinative or of any concern — a matter of complaint to more recent commentators.[135] Typically, the question before the courts was whether the impugned legislation was authorized by the terms of the B.N.A. Act.[136]

The 1898 *Fisheries Reference*[137] exhibited the unbounded nature of legislative energy in Canadian constitutionalism. Despite the likelihood that the federal power over fisheries might trench on provincial property rights,[138] the Privy Council held that this was no reason to curtail the limits of federal fisheries legislation. According to Lord Herschell, the "suggestion that the [federal] power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred." Only the jurisdictional question, and not the "reasonableness" of the legislation, was of concern to courts: "The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislation is elected."[139]

For provincial reformers, the threat of federal tyranny was to be checked by the sovereign power of the provincial governments, since the provinces were also supreme within their jurisdictional boundaries. Thus, argued Oliver Mowat before the Supreme Court of Canada: "Where there is jurisdiction, the will of the Legislature is omnipotent according to British theory, and knows no superior law in the sense in which the American Courts are accustomed to adjudicate upon constitutional questions."[140] Lefroy restated the absolutist axiom that once a law is passed by the appropriate level of government

> it is not competent for any Court to pronounce the Act invalid because it may affect injuriously private rights ... If the subject be within the legislative jurisdiction of the Parliament, or of the Provincial Legislatures, respectively ... ef-

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[135] See *e.g.* A.E. Safarian, *Canadian Federalism and Economic Integration: Constitutional Study prepared for the Government of Canada* (Ottawa: Information Canada, 1974).

[136] See W.R. Lederman, "The Classification of Laws Under the British North America Act" in Lederman, ed., *supra* note 1. See also text accompanying notes 1-4, above. This was not always accomplished by declaring laws *ultra vires* (see *e.g. Kinnear* v. *Robinson* (1867), 12 N.B.R. 568 (S.C.)).

[137] *Canada (A.G.)* v. *Ontario (A.G.)*, [1898] A.C. 700 (P.C.) [hereinafter *Fisheries Reference*].

[138] This is to be distinguished from *private* proprietary rights (see *R.* v. *Robertson*, [1882] 6 S.C.R. 52, 2 Cart. B.N.A. 65 [hereinafter *Robertson* cited to S.C.R.], discussed in text accompanying notes 143ff, below).

[139] *Fisheries Reference*, *supra* note 137 at 713. For more on the omnipotence of Canadian legislators, see W.R. Riddell, "The Constitutions of the United States and Canada" (1912) 32 Can. L. T. 849.

[140] Reported in the "Argument" in *Severn*, *supra* note 6 at 81 [hereinafter "Argument"]. See J.N. Pomeroy, *An Introduction to the Constitutional Law of the United States* (New York: Hurd & Houghton, 1870) at 92, cited by Oliver Mowat in "Argument", *ibid.*

> fect must be given to it in all Courts of the Dominion, however private rights may be affected.[141]

Despite the judicial tendency to submerge the normative questions raised by the scope of energetic federalism, constitutional questions continued to raise the tension between liberty and authority. On some of those occasions, using a variety of judicial techniques, courts appeared to prefer property rights over legislative energy.[142] In *Robertson*, the Supreme Court of Canada of 1882 (which usually granted the federal government a wide berth), ruled that federal jurisdiction over "fisheries" did not extend to property rights, namely, the "ownership of beds of the rivers, or of the fisheries, or the rights of individuals therein".[143] According to Chief Justice Ritchie, the national power could only affect "fisheries generally, tending to their regulation, protection and preservation".[144] Federal power, therefore, could not impair private-property owners, such as the owner of property at a bend in the Miramichi river.[145] Echoing Locke and anticipating the later work of Hayek, Ritchie C.J. restricted federal power to the enhancement, through "general laws", of fishery production.[146]

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[141] Lefroy, *supra* note 6 at 279. He cites the "useful" article by T.C. Anstey, "On the Competence of Colonial Legislatures to Enact Laws in Derogation of Common Liability or Common Right" (1868) 3 Papers Read Before the Juridical Society 401. Anstey writes that, as of the date of the passing of the *Colonial Laws Validity Act*, laws of the colonial legislature that are repugnant to the "liberties of Englishmen", including the Magna Charta, may have effect as long as they are not repugnant to some Imperial statute (Anstey, *ibid.* at 404, cited in Lefroy, *ibid.* at 284).

[142] Lefroy offers other examples of judicial misgivings with energetic federalism in *Lefroy*, *ibid.* at 279-88. See *e.g.*: "no power is given to it [the province] to impair the obligation of contracts" (*Union St. Jacques de Montréal* v. *Belisle* (1872), 20 L.C.J. 29 at 38, 5 R.L.O.S. 622 (Qué. Sup. Ct.), Duval C.J.); "[I]t is possible that the extreme right to legislate does exist, but it could only be exercised where there was an extreme public necessity for it" (*Venning* v. *Steadman* (1884), 9 S.C.R. 206, Henry J.).

[143] *Robertson*, *supra* note 138 at 120. This was consistent with the Common law rule that the right to fish belongs to the owner of the *solum* or bed (see: S. Fairley, "Canadian Federalism, Fisheries and the Constitution" (1980) 12 Ottawa L. Rev. 257; Hogg, *supra* note 6, c. 29). The ruling in *Robertson* was confirmed in the *Fisheries Reference*, discussed above.

[144] *Robertson*, *ibid.* at 120-21.

[145] For a discussion regarding judicial attitudes towards water resources, see: J. Bendickson, "Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario 1870-1930" in D. Flaherty, ed., *Essays in Canadian Legal History*, vol. 2 (Toronto: University of Toronto Press, 1981) 365; F.A. Sharman, "River Improvement Law in the Early Seventeenth Century" (1982) 3 J. Legal Hist. 222.

[146] Hayek advocated the promulgation only of general rules: "[T]he private citizen and his property are not [to be] subject to specific commands (even of the legislature), but only to such rules of conduct as apply equally to all" (Hayek, *supra* note 11 at 24). Justice Strong reached the same result by applying to the B.N.A. Act the statutory presumption that property rights were not to be impaired "unless [the Court was] compelled to do so by express words or necessary implication" (*Robertson*, *supra* note 138 at 134). See also *Western Counties Railway Co.* v. *Windsor and Annapolis Railway*, [1881-82] 7 A.C. 178, 1 Cart. B.N.A. 397 (P.C.). On the application of this technique, see J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

B. Prohibition and Regulation

The series of cases concerning the prohibition and regulation of liquor became the terrain over which the contours of the federal-provincial division of powers were delineated, culminating with provincial success in the 1896 *Local Prohibition* case. The decisions in these cases serve as a more discreet lens through which to view judicial misgivings about energetic federalism — misgivings that, I will argue, were not solely concerned with the potential omnipotence of Parliament over the provincial legislatures.

The *Local Prohibition* case, in particular, provides a striking example of how judicial anxiety with the potential scope of legislative energy may have driven the Privy Council to a result that confined authority under the general trade and commerce power. Most discussions of this case have concerned the Privy Council's interpretation of the federal residual clause. Other explanations of its ruling, for example the one recently resurrected by historian Paul Romney ("the text made them do it"), are dissatisfying.[147] My offering is tied to the ideology of productivity. Relying on the distinction between prohibition and regulation (and strictly confining federal power over trade to the latter), the Judicial Committee of the Privy Council came to reveal, I will argue, a marked prejudice in favour of property and productivity. By unnecessarily confining federal power, when a less restrictive interpretation would have sufficed for the purposes of provincial autonomy, the Privy Council laid bare a preference for liberty over authority.

Vipond has ably demonstrated the extent of the provincial reformers' fear of the absolutist potential of federal power. Reformers saw the potential for arbitrary federal interference with local self-government, for example through use of the power to disallow and via the power to regulate trade and commerce, as "threatening to them as legislative interference with individual autonomy".[148] For the provincial autonomists, "rights", including economic rights, were best protected and promoted at the local level. According to Vipond, the "autonomists were quite aware of the rhetorical possibilities of describing provincial autonomy as a form of liberalism, and they therefore drew out the analogy between provincial and individual rights enthusiastically."[149] Provincial rights and individual rights were conflated, and defence of the former necessar-

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[147] See: *Mr. Attorney*, *supra* note 133; "The Nature and Scope", *supra* note 133; "Why Lord Watson Was Right" in Ajzenstat, ed., *supra* note 133. A number of explanations are neatly canvassed in Greenwood, *supra* note 22.

[148] R. Vipond, "Comment: Liberalism, Federalism and the Origins of Confederation" (1991) 26 J. Can. Stud. 104 at 106 [hereinafter "Comment"]. See also R. Vipond, "Alternative Pasts: Legal Liberalism and the Demise of the Disallowance Power" (1990) 30 U.N.B.L.J. 126 at 144-45.

[149] *Liberty and Community*, *supra* note 133 at 135.

ily meant defence of the latter.[150] Property owners, according to that argument, would become the beneficiaries of claims to provincial autonomy.[151]

The courts also came to accept that argument, regarding the protection of provincial rights as synonymous with the protection of individual rights. In other words, courts came to read "property and civil rights" as concerning property rights *per se*. In the fisheries case of *Robertson*, for example, Ritchie C.J. found there was nothing in the B.N.A. Act that exhibited a legislative intention to give to Parliament the "right to deprive the province or individuals of their right to property".[152] Thus, the scope of provincial autonomy and, *ipso facto*, that of individual autonomy came to be outlined in the series of cases concerning the regulation and prohibition of the liquor trade in the late-nineteenth century. These cases serve as the groundwork on which the Privy Council's decision rests in *Local Prohibition*.

The story begins with the 1879 trial decision in *R.* v. *Fredericton (City of)*.[153] The New Brunswick Supreme Court ruled that the Parliament of Canada had no jurisdiction to prohibit liquor consumption pursuant to the procedures laid out in the *Canada Temperance Act*.[154] The court ruled that the Act was *ultra vires* because, *inter alia*, it unduly interfered with property and civil rights in the province. It was in the course of articulating that basis for the decision that the justices conflated property with provincial autonomy and endorsed the idea that the federal trade and commerce power was available only for the regulation, and not the prohibition, of commerce. "There is nothing the Constitution guards more sacredly than property,"[155] wrote Justice Fisher. Under the C.T.A., the "right of property is infringed upon, and the value of the liquor,

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[150] See "Comment", *supra* note 148 at 106. As provinces had been granted exclusive jurisdiction over "property and civil rights", this could be neatly achieved.

[151] Edward Blake, noted parliamentarian, counsel and provincial rights advocate, spoke out in Parliament against federal disallowance of the Ontario *Rivers, Streams and Creeks Act*, S.O. 1881, c. 11, in these very terms:

> I am a friend to the preservation of the rights of property...but I believe in the subordination of those rights to the public good. ...
>
> I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Provinee (*House of Commons Debates* (14 April 1882) at 915).

This was brought to my attention by the intellectual biographical sketch of Blake by R.C.B. Risk, "Blake and Liberty" in Ajzenstat, ed., *supra* note 133, 205.

[152] *Robertson, supra* note 138 at 123.

[153] (1879-80), 19 N.B.R. 139 (S.C.) [hereinafter *Fredericton* (Trial)]. See also: W. Lahey, "Constitutional Adjudication, Provincial Rights, and the Structure of Legal Thought in Late Nineteenth Century New Brunswick" (1990) 39 U.N.B.L.J. 185; *Canada Temperance Act; Ex parte Grieves* (1879) (S.C.) [unreported], cited in Lahey, *ibid.*

[154] S.C. 1878, c. 16 [hereinafter C.T.A.].

[155] *Fredericton* (Trial), *supra* note 153 at 174.

as an article of merchandize, sensibly diminished".[156] According to Justice Weldon, while it was appropriate for Parliament to impose duties on the import of liquor, it was inappropriate for Parliament to then prohibit its sale within the country: "Was not authority impliedly given to the importer to sell the same and not to accumulate it in his store or warehouse, or if exposed to sell, be subjected to heavy penalties, and his goods, confiscated and utterly destroyed?"[157]

An energetic federal government emerged victorious, however, on appeal to the Supreme Court of Canada,[158] in the third constitutional case to be decided by the Court and the first in a series of pivotal challenges to laws regarding the consumption of liquor. Chief Justice Ritchie found nothing in the terms of the B.N.A. Act to limit the legislative power conferred. It did not matter whether Parliament was motivated by "a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry or local manufactures".[159] Nor did it matter that Parliament was legislating in regard to the "prohibition" of trade and commerce. Ritchie C.J. did "not entertain the slightest doubt that the power to prohibit is within the power to regulate".[160] According to the majority, only the federal government was granted a power to prohibit trade and commerce — the provinces had no such authority.[161]

Justice Henry, in dissent, articulated the provincial reply. If the C.T.A. was *intra vires*, he could see no impediment to federal power "that would not merely restrain and control, but completely nullify, the local legislative power in respect of 'civil rights and property' and other important interests".[162] For the majority, on the other hand, once it was established that authority was conferred under the B.N.A. Act, the extent to which federal power might threaten provincial and "other important interests" was of no concern. Here, there was no doubt that the federal government had such authority under its power to regulate trade and commerce at section 91(2).

The Privy Council affirmed the *intra vires* status of the C.T.A. two years later in *Russell* v. *R.*[163] It found the local-option scheme was within the "general authority of Parliament to make laws for the order and good government of Canada". Not only did

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[156] *Ibid.*

[157] *Ibid.* at 182.

[158] See *Fredericton*, *supra* note 3. The earlier two constitutional cases were: *Severn*, *supra* note 6; *Valin* v. *Langlois* (1879), 3 S.C.R. 1.

[159] *Fredericton*, *ibid.* at 533. Encouraging local industry would have been a legitimate reason to interfere with property rights, according to Blackstone (see discussion at Part I.A.2, above).

[160] *Ibid.* at 537. Taschereau J., in a concurring judgment, wrote: "To my mind, it is a regulation, whether it is taken as prohibiting or as regulating the trade in liquors. A prohibition is a regulation"(*ibid.* at 559).

[161] See *ibid.* at 542. Ritchie C.J. cited with approval his earlier judgment in *R.* v. *Justices of the Peace of King's County* (1875), 15 N.B.R. 535, 2 Pugs. 535 (S.C.) [hereinafter *Justices of the Peace*].

[162] *Fredericton*, *ibid.* at 556.

[163] (1882), [1881-82] 7 A.C. 829, 2 Cart. B.N.A. 12 (P.C.) [hereinafter *Russell* cited to A.C.].

the scheme concern public order, safety, and morals, having a "direct relation to criminal law", but the Privy Council also indicated that it did not wish to express any dissent from the majority of the Supreme Court of Canada in *Fredericton*, who also found authority in section 91(2).[164]

A little more than a year later, the Privy Council further expanded the bounds of energetic federalism by holding that the provinces were also entitled to regulate liquor consumption.[165] *Hodge* upheld an Ontario scheme providing for the issuance of liquor licenses by a Board of Licence Commissioners,[166] an activity previously performed by the municipalities. The Ontario scheme, wrote Lord FitzGerald, concerned matters of a merely local nature in the province. The Privy Council's ruling in *Russell*, however, might have been interpreted as precluding any role for the provinces in liquor traffic. On the contrary, according to the Court in *Hodge*, what the ruling in *Russell* indicated was that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose, fall within sect. 91."[167] As the C.T.A. had not been adopted in Toronto, the tavern keeper's place of business, the Ontario Act could not be considered in conflict with the federal one and, therefore, could remain operative. In addition, Lord FitzGerald emphasized that in the earlier *Russell* ruling, federal competence was found under the general power to make laws for the peace, order, and good government of the Dominion and not under the federal trade and commerce power. The Privy Council thereby reiterated its earlier pronouncement in *Parsons*[168] that the federal power to regulate trade and commerce did not extend to local matters of intra-provincial trade. The ruling in *Hodge*, therefore, was that temperance laws

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[164] See *ibid.* at 839, 842. Edward Blake later would complain that *Russell* was poorly argued by the lead counsel for the Provinces, Judah P. Benjamin (Benjamin was not even present for most of the argument (see *House of Commons Debates* (16 March 1883) at 239-41)). On Benjamin's role as counsel in these cases, see C.O. Johnson, "Did Judah P. Benjamin Plant the 'States' Rights' Doctrine in the Interpretation of the British North America Act?" (1967) 45 Can. Bar Rev. 454). Benjamin and his junior had not brought to the Board's attention the long standing practice of municipal regulation of liquor establishments, exercised in the years before the B.N.A. Act was enacted (see the extensive lecture Blake gives Prime Minister MacDonald on the powers of municipal institutions over the regulation of liquor prior to Confederation in Canada in *House of Commons Debates* (16 March 1883) at 240, discussed in Risk, *supra* note 89 at 715). A contemporary string of cases before provincial high courts had affirmed this traditional municipal role in the regulation (if not prohibition) of retail liquor sales by upholding provincial laws under section 92(8) which concerns "Municipal institutions in the Province" (see *e.g.*: *Re Slavin* (1874-75), 36 U.C.Q.B. 159 [provinces can regulate or prohibit]; *Keefe* v. *McLennan* (1876), 13 N.S.R. 5, 2 Russ. & Ches. 5 (S.C.) [provinces can regulate]; *Sulte* v. *Three Rivers (City of)* (1883), 2 Cart. B.N.A., 5 L.N. 330 (Que. C.A.) [provinces can prohibit]; *Blouin* v. *Quebec (City of)* (1880), 7 Que. Law Rep. 18 (Sup. Ct.) [Sunday closing is provincial police regulation]. But see *Justices of the Peace*, *supra* note 161, Ritchie, C.J. [provinces cannot prohibit]).

[165] See *Hodge*, *supra* note 89. Followed in: *Sulte* v. *Three Rivers (City of)* (1885), 11 S.C.R. 25, 4 Cart. B.N.A. 305; *Molson* v. *Lambe* (1888), 15 S.C.R. 253, 4 Cart. B.N.A. 334. See discussion in Risk, *supra* note 89 at 722ff.

[166] The Ontario *Liquor License Act*, S.O. 1876, c. 26.

[167] *Hodge*, *supra* note 89 at 130.

[168] *Supra* note 21.

were capable of having a "double aspect." Federal authority over prohibition could be found under the general power to make laws for the peace, order, and good government of Canada, while provincial authority over regulation could be found under a variety of classes of subjects enumerated in section 92 having to do with local regulation.[169]

Authority over liquor control was made no less complex by the Supreme Court and Privy Council rulings in the *McCarthy Act Reference*.[170] At issue there was the federal *Liquor Licence Act*[171] which provided for a uniform scheme of liquor regulation administered by municipal licensing boards — similar in design to the Ontario scheme upheld in *Hodge*.[172] Unlike the C.T.A., the *McCarthy Act* concerned regulation and not prohibition. Each court held that legislation to be *ultra vires* the authority of the federal government.[173] Without written reasons, it is difficult to discern precisely what occurred in that reference. Alexander Smith concludes, however, after a review of the transcripts of oral argument, that the decision of the Supreme Court involved the recognition "that the commerce power does not embrace *all* intra-provincial activity, and, in particular, does not embrace the *regulation* of the retail liquor traffic within the several provinces".[174] As Justice Strong of the Supreme Court of Canada remarked, he could not find that the Act concerned trade and commerce "in the larger sense and not mere retail dealing".[175] During the course of argument before the Privy Council, Sir Montague Smith distinguished between prohibitive legislation applied across the country, such as

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[169] See A.H.F. Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) c. 20.

[170] As was the practice at the time, no written decisions were issued in reference cases. A transcript of the oral argument before the Supreme Court of Canada can be found in House of Commons, "Supreme Court of Canada, Reference re: *The Liquor Licence Act* of 1883" in *Sessional Papers* (1885) No. 85 at 42-244. The argument before the Judicial Committee of the Privy Council can be found in U.K., J.C.P.C., *Report of the Proceedings of the Judicial Committee of the Privy Council on the hearing of the petition of the Governor-General of Canada in relation to the Dominion Liquor License Acts of 1883 and 1884*. I have found an easily accessible reproduction of the Privy Council arguments in G.J. Wheeler, *Confederation Law of Canada* (London: Eyre and Spottisgoode, 1896) at 144-58. See also *Cassel's Digest of Supreme Court Decisions* (1875-93) (Toronto: Carswell, 1893) at 509. A good discussion of the arguments before both courts can be found in Smith, *supra* note 18 at 49-57.

[171] S.C. 1883, c. 30 [hereinafter *McCarthy Act*].

[172] Indeed, the federal Act was intentionally desigued to supersede the Ontario Act. Macdonald had been enraged by the way Ontario Premier Mowat had used liquor licensing for patronage purposes (see discussion by Edward Blake in *House of Commons Debates* (16 March 1883) at 237). See also: Risk, *supra* note 89; "The Nature and Scope", *supra* note 133.

[173] This would lead Edward Blake in 1890 to propose a resolution to amend the *Supreme Court Act*, S.C. 1875, c.11, that written reasons be given in reference cases. This led to an amendment in 1891 (*An Act to Amend the Supreme Court Act*, S.C. 1891, c. 25). See discussion at Part III, below.

[174] Smith, *supra* note 18 at 53. Smith emphasized, however, that "it must not be supposed that the Supreme Court had yet accepted the general proposition that *all* local activity is excluded from the commerce clause" (*ibid.*).

[175] Quoted in Smith, *ibid.* at 54.

in *Russell*, and regulation of local traffic, such as was the case here, indicating a clear preference for provincial authority over the latter.[176]

The discussion so far indicates that higher courts were, for the most part, facilitative of energetic federalism. Both levels of government, for example, could legislate in regard to liquor traffic. Hints of a judicial concern with the effects of energetic federalism surfaced; however, through the narrow construction accorded the federal power to regulate trade and commerce in *Parsons* and, then, in *Hodge*. It is in the *Local Prohibition* reference that the Privy Council was faced squarely with the choice of whether to prefer legislative energy over property.

C. *The* Local Prohibition *Case*

The stage was now set for determining whether the provinces had the authority not only to regulate but to prohibit liquor consumption. The question arose in two challenges to the Ontario *Local Option Act*,[177] one sent to the Supreme Court by the federal Cabinet for an advisory opinion, the other arriving at the Supreme Court on appeal from a judgment of the Ontario Court of Appeal. The Statute concerned a local-option prohibition scheme virtually identical to the C.T.A. Here, then, was a clear opportunity to rule whether provinces had authority to prohibit trade in liquor, not merely to regulate it, and, if so, to determine the nature of federal power over the same subject matter. Because different panels of the Court sat on each case, the majorities shifted, and two contradictory judgments resulted.

In the appeal of *Huson* v. *South Norwich (City of)*,[178] the Supreme Court upheld the validity of the Ontario Statute under provincial power over "Municipal Institutions" by applying the double-aspect rule. Parliament and the provinces had concurrent powers to prohibit retail-liquor consumption; but a province could not go so far as to prohibit its manufacture and importation, as that role was reserved to Parliament.[179] In the reference, however, a different panel of the Court held the Act *ultra vires* the Province as it did not have the authority to enact prohibitory legislation, an indivisible matter which could not be the subject of more than one aspect.[180] Nor would the Court distinguish between prohibition of retail sales from wholesale, manufacture, or importation.[181] Neither majority doubted that Parliament had the authority, under the residual or commerce clauses, to enact prohibitory legislation. The question was then put to the Privy Council on appeal in the *Local Prohibition* case.

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[176] See Wheeler, *supra* note 170 at 148. On the significance of the decision, see Lefroy, *supra* note 6 at 407.

[177] S.O. 1890, c. 56, s. 18. The preamble of the legislation stated: "[I]t is expedient that municipalities should have the powers by them formerly possessed."

[178] [1895] 24 S.C.R. 145, 19 O.A.R. 343 [hereinafter *Huson* cited to S.C.R.].

[179] See *ibid.* at 148.

[180] See: *Reference Re Provincial Jurisdiction to Pass Prohibitory Liquor Laws* (1895), 24 S.C.R. 170 at 220, Gwynne J. [hereinafter *Re Prohibitory Laws*]; Smith, *supra* note 18 at 58-60.

[181] See *Re Prohibitory Laws*, *ibid.* at 228, Gwynne J.

In *Local Prohibition*, the provincial strategy before the Privy Council was three-pronged.[182] First, the Province would rely upon provincial jurisdiction over municipal institutions and showcase the prohibitory laws over liquor that had been enacted prior to confederation.[183] Second, it would invoke the double-aspect doctrine articulated in *Hodge*, arguing that there was no conflict between the two Acts as the provincial Act could not apply where the federal one was in force.[184] Third, the Province would argue that federal power over trade and commerce had to be confined to its regulation, and not to its prohibition, thereby, isolating the federal aspect to the residual clause recognized in *Russell*.[185]

Lord Watson dealt first with the issue of federal jurisdiction. He accepted Ontario's argument that the federal power to regulate trade did not include a power to prohibit it altogether: "A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation."[186] Here, Lord Watson relied only on the recent interpretation of a municipal by-law by Lord Davey: "[A] power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."[187] As I will argue below, it was unnecessary for the Privy Council to reach that conclusion.

If no such power to prohibit could be found in section 91(2), how might the Privy Council's earlier decision in *Russell* be explained? Lord Watson, here, articulated what has come to be known as the "national dimensions" branch of the P.O.G.G. provision.[188] First, he distinguished between the opening words of section 91 and the enumeration of the classes of subjects belonging exclusively to Parliament. The latter were included in the closing words of section 91 and were "deemed", therefore, not to be

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[182] See the transcript of oral argument for the province reproduced in: Wheeler, *supra* note 170 at 1045-64; *The Local Prohibition Appeal: An Appeal from the Supreme Court of Canada to Her Majesty the Queen in Council* (London: William Brown, 1895). The argument is summarized in *Local Prohibition, supra* note 16 at 351-55.

[183] See Wheeler, *ibid.* This had been accepted by the Privy Council in *Hodge, supra* note 89 at 131.

[184] See Wheeler, *ibid.* at 1045-52.

[185] See *ibid.* at 1051-52. Romney argues that Watson's interpretation of the federal residuary power resembled Oliver Mowat's approach articulated thirteen years earlier in a paper Mowat prepared to assist counsel in the *Parsons* case (see: Ontario, Legislative Assembly, "Report of the Attorney-General of Ontario with Respect to Certain Proceedings Before the Imperial Privy Council, Involving the Right of the Provincial Legislature to Pass the Act to Secure Uniform Conditions in Policies of Insurance" by O. Mowat in *Sessional Papers* (1882) at 3; "Why Lord Watson Was Right" in Ajzenstat, ed., *supra* note 133 at 190; "The Nature and Scope", *supra* note 133 at 19ff).

[186] *Local Prohibition, supra* note 16 at 363.

[187] *Toronto (City of)* v. *Virgo*, [1896] A.C. 88 at 93 (P.C.) [hereinafter *Virgo*]. That case concerned the powers delegated to municipalities in Ontario.

[188] There might be some matters, "in their origin local and provincial, [that] might attain such dimensions as to effect the body politic of the Dominion, and to justify Parliament in passing laws for their regulation or abolition". But, warns Watson, "great caution must be observed in distinguishing between that which is local and that which is provincial" (*Local Prohibition, supra* note 16 at 361).

within the classes of subjects assigned to the provinces under section 92.[189] It followed that "in legislating in regard to such matters [as concern the peace, order, and good government of Canada], the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by sec.92."[190] There might be some matters, however, "in their origin local and provincial, [which] might attain such dimensions as to effect the body politic of the Dominion, and to justify Parliament in passing laws for their regulation or abolition."[191] Deferring to the Privy Council's prior decision in *Russell*, Lord Watson found that the federal Act had such a dimension as to bring it within the P.O.G.G. clause.[192]

Lord Watson concluded that the Ontario legislature did have the power to prohibit trade as the legislation in question concerned property within the Province and the "civil rights of persons in the province".[193] He did not accept that provincial jurisdiction could be found, as was argued forcefully by Ontario, under "municipal institutions in the Province":[194] "[A]ccording to its natural meaning, [section 92(8)] simply gives provincial legislatures the right to create a legal body for the management of municipal affairs." The clause, for example, could not permit provinces to endow municipalities with powers that were now exercisable by the Parliament of Canada. Hence, "the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provi-

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[189] The Privy Council, thus, overruled its previous decision in *Parsons*, that the concluding part of section 91 "applies in its grammatical construction only to No.16 of s.92" (*Parsons*, *supra* note 168 at 108; *Local Prohibition*, *ibid.* at 368).

[190] *Local Prohibition*, *ibid.* at 360. Here, Lord Watson was in general agreement with Mowat as expressed in Mowat's 1882 memorandum in *Parsons* (see *ibid.*).

[191] *Local Prohibition*, *ibid.* at 361.

[192] In this way, it is not quite accurate to say, as Greenwood does, that Lord Watson "in effect reversed" the decision in *Russell* (Greenwood, *supra* note 22 at 245).

[193] *Local Prohibition*, *supra* note 16 at 368. The Court found the *Local Option Act* valid under sections 92(13) and 92(16) but not under section 92(9) as the subsection cannot "be construed as authorizing the abolition of the sources from which revenue is to be raised" (*Local Prohibition*, *ibid.*).

[194] One alternative, which Lefroy characterized as "bold and comprehensive" (Lefroy, *supra* note 6 at 54), was to generalize provincial power and to adopt the language of Chief Justice Dorion in *Cooey v. Brome (County of)* (1878), 1 L.N. 519 (Que. Sup. Ct.), cited in *Lepine v. Laurent* (1891), 17 Q.L.R. 226 (Sup. Ct.): "'[I]n the absence of any expression to restrict the power so conferred [municipal institutions] must be understood to comprise all those matters which, at the time the union was effected, had been considered by the then existing Legislatures as belonging to municipal institutions'" (*ibid.* at 228, quoted in Lefroy, *ibid.*). See also A.H.F. Lefroy, "Prohibition: The Late Privy Council Decision" (1896) 16 Can. L.T. 125 at 134 [hereinafter "Prohibition"]. The problem, as Risk has noted, was the diversity of municipal powers at confederation which offered no proof that section 92(8) carried within it a local power to prohibit (see Risk, *supra* note 89 at 728-30). While municipalities in Ontario exercised such powers, those in New Brunswick did not. It could not be presumed, then, that any core of municipal jurisdiction was carried over into section 92(8). But to deny any core of jurisdiction rubs against the interpretive scheme of the Act. Indeed, the Privy Council recognized such a core of jurisdiction in *Hodge*.

sions of sec.92 other than No. 98."[195] Authority to prohibit liquor traffic within the province was authorized, instead, by the exclusive jurisdictions over "Property and Civil Rights" and "Matters of a merely local and private Nature in the Province".[196]

The significance of *Local Prohibition* lies in the limitations Lord Watson placed on federal legislative power under section 91. It is questionable whether the Privy Council need have gone as far as it did in narrowing unhesitatingly the potential scope for section 91 and, in particular, the ability of the federal government to prohibit trade and commerce. Smith contends that the Privy Council was obliged to address the limits of the federal trade and commerce power because, if liquor prohibition fell within a federal head of power, then it would be "deemed" not to fall within section 92 by virtue of the concluding part of section 91.[197] Smith presumes that this interpretation of the deeming clause was inevitable despite its having been expressly rejected by the Privy Council in *Parsons*.[198] Moreover, Smith would be correct only if the prior ruling in *Hodge* was overlooked. *Hodge* had determined that authority for federal prohibition could be found in the peace, order, and good government clause and that the subject matter of liquor traffic was capable of having more than one aspect. Applying the double-aspect rule could have settled the question of federal power — without any need to proceed further.[199]

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[195] *Local Prohibition, supra* note 16 at 364.

[196] *Ibid.* Lord Watson preferred not to determine conclusively whether the subject matter of the law fell within either sections 92(13) or 92(16). But he did suggest that section 92(16) was more akin to the federal residual clause, suggesting section 92(13) may be the more appropriate source (*ibid.* at 369). It should be noted that, Lord Herschell, who sat on this Board, made the same argument on behalf of the Dominion as counsel in the *McCarthy Act Reference, supra* note 170. Lord Halsbury indicated his agreement with Lord Herschell during argument, and he too sat on *Local Prohibition* (see Wheeler, *supra* note 170 at 150). The question of which enumeration applied to the subject of liquor prohibition was settled by the Privy Council in *Manitoba (A.G.)* v. *Manitoba Licence Holder's Assoc.* (1901), [1902] A.C. 73. The answer is: "Matters of a merely local and private Nature", section 92(16).

[197] See Smith, *supra* note 18 at 64. During the course of argument, Lord Watson explained that this also was a distinction made necessary by reason of the concluding words of section 91 (see Wheeler, *ibid.* at 1054). Romney writes that the Board was obliged to explain the federal residuary power in light of the deeisions in *Hodge, supra* note 89, and the *McCarthy Act Reference, supra* note 170. He says nothing, however, about the need to address the scope of the federal trade and commerce power (see "Why Lord Watson Was Right" in Ajzenstat, ed., *supra* note 133 at 191).

[198] *Parsons, supra* note 168 at 108. Lysyk argues that it makes little difference whether one relies on the deeming clause at the end of section 91 or the declaratory clause in the opening words of the section in order to come to this conclusion (see K. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can. Bar Rev. 531 at 541). Gwynne J. made a similar point in *Fredericton, supra* note 3 at 566. See also discussion in "Prohibition", *supra* note 194 at 127-28.

[199] It is significant that the only reference to *Hodge* in the *Local Prohibition* judgment is in its discussion of the provincial power to license saloons and taverns (section 92(9)) which, the Privy Council concludes, does not entitle provinces to abolish the "sources from which revenue is to be raised" (*Local Prohibition, supra* note 16 at 364). That was despite the fact that *Hodge* dominated during oral argument (see Wheeler, *supra* note 170 at 1044ff).

As Lefroy,[200] Laskin,[201] and O'Connor[202] have argued, the Privy Council found a double aspect in the subject matter, in any event.[203] Being bound to their ruling in *Russell* in which the C.T.A. was authorized by the opening words of section 91, the Board applied the rule of federal paramountcy, found no conflict, and permitted the provincial law to operate concurrent with the federal law. If this were a matter *exclusively* for the provinces, as Lord Watson had contended, there would have been nothing for Parliament to do in respect of liquor prohibition as it could not, acting under the P.O.G.G. clause, "trench upon provincial legislation with respect to any of the classes of subjects enumerated in s.92".[204] The principle could not hold, however, as Lord Watson held, in effect, that federal power could trench on provincial subjects if a matter assumed national dimensions. It mattered not in the result, then, whether the province had exclusive jurisdiction.

The Privy Council simply could have accepted the provincial argument *that the specific subject matter of local liquor prohibition* was a matter for the provinces, as it had found in *Hodge*.[205] It even could have confined *Russell* to the residual clause, as it did in *Hodge*. It could have limited its decision to the liquor trade, solely: the subject of local concern, generally, and of national concern only in exceptional circumstances. All of this could have been done with no immediate difference in result. The Privy Council could, then, have left to the federal government the power to prohibit trade, generally, under its trade and commerce power.[206]

Having found a double aspect in the subject matter of liquor prohibition, the practical consequence of the decision was continued confusion. The provinces could enact a local-option scheme, as could Parliament. Whether the provinces had the power to enforce province-wide mandatory prohibition was still in doubt.[207] As provinces could

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[200] See: "Prohibition", *supra* note 194; *The Law of Legislative Power in Canada, supra* note 6 at 399.

[201] See "'Peace, Order and Good Government' Re-examined" in Lederman, ed., *supra* note 2 at 78.

[202] See O'Connor, *supra* note 17 at 65, 72.

[203] But, this was a double aspect of a different nature, as it concerned an unenumerated, "non-exclusive" federal power. This may help to explain why the Privy Council made no reference to *Hodge* in this regard.

[204] *Local Prohibition, supra* note 16 at 360.

[205] *Hodge, supra* note 89. The Privy Council could have reached this conclusion even if the subject matter of municipal institutions had drawn its substantive content from sections 92(13) or 92(16).

[206] This, essentially, was the argument of Edward Blake, appearing on behalf of the Brewers and Distillers Association. He argued that there may be fiscal and economic grounds for allowing Parliament to prohibit trade (see Wheeler, *supra* note 170 at 1063). As Blake also pointed out, in the United States no such distinction between prohibition and regulation had been sustained (see: Wheeler, *ibid.*; Smith, *supra* note 18 at 67-68). Blake is alluding to the importance of retaining a federal power to prohibit. Even though other heads of power may be available, as under the criminal law, these are available conditionally (see *infra* note 236).

[207] This is because the Board considered six of the seven questions referred to it as "being in their nature academic rather than judicial" (*Local Prohibition, supra* note 16 at 370). Although the Board

not halt the import of liquor and, likely, could not halt distribution beyond provincial borders, provincial prohibitory laws could result, as the *Monetary Times* suggested, only by substituting domestic, provincial spirits for out-of-province or foreign spirits.[208] The pro-liquor-trade *Times* concluded: "[T]he questions which the Privy Council was invited to answer mostly concerned the powers of the Provincial Legislature, and the answer is practically that they have very little."[209] The Montreal *Gazette* agreed, viewing any further interference with the Ontario liquor trade as unlikely because of the potential flight of business.[210]

III. Why Lord Watson Did the Wrong Thing

Given the options available to Lord Watson, why did he take this occasion to rule conclusively on a number of division of powers questions that might have arisen in the foreseeable future? After all, less exhaustive rulings that would lead to the same immediate result were also available.[211] Why, then, did the Privy Council define conclusively the ambit of federal power to prohibit trade and commerce, confining it to a residual clause which could only be available in exceptional cases and which could not trump exclusive provincial classes of subjects?

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did provide some guidance, many questions concerning the limits of the provincial power to prohibit trade and commerce remained unanswered. For example, a draft bill to prohibit province-wide retail sales had been tabled by the leader of the Ontario opposition and its constitutionality was still in doubt. For the prohibition movement, even this would not suffice. See the results of *The [Toronto] Globe* mail-in poll which indicated 508 readers were opposed to and 370 readers were in favour of the Marter Bill. Over 2,800 Globe readers indicated their support for prohibition (see "The Plebiscite" *The [*Toronto*] Globe* (1 July 1893) 20).

[208] See *The Monetary Times* (22 May 1896) 1496.

[209] *The Monetary Times* (15 May 1896) 1461.

[210] [T]here is sure to be a strong interference brought to bear on the Government to allow matters to remain as they are at present, as any interference with the present large liquor manufacturing interests would probably lead to the withdrawal of large manufacturing interests from Toronto, and their location in some other part of the Dominion ("Judgement Rendered in Ontario Prohibition Appeal to Privy Council; Prohibit Manufacture of Spiritous Liquors; Power to do so Lies With the Provinces; Cannot Prohibit the Importation" *The [Montreal] Gazette* (11 May 1896) 1).

The Gazette added: "[I]t would be a serious matter for Ontario to lose these concerns, but in one or more cases it might be Quebec's gain" (*ibid.*).

[211] The Privy Council had previously expressed caution about deciding more of a case than was immediately necessary. In *Parsons*, Sir Montague Smith wrote that it was a "wise course ... to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand" (*Parsons*, *supra* note 168 at 109). This caution was quoted approvingly in *Hodge*, *supra* note 89 at 128. Nonetheless, as Laskin maintains, the Privy Council in *Parsons* proceeded to delineate the limits of federal jurisdiction over insurance contracts when only certain statutory conditions were at issue (see "The Supreme Court of Canada" in Lederman, ed., *supra* note 2 at 139). Greenwood writes: "If Lord Watson's disregard of contrary arguments suggests a definite bias toward the provincialist interpretation, so does his tendency to go far beyond what was necessary to decide the case at hand" (Greenwood, *supra* note 22 at 254).

As already mentioned, a literal interpretation of the clauses in question did not lead necessarily to Lord Watson's conclusion. The interpretations of the opening words of section 91 offered by eminent Canadian scholars differ markedly from that of Lord Watson's and are sufficient to show, at the very least, that his decision was not necessarily the only nor the correct one.[212] That there is a range of ambiguity in constitutional language is no great insight; but to declare, as Romney has, that only one series of interpretations of sections 91 and 92 was possible is dogmatically unhelpful.[213] Speculations of a sociological kind have been offered which suggest other factors may have influenced the Privy Council, and here, I will identify only three.[214]

For Mallory, the story of Canadian history is one of a dialectic between individualism and collectivism.[215] Even in the nineteenth century, there were growing demands for a more active state role in economic regulation and welfare. "It becomes plain," writes Mallory, "that judicial interpretation of the constitution before 1914 was resulting in something much more complex than merely a whittling away of the powers of the Dominion."[216] What was at work was a "judicial hostility"[217] towards these new encroachments on *laissez-faire* economics:

> Such enactments attacked both the rules and the assumptions on which the common law of the nineteenth century was based, and account for the lack of sympathy with the purpose of legislation which led many judges to interpret it in such a way as to give it as little effect as possible.[218]

The confrontation between *laissez-faire* and collectivism came to a head in the series of cases decided in the aftermath of the depression, which are the main focus of Mallory's classic work, *Social Credit and the Federal Power.*

Greenwood finds Mallory unconvincing. Those cases decided in the late-nineteenth century did not favour *laissez-faire* over collectivism; rather, many of these decisions (at least eight of thirteen) had a discernibly negative effect on business interests.[219] Thus, Greenwood writes: "[S]tatistically speaking, no pro-business bias is evi-

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[212] See references *supra* note 17.

[213] See: "Why Lord Watson Was Right" in Ajzenstat, ed., *supra* note 133; "The Nature and Scope", *supra* note 133.

[214] For example, I will not discuss Arthur Lower's suggestion that the Privy Council perceived a strong central government as a threat to imperial unity in A. Lower, "Theories of Canadian Federalism" in A. Lower *et al.*, eds., *Evolving Canadian Federalism* (Durham, N.C.: Duke University Press, 1958) 38). Lower's rationale and others' views are discussed in R.I. Cheffins & R.N. Tucker, *The Constitutional Process in Canada*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976) at 106-107.

[215] See *Social Credit*, *supra* note 21.

[216] *Ibid.* at 34.

[217] *Ibid.* at 30.

[218] *Ibid.* at 31.

[219] See Grcenwood, *supra* note 22 at 258. He includes the *Local Prohibition* case as one which operated against business interests.

dent before or during Lord Watson's period of activity on the Board."[220] Moreover, if the judiciary was concerned with forestalling collectivist measures, they may equally have evinced a prejudice in favour of centralization, given the myriad of provincial initiatives that regulated the market.[221] As Alan Cairns writes, "it is far from clear that support for provincial authority is necessarily reactionary and support for federal authority necessarily progressive."[222]

Greenwood instead offers the interesting hypothesis that the Privy Council made a habit of actively reversing Supreme Court of Canada decisions in order to justify continued appeals to the Judicial Committee. This is Greenwood's "institutional self-interest" argument. In 1875, the Canadian Parliament had dared challenge the jurisdiction of the Privy Council as the final court of Canadian appeal. A controversial, yet ambiguous, clause included in the statute establishing the Supreme Court abolished appeals to the Privy Council except those appeals seeking relief under the Royal Prerogative.[223] Moreover, by the 1890s, Greenwood points out, Australian politicians who were drafting the new Australian constitution were clamouring for the abolition of appeals to the Imperial Court.[224] Thus, according to Greenwood, "from the vantage point of a member of the Judicial Committee in the 1880's and 1890's, the possibility that Britain would be faced with an insistent demand from Canada to abolish or limit appeals must have appeared to be more than academic."[225] In order to forestall similar expressions of opinion from proliferating in Canada, the Privy Council overturned a significant percentage of Supreme Court decisions in the pursuit of its own self-preservation.

This hypothesis is paradoxical and curious for at least two reasons. First, such a course of action could equally have fuelled resentment at home. Rather than legitimat-

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[220] *Ibid.*

[221] See *ibid.* at 259.

[222] A. Cairns, "The Judicial Committee and its Critics" in D. Williams, ed., *Constitution, Government, and Society in Canada* (Toronto: McClelland & Stewart, 1988) 43 at 54. Kennedy goes somewhat further when he writes that good social policy arguments exist for empowering either level of government on any single issue (see Kennedy, *supra* note 4).

[223] See: *Supreme Court Act*, S.C. 1875, c. 11, s. 47; F.H. Underhill, "Edward Blake, the Supreme Court Act, and the Appeal to the Privy Council, 1875-6" (1938) 19 Can. Hist. Rev. 245; L.A. Cannon, "Some Data Relating to the Appeal to the Privy Council" (1925) 3 Can. Bar Rev. 455. After negotiations with Edward Blake, the Attorney General for Canada, the imperial authorities allowed the Bill to pass on the understanding that the clause had no effect on the jurisdiction of the Privy Council in Canadian appeals. It would be wrong to read too much into this dispute, writes Frank MacKinnon: "[The] inescapable fact is that Canadians themselves were not agreed on the appeals question; nor were they ready to place their entire confidence in the new Supreme Court" (F. MacKinnon, "The Establishment of the Supreme Court of Canada" in Lederman, ed., *supra* note 1, 106 at 115-16).

[224] See Greenwood, *supra* note 22 at 264. See generally J. Goldring, "The Privy Council as a Constitutional Court: Canadian Antecedents of Australian Constitutional Interpretation" (1992) 10 Australian J. Can. Studies 1.

[225] Greenwood, *ibid.* at 263.

ing the Court's existence, it could have undermined it further.[226] Moreover, the Supreme Court of Canada's apparent bias in favour of Parliament was, itself, sufficient to justify appeals to the more impartial Privy Council. The conflicting decisions in *Huson* and *Local Prohibition*,[227] for example, likely did not assist in enhancing the Supreme Court's legitimacy. Second, only four years before that case was argued in the Privy Council, the Parliament of Canada amended the *Supreme Court Act*, at the behest of Edward Blake,[228] to clarify the roles of the Supreme Court of Canada and the Judicial Committee with respect to references.[229] Rather than challenging the Privy Council's jurisdiction, Parliament affirmed it only a short time before Lord Watson's decision. In sum, contrary to Greenwood's conclusion, the evidence suggests that the Privy Council had little reason to be concerned about its institutional self-preservation at this time, at least as regards its jurisdiction in Canadian appeals.

Greenwood may be correct to surmise, however, that there was an element of self-interest operating in these decisions. But, his argument is less convincing insofar as it denies a significant role for other considerations which also must have been a factor in Privy Council decision making. The legal culture of the Common law within which the Privy Council operated would appear to be as — or more — important a motivator than were anxieties about institutional self-preservation.[230] This blinds Greenwood to the kinds of concerns that Mallory was eliciting and which resonated in later decisions of the Board.

Risk, admitting that the result in *Local Prohibition* is difficult to explain, taps into some of its root causes:

> The immediate influences seem to be ideas about freedom and the understanding of the purpose of the legislation. The power of the appeal to freedom was suggested by Herschell's strong comments [during argument] about diversity and freedom. Understanding the significance of the purpose of the legislation

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[226] Indeed, such arguments were made primarily in the post-depression years after a series of unpopular reversals of the Supreme Court by the Privy Council and led, finally, to the abolition of appeals to the Privy Council (see Cairns, *supra* note 222 at 51-52, 69-70).

[227] See *supra* notes 178 and 16, respectively.

[228] See *House of Commons Debates* (29 April 1890) at 4084-92 (Blake).

[229] See S.C. 1891, c. 25. The statute explicitly referred to the Privy Council in regard to certain appeals from courts in Québec. As for references, only the Supreme Court is mentioned. Blake, in his resolution approved by Parliament the year before, and which formed the basis of the amendment, contemplated references "to a high judicial tribunal". John A. MacDonald approved of Blake's resolution, adding that an advisory opinion of the Supreme Court "should be considered in the nature of a judgment so far as to allow of an appeal to the Judicial Committee of the Privy Council" (*House of Commons Debates* (29 April 1890) at 4084 (Blake), 4094 (MacDonald)). See also: *House of Commons Debates* (9 July 1891) at 1990 (Thompson); B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968) at 183-85.

[230] See Lerner, *supra* note 126 at 698-700. For an emphatic and sustained argument about the Common law context in which constitutional adjudication operates, see: P. Bobbit, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); P. Bobbit, *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991).

> depends upon remembering the result: what Ontario won was the power to impose prohibition. The objective of the legislation may have seemed moral and social, not economic.[231]

If the objectives of the legislation were moral and social, why, then, did the Privy Council go so far as to generally preclude a power to prohibit under the trade and commerce power? Blake directly addressed this point during the course of argument before the Privy Council, maintaining that there may be important fiscal, economic, and political grounds for wanting to uphold a power to prohibit trade and commerce at the national level.[232]

Risk is correct that ideas about freedom were at work in the case. It was not, however, the unfettered freedom associated with *laissez-faire* that Mallory argued was driving the post-depression jurisprudence. At the social and moral level, Mill had argued forcefully several decades earlier that self-regarding activities, such as the "act of drinking fermented liquors", could not justifiably be interfered with by the state.[233] Indeed, the prohibition movement in Britain had not succeeded politically as it had on the North American continent.[234] Thus, as Risk suggests, the Privy Council may have preferred to encourage diversity and freedom by keeping such matters confined to particular locales.

At an economic level, the idea of freedom at work may have been linked to a version of economic liberalism with roots in the Lockean tradition, outlined above. Such a version would have proceeded as follows: The regulation of trade nationally, concerns belonging to the federal government under section 91(2), should be limited to ensuring, by regulation, that property is being used productively.[235] Limitations on the use of private property would still be available to either level of government under other heads of power,[236] but the idea of "prohibiting", in effect abolishing, property nationally is to

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[231] Risk, *supra* note 89 at 734.

[232] See Blake's speech before the Privy Council, reproduced in Wheeler, *supra* note 170 at 1063.

[233] "On Liberty" in *Utilitarianism, supra* note 65 at 144-45.

[234] There was, however, a vigorous temperance movement campaigning for legislative prohibition as of 1853. Atiyah writes:

> Although the prohibition movement never made much headway in Parliament, its support throughout the country even in the 1850s and 1860s suggests that coercive laws designed for a man's own good would not have been condemned by the people at large nearly so enthusiastically as they were condemned by John Stuart Mill in *On Liberty* (Atiyah, *supra* note 43 at 560-61).

[235] A more libertarian view would be along the lines of Mill: "Restrictions on trade, or on production for the purposes of trade, are indeed restraints; and all restraint, *qua* restraint, is an evil" (*Utilitarianism, supra* note 62 at 150).

[236] For example, the criminal law power enables the federal government to regulate business combinations (see *Proprietary Articles Trade Assoc.* v. *Canada (A.G.)*, [1931] A.C. 310, 1 W.W.R. 552 (P.C.)). But see *Re Validity of s.5(a) of Dairy Industry Act*, [1949] S.C.R. 1 where the Supreme Court of Canada allowed that regulation of trade may include prohibition, but that prohibition of trade for economic reasons was not part of the criminal law power (see especially *ibid.* at 50-53, Rand J.). The provinces however, under section 92(13), have jurisdiction over property generally.

be discouraged.[237] Consequently, the federal government should be deprived of the power generally to prohibit certain trades or forms of commerce.[238] The ideology of productivity would admit government regulation, but only if it encouraged productivity. On the other hand, to paraphrase Locke: "[P]roperty rules that discouraged productive labour would not be in the common good"[239] and should be discouraged. A federal power to prohibit trade would have enabled the enactment of rules that prohibit — effectively outlawing — productivity.

That interpretation of *Local Prohibition* is strengthened by a number of arguments prevalent at the time. I have already mentioned the influence of Mill on legalism in the nineteenth century and his particular views on prohibition.[240] While the English public may have been more supportive of prohibition than was Mill,[241] political and legal élites were less favourable. Dicey identified liquor legislation in the colonies as a clear instance of the "socialistic" tendencies which also were influencing the development of the law of England.[242] An article by Horace Nelson, discussing the Judicial Committee's jurisprudence under the B.N.A. Act, appeared in the British *Law Magazine and Review* in 1890.[243] As the article was penned before the decision in *Local Prohibition*, the author illustrated the prohibition cases with references to the Privy Council's rulings in *Russell* and in *Hodge*. Where the author describes one of the rulings in *Russell*

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[237] See S.B. Drury, "Locke and Nozick on Property" in R. Ashcraft, ed., *John Locke: Critical Assessments*, vol. 3 (London: Routledge, 1991).

[238] In the United States, those opposed to Jefferson's 1809 embargo argued that the Congressional power over the regulation of trade and commerce did not extend to the prohibition of foreign trade. U.S. slave states also argued in 1841 before the United States Supreme Court that Congress did not have the power to prohibit trade (see E.S. Corwin, *The Commerce Power Versus States Rights* (Princeton: Princeton University Press, 1936) c. 2). For a time during the *Lochner* era, the United States Supreme Court came to accept the proposition (see *Hammer* v. *Dagenhart*, 247 U.S. 251, 38 S. Ct. 510 (1918), which struck down a federal law designed to prohibit inter-state traffic of goods produced by child labour). This created what Edward Corwin described as "a realm of no-power, a 'twilight zone,' a 'no-man's land' in which corporate enterprise was free to roam largely unchecked" (E. Corwin, "The Passing of Dual Federalism" in R.G. McCloskey, ed., *Essays in Constitutional Law* (New York: Knopf, 1957) 185 at 208. It is interesting to note that Corwin compares this result to that achieved by judicial interpretation of the B.N.A. Act (see *ibid.* at 189).

[239] T.A. Horne, *Property Rights and Poverty: Political Argument in Britain, 1605-1834* (Chapel Hill: University of North Carolina Press, 1990) at 60.

[240] Members of the Privy Council must have been reading Mill's *Principles of Political Economy*. In *Lambe*, the Privy Council adopted Mill's definition of indirect taxation "not only because it is that of an eminent writer ... but because it seems to ... embody with sufficient accuracy ... an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act" (*Lambe*, *supra* note 3 at 582-83). See V.C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77 at 84.

[241] See Atiyah, *supra* note 43 at 561.

[242] *Law and Public Opinion*, *supra* note 112 at 299-300.

[243] See H. Nelson, "Colonial Federation: The Judicial Committee and the British North America Act, 1867" (1890) 15 L. Mag. & Rev. 107.

(that liquor prohibition did not belong to the "Property and Civil Rights" class of subjects), there appears the following editorial note:

> It might surely, however, be argued that the right to procure what are somewhat invidiously called "Intoxicating Liquors," viz., beer, wine, spirits, is a Civil right, as part of the general right to obtain food for the sustenance of the individual by lawful means, i.e., by paying for it.[244]

Legal scholars in the United States also reflected an *animus* toward state regulation of the liquor trade. Cooley's *Treatise on Constitutional Limitations*[245] is "generally recognized as the single most influential work in [U.S.] constitutional law in the latter part of the nineteenth century".[246] Cooley was also cited frequently by Canadian scholars,[247] by counsel in argument before courts,[248] and was respected greatly in Britain.[249] In the United States, state laws prohibiting the manufacture and sale of liquor were considered in the nature of police regulations and were, therefore, constitutionally valid. Cooley bemoaned this interpretation and, in remarkably strong language, attacked the

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[244] Nelson, *ibid.* at 118. Lord Watson himself had occasion to describe the gentlemanly fashion of imbibing in the late-nineteenth century in *Thomson* v. *Weems* (1884), [1883-84] 9 A.C. 671 (H.L.) [hereinafter *Thomson*]. Considering whether an insured had been truthful in describing himself as temperate, Lord Watson wrote:

> In judging a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious (*Thomson, ibid.* at 696).

[245] Interestingly, provincial reformer David Mills attended Cooley's lectures at Michigan, which "decisively shaped" Mill's views about constitutional law (Vipond, *supra* note 133 at 39).

[246] P. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven: Yale University Press, 1992) at 73.

[247] See *e.g.* Lefroy, *supra* note 6. The *Western Law Times*, published in Manitoba, described Cooley as "an author of exceptional ability" ((1891) 2 West. L.T. 147). On the influence of U.S. legal treatises, including Cooley's at the time, see: Baker, *supra* note 57 at 253-54; "Comment", *supra* note 148 at 142.

[248] See: Mowat's argument in *Severn*, *supra* note 6; the argument on behalf of the appellant in *Hodge*, *supra* note 89. Note Lord FitzGerald's intervention: "We will take the passages from Cooley as part of your argument but not as authority" (*Hodge, ibid.* at 119). On Cooley's influence on provincial reformers, see *Liberty and Community, supra* note 133 at 39. Admittedly, this was often done in order to elucidate the elements of U.S. and not Canadian, constitutional law. In Lefroy's treatise, for example, it is interesting how Cooley's *Treatise on Constitutional Limitations* is used in the "Introductory Chapter" to elucidate U.S. limitations, both express and *implied*, yet is not tied to the cases he discussed under Proposition 21, concerning statutes that impair vested rights and which rebuff energetic federalism by declaring that legislatures cannot impair the obligation of contracts (see Lefroy, *supra* note 6).

[249] In their obituary of Cooley, the British editors of the *Law Quarterly Review* wrote that he was "among the most meritorious of recent American writers on both constitutional and municipal law" ((1898) 14 L.Q. Rev. 342). On the cross-fertilization of U.S. and British legal scholarship, see: M.H. Hoeflich, "The Americanization of British Legal Education in the Nineteenth Century" (1987) 8 J. Legal Hist. 244; "Hatred of Disorder" in Fitzpatrick, ed., *supra* note 95.

state's ability to prohibit the liquor trade.[250] He was of the view that prohibition smacked of special-interest legislation, the kind of class rule that the United States's Constitution was designed to inhibit. The following extract from Cooley's text reflects this thinking, which likely was shared by his larger Anglo-American audience:

> Perhaps there is no instance in which the power of the legislature to make regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purposes of sale becomes a criminal offence, and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes perhaps a nuisance, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but whether satisfactory or not, they rest exclusively in the legislative wisdom.[251]

Christopher Tiedeman also singled out liquor-prohibition laws for critique.[252] Like Mill, Tiedeman could see no justification for prohibiting what was considered to be a destructive, but self-regarding, habit: "[N]o trade can be subjected to police regulation of any kind, unless its prosecution involves some harm or injury to the public or to third persons."[253]

Despite their misgivings, however, Tiedeman, Cooley, and Lord Watson had to abide by legislative wisdom in regard to liquor prohibition. At the sub-national level, states and provinces were constitutionally entitled to prohibit the liquor trade. In Canada, however, Lord Watson could use the opportunity presented in *Local Prohibition* to disable the federal government from constitutionally experimenting too extensively with what was otherwise productive enterprise. This was achieved by applying principles of statutory interpretation drawn from the Common law, principles articulated by Dicey in *The Law of the Constitution.* As discussed above, Dicey equated democratic decision-making by federal institutions to decisions made by subordinate law-making bodies, such as an English railway company or a municipal institution. Following Dicey, Lord Watson could simply invoke *Virgo*, a case concerning the limits of regulatory power delegated to a municipality, as precedent in a case concerning the division

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[250] This was despite Cooley's own activities in favour of temperance. "He could issue a call for a Citizen's ticket to clean out the 'saloon' element in city government, preside at temperance meetings ..." (*Constitutional Conservatism, supra* note 85 at 136).

[251] *Treatise on Constitutional Limitations, supra* note 58 at 583-84.

[252] See: C.G. Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* (New York: Da Capo Press, 1971); D.N. Mayer, "The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism" (1990) 55 Mo. L. Rev. 93 at 98.

[253] Tiedeman, *ibid.* at 301.

of powers under a new federal constitution. The analogy between the federal Parliament and a railway company or municipality, although an "apparent absurdity", was, according to Dicey, nonetheless just.[254]

It might be said in reply that if the Privy Council was concerned with thwarting the legislative energy that impaired productivity, it should have decided the case the other way. In the late-nineteenth century, the provinces were the most active interveners in economic and social matters.[255] I offer two responses to this contention. For the most part, arguments for federalism have been animated by a fear of central authority; legislative power at the national level could do the greatest amount of harm to liberty. According to Samuel Beer, "the argument which was foremost in the minds of the [U.S.] framers and which still holds greatest promise as a rationale for states is the argument from liberty."[256] Both Montesquieu[257] and Proudhon[258] conceived of federalisms that were primarily designed to promote liberty. This anxiety about the power of national governments prompted Cooley to advocate, in his law lectures, that regulation "'not be placed in the hands of the central power'".[259] Later theorists, such as Harold Laski, recognized that "there is a close connection between the idea of federalism and the idea of

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[254] See *Law of the Constitution, supra* note 115.

[255] "The situation was such," writes Greenwood, "that a judge interested in preventing collectivist legislation would hardly have decided to decentralize legislative jurisdiction" (Greenwood, *supra* note 22 at 259).

[256] S.H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, Mass.: Harvard University Press, 1993) at 387. See also, *The Federalist Papers, supra* note 82 at nos. 17, 46, 51. On the ambiguous view the Federalists had of federalism, see an interesting essay by M. Diamond, "*The Federalist's* View of Federalism" in W.A. Schambra, ed., *As Far As Republican Principles Will Admit* (Washington: A.E.I. Press, 1992) 108. Diamond claims: "*The Federalist* says relatively little positively about the value of the federal features" (*ibid.* at 134). See also Woodrow Wilson, for whom the object of federalism is "to check and trim policy on national questions ... it was purposed to guard not against revolution, but against unrestrained exercise of questionable powers" (W. Wilson, *Congressional Government: A Study in American Politics* (Boston: Houghton, Mifflin, 1885) at 13-14). See also R.A. Epstein, "Exit Rights Under Federalism" (1992) 55 L. & Contemp. Probs. 147.

[257] See C.L. de Secondat, baron de la Brède et de Montesquieu, *The Spirit of the Laws*, trans. T. Nugent (London: G. Bell and Sons, 1914) where he advocates a loose "confederate republic" (*ibid.* at Book 9). When the executive and legislative powers were united, Montesquieu argued: "[T]here can be no liberty" (*ibid.*, Book 11 at 163). Similarly, confederate republics provided the balance necessary to guarantee the happiness of each republic and sufficient strength against external attacks (*ibid.*, Book 9 at 138). Internal dissension, however, would be quelled by other confederates. A solution to factionalism that was "emphatically not Madison's solution" (Diamond, *ibid.* at 140).

[258] See P.-J. Proudhon, *The Principle of Federation*, trans. R. Vernon (Toronto: University of Toronto Press, 1979). For Proudhon, federalism assured the ascendancy of liberty as against authority (see *e.g.*, *ibid.* at 48).

[259] Quoted in *Constitutional Conservatism, supra* note 82 at 135. The quote is from the lecture notes of one of Cooley's law students. The note reads: "It should not be placed ..." In context, Jones figures "It" means "regulation".

liberty."[260] The second response concerns the shift toward government centralization in the late-nineteenth century. It had become apparent in the United States and, certainly, in Britain[261] that government intervention on a national scale by a central authority was a social necessity, although it also threatened to become a social evil.[262] It was this trend toward "collectivism" that alarmed such writers as Dicey[263] and prompted the anxiety with energetic federalism, which I have been describing.

IV. *Envoi* on the Federal Trade and Commerce Power

Professor Risk writes that the next case in the series, *Re Board of Commerce*,[264] "is twenty-six years and a world away"[265] from the previous cases. For our purposes, it is not that far away and usefully completes the narrative. The case concerned legislation designed to curb the negative effects of the depression caused, in part, by business combinations and hoarding. In the Supreme Court of Canada, Justice Duff, in denying a federal ability to legislate in these matters under the residual clause, further encumbered the federal power to control the economy.[266] He surmised that a variety of fright-

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[260] H. Laski, *The Foundations of Sovereignty and Other Essays* (New York: Harcourt, Brace, 1921) at 87. See also H. Laski, *A Grammar of Politics*, 4th ed. (London: George, Allen & Unwin, 1938) at 101, 132.

[261] See *The Nineteenth-Century Constitution, 1815-1914, supra* note 61 at 294-98. See discussion of the pressures for a central government role which led to the enactment of the *Poor Law Amendment Act, 1834* (U.K.), 4 & 5 Will., c. 76, although management would be entrusted to local committees.

[262] Cooley came around to this view late in his career:

> [I]t is the central government rather than the State that now seems to stand before the people as the chief representative of public order and governmental vigour, and as the possessor of general rather than of exceptional and particular powers (T.M. Cooley, "Comparative Merits of Written and Prescriptive Constitutions" (1888-89) 2 Harv. L. Rev. 341 at 355).

[263] *Law and Public Opinion, supra* note 112 at 288-302. Dicey was alarmed by the general trend towards "collectivist" or "socialist" solutions. He quoted from J. Morley, *Life of Cobden* (London: MacMillan, 1908) vol. 1, approvingly: "'in the country where socialism has been less talked about than any other country in Europe, its principles have been most extensively applied'" (Morley, *ibid.* at 302-303, quoted in *Law and Public Opinion, ibid.* at 289-90). Of this passage Dicey wrote: "Every year which has passed since their publication [1881] has confirmed their truth" (*Law and Public Opinion, ibid.* at 290).

[264] *Reference Re The Board of Commerce Act, 1919 and the Combines and Fair Prices Act, 1919* (1920), 60 S.C.R. 456, 3 W.W.R. 658 [hereinafter *Board of Commerce* (S.C.C.) cited to S.C.R.], rev'd (1921), [1922] 1 A.C. 191, 1 W.W.R. 20, (P.C.).

[265] Risk, *supra* note 89 at note 149, p. 735.

[266] J.G. Snell and F. Vaughan write that Justice Duff "shared the Judicial Committee's fear of the unchecked use of the federal power in matters relating to peace, order, and good government" (J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 140). More particularly, Justice Duff "was in sympathy with the constitutional philosophy of Lord Watson as expressed in the *Local Prohibition* case" (*ibid.*).

ening legislative measures were conceivable if the Board of Commerce scheme were authorized by the B.N.A. Act:

> Measures to increase production might conceivably be proposed and to that end nationalization of certain industries and even compulsory allotment of labour [might be proposed] ... I am not convinced that it is a proper application of the reasoning to be found in the judgments on the subject of drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstances forcing upon a province a system of nationalization of industry.[267]

Here, then, was an immodest expression of liberty's fear of authority. For Justice Duff, that fear was perched over a very slippery slope. Gerald Le Dain accurately captures the implications of this passage:

> [It] is suggestive evidence for those who contend that in these years the courts were concerned with provincial autonomy more as a means of denying the governmental power necessary for extensive and effective regulation of business than as a constitutional value essential to the preservation of Confederation.[268]

I would add that the same might be said of Lord Watson's ruling in the *Local Prohibition* case.

V. Conclusion

A. Constitutional Interpretation and Ideology

I have attempted to show that there was an economic ideology underlying judicial consideration of the B.N.A. Act in the late-nineteenth century. This ideology was one reverent of the productive power of property while, at the same time, grudgingly respectful of the ability of the state to intervene in the economy. As Locke argued, the protection of property is one of the objectives of convening political society. The polity may regulate property, but it cannot abolish it; for this would be contrary to the aims of political society as well as natural law. Just as Locke reified the productivity of property so, occasionally, did the courts in their judicial interpretation of the Canadian Constitution.

Blackstone's conception of the Common law, the political economy of Mill, and the constitutional thought of Cooley and Dicey, all contributed to the development of a

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[267] *Board of Commerce* (S.C.C.), *supra* note 264 at 512. See the discussion by B. Laskin, "'Peace, Order and Good Government' Re-examined" in Lederman, ed., *supra* note 2 at 85ff. It was in response to Justice Duff's judgment that Laskin wrote: "[T]he British North America Act does not enshrine, in its distribution of legislative power, any particular economic theory" (*ibid.* at 88).

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

powerful rationale for the protection of property and the facilitation of productivity. Though obscured in much of the constitutional discourse of the Privy Council in the late-nineteenth century, that ideology emerged clearly in the *Local Prohibition* case.

The judiciary was likely not far removed from "common sense" understandings of productivity and property. Although no public-opinion polls are available to confirm this suspicion, Mallory and Cairns agree that the Privy Council's decisions from this period "pretty well reflected the inclinations of Canadians in the pre-1914 world".[269] Risk reminds us that the legislative choice of prohibition was ultimately respected, both at local and federal levels. Despite confining potential parliamentary preferences, the courts may have symbolically satisfied the preferences of both the prohibition movement and those concerned with the injurious interference with productive property. But as a Montreal *Gazette* reporter astutely observed, with divided responsibility over liquor prohibition and the "wealthy and powerful" interests of the liquor lobby at work, governments were sure "to allow matters to remain the same".[270]

At an ideological level, then, the judiciary may have been tapping into "common sense" notions of labour and property. As previously noted, labour is what Blackstone characterized as "what is universally allowed" to give the fairest title to property. A common sense ideological structure "presents itself to popular experience as transhistorical — the bedrock, universal wisdom of the ages".[271] It presents "the world described in its images and categories [as] the only attainable world in which a sane person would want to live".[272] It is the universalizing and naturalizing effects[273] of the ideology of productivity that makes it very successful as a discourse. It is so successful, in fact, that it has attained an imposing hegemony, one which can be seen at work in constitutional interpretation beyond the *Local Prohibition* case.

B. A Note On The Application of the Ideology of Productivity Beyond Local Prohibition

While the focus of my inquiry has been the few cases decided in the period between confederation and the end of the nineteenth century, other aspects of constitutional law may have been offered up for investigation. Important work along these lines has been conducted by Bruce Ryder with regard to over one hundred legislative initiatives in British Columbia between 1872 and 1922, which discriminated against Asians.[274] Ryder has inquired into both judicial interpretation and federal use of the

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[269] *Social Credit, supra* note 21 at 38. See also Cairns, *supra* note 222 at 62.

[270] *The [Montreal] Gazette* (11 May 1896) 1.

[271] S. Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the Left* (London: Verso, 1988) at 142.

[272] R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 at 109.

[273] See M. Barret, *The Politics of Truth: From Marx to Foucault* (Cambridge: Polity Press, 1991) at 167.

[274] See B. Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Legislation, 1884-1904" (1991) 29 Osgoode Hall L.J. 619.

disallowance power in relation to these statutes. He has concluded that those statutes which impaired the productivity of labour, for example laws impeding the entry of Japanese and Chinese labour into the province or laws excluding them from employment, were either judicially nullified or disallowed by the federal government.[275] Laws that impaired citizenship rights, however, were of less concern to both the judiciary and the federal government and were allowed to stand without qualification.[276] His study shows that "judicial and federal cabinet interpretations of the Constitution tended to permit uses of state power that contributed to the formation of a class structure embedded in and intertwined with relations of racial inequality and to prohibit those that did not."[277] Those laws which the Cabinet and the judiciary did prohibit were those that impaired the ability of labouring classes to contribute to economic productivity.[278]

One could also examine the jurisprudence of Justice Ivan Rand with the ideology of productivity in mind. This emerges most clearly, perhaps, in *Winner* v. *S.M.T. (Eastern) Ltd.*[279] The plaintiff in that case operated a bus-line from Maine to New Brunswick and Nova Scotia. New Brunswick licensing authorities permitted the plaintiff to pass through the Province but would not permit anyone to embark or disembark while there. The majority of the Supreme Court of Canada held that licensing of the bus-line fell within federal authority. Rand J. went further, holding that "a Province cannot, by depriving a Canadian of the means of working, force him to leave it; it cannot divest him of his right or capacity to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action."[280] It is not insignificant that, in coming to this conclusion, Rand J. relied on Lord Watson's decision in *Union Colliery*, which struck down a law forbidding employment of Asian labourers in mining operations.

The dialectic between energetic federalism and the discourse of productivity becomes even clearer when one turns to cases concerning aboriginal title. Locke's thinking about productivity has a significant role to play there, as well.[281] He denigrated the use of property made by aboriginal peoples on the basis of his theory of productivity. This rationale also provided European colonizers with a justification for their appro-

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[275] One of those decisions, *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580 (P.C.) [hereinafter *Union Colliery*], which struck down British Columbia legislation impairing the ability of Asians to work in mining operations, was rendered by Lord Watson.

[276] See Ryder, *supra* note 274 at 623.

[277] *Ibid.* at 625.

[278] Ryder has situated these concerns in the larger context of federalism debates (see B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308). He argues that where legislation concerned preservation of the social or moral order, the judiciary were more inclined to find authority, as in the double-aspect rule, whereas if the law was seen as interfering with market relations, the judiciary were more likely to apply the "classical-paradigm" or "water-tight compartments" approach.

[279] [1951] S.C.R. 887, 4 D.L.R. 529 [hereinafter cited to S.C.R.].

[280] *Ibid.* at 917.

[281] See Wood, *supra* note 42 at 66.

priation of aboriginal land in North America. After all, Locke, himself, had written that the Indian nations in the Americas had not made productive use of what was available to them:

> [They] who are rich in land and poor in all the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty ... yet for want of improving it by labour, have not one hundreth [*sic*] part of the Conveniences we enjoy: And a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in *England*.[282]

Robert Williams's study, *The American Indian in Western Legal Thought*,[283] confirms Locke's influence on the European settlers in the Americas. Williams writes that Locke's discourse "legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law."[284]

The Lockean discourse of productivity has emerged more recently in the trial judgment of *Delgamuukw* v. *British Columbia (A.G.)*.[285] The Gitksan and Wet'suwet'en people sought a judicial declaration of their existing aboriginal rights, which included ownership, possession, and jurisdiction with respect to their territories and peoples and which would act as a burden on the Crown's underlying title. Chief Justice MacEachern ruled, after the lengthiest aboriginal-claims trial in Canadian history, that the Gitksan and Wet'suwet'en claims had been extinguished in law by the exercise of sovereignty early in the colonial period.[285] Here, the Court simply followed precedent,

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[282] Locke in *Two Treatises of Government*, *supra* note 19 at 2:41, 296-97. See discussion in E.P. Thompson, *Customs in Common* (London: Merlin Press, 1991) at 164-65.

[283] R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) c. 6.

[284] Williams, *ibid.* at 248. Williams pursues this theme in his discussion of the U.S. colonists' negative reaction to the *Royal Proclamation* of October 7, 1763, reprinted in R.S.C. 1985, App. II, no. 1 at 1-7 [hereinafter *Royal Proclamation*]. The *Royal Proclamation* prevented the colonists from purchasing or settling aboriginal lands in western North America without "special leave and license" of the Crown. The colonists seized on Locke's discourse of productivity, which affirmed their understanding of their own relationship "to a New World wilderness and an Old World empire ... Locke's text told the colonists that the proclamation represented nothing other than an attack on their natural rights to acquire and labour upon American land, thereby converting that land into valuable property" (Williams, *ibid.* at 247). While the colonists had expected those lands to provide valuable profits, the *Royal Proclamation* warranted the fiercest resistance.

[285] (1991), 79 D.L.R. (4th) 185, 3 W.W.R. 97 (B.C.S.C.) [hereinafter *Delgamuukw* (Trial) cited to D.L.R.], rev'd in part (1993), 104 D.L.R. (4th) 470, 5 W.W.R. 97 (B.C.C.A.) [hereinafter *Delgamuukw* (C.A.) cited to D.L.R.]. I have benefited greatly from the discussion of this case by M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Lantzville and Montreal: Oolichan Books and Institute for Research on Public Policy, 1992) 221.

[286] See *Delgamuukw* (Trial), *ibid.* at 284-85, 452ff. The majority judgment in the British Columbia Court of Appeal did not substantially differ in this regard (see *Delgamuukw* (C.A.), *ibid.* at 515-20, Macfarlane J.A.). It is instructive that Justice Macfarlane cited Dicey in support of the proposition that, according to the English constitution, parliamentary sovereignty is unquestionable (*ibid.* at 520). Similarly, Justice Wallace, dissenting in part, cited Dicey and concluded that the plaintiff's

most recently articulated by Chief Justice Dickson in *R.* v. *Sparrow*,[287] that Canadian sovereignty over the land and its prior occupants was obtained simply by virtue of the European settling of the continent. There was, wrote Dickson C.J., "from the outset *never any doubt* that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".[288]

Michael Asch and Patrick Macklem argue convincingly that this "settlement thesis", and the "contingent" theory of aboriginal rights that it generates "ultimately rest[s] on unacceptable notions about the inherent superiority of European nations".[289] That is fortified by further reference to the trial judgment in *Delgamuukw* and its privileging of European modes of productivity. Chief Justice MacEachern found that, at the time of first European contact, the Gitksan and Wet'suwet'en peoples were acting on "survival instincts"[290] and "eking out an aboriginal way of life."[291] By contrast, the white settlers were "preoccupied with the business of getting a new colony started, and of scratching out a hard life in a hard land".[292] In a passage that Asch describes as based on ethnocentric reasoning, the Chief Justice writes:

> It would not be accurate to assume that even the pre-contact existence in the territory was in the least idyllic. The plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring people were common, and there is no doubt, to quote Hobbs [*sic*], that aboriginal life in the territory was, at best, "nasty, brutish and short".[293]

According to Chief Justice MacEachern, the archaeological evidence established "human habitation" at some of the village sites "but not necessarily occupation".[294] As a result, aboriginal peoples could not be said to have "owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by law".[295] What the Gitksan and Wet'suwet'en people had proved was an entitlement to occu-

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claim was "incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846" (*ibid.* at 592). Only Justice Lambert, also dissenting in part, held that a residual number of aboriginal customary laws of self-government and self-regulation continued in force and were not abrogated by British sovereignty (see *ibid.* at 724ff).

[287] [1985] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1 [hereinafter cited to S.C.R.].

[288] *Ibid.* at 1103 [emphasis added].

[289] M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498 at 510.

[290] *Delgamuukw* (Trial), *supra* note 285 at 441.

[291] *Ibid.* at 248.

[292] *Ibid.* at 343.

[293] *Ibid.* at 281. Presumably, the Chief Justice did not add "solitary" to this list, as does Hobbes, because these peoples did not also suffer from loneliness. The British Columbia Court of Appeal was careful to distance itself from these findings: "There is no question that the Gitksan and Wet'suwet'en people had an organized society, and that the use and occupation of land and certain products of the lands and waters were integral to that society" (*Delgamuukw* (C.A.), *supra* note 285 at 543, Macfarlane J.A.).

[294] *Delgamuukw* (Trial), *ibid.* at 263.

[295] *Ibid.* at 451.

pancy for use of certain vacant Crown land.[296] This type of strategic move, founded upon the Lockean argument that the Americas were a "waste" land is one of the "notorious distortions" invented by European historians and other settlement writers.[297] Thus, Lockean productivity has been used simultaneously to justify occupation of aboriginal land by European colonists claiming title and to demote aboriginal title to simple occupation — a most invidious dialectic.

Locke's workmanship model, I am suggesting, emerges as a useful tool for thinking about constitutional interpretation in the late-nineteenth century and beyond. Conceptions about productivity, coupled with anxieties about the prospects of class rule, had a profound influence on Anglo-American constitutional thought. Compounded by stereotypes about race and gender, these anxieties spilled over into the judicial classification of laws under the B.N.A. Act. In sum, this paper is a call for further research into the economic ideology underlying constitutional interpretation. Thinking about constitutional law in this way provides some insight into liberty's continuous struggle with the supremacy of authority — the neglected underside of Canadian constitutional law.

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[296] The Chief Justice was prepared to find that, "as of the date of British sovereignty," they had established the requirements for recognizing their "continued residence in the villages, and for non-exclusive aboriginal sustenance rights within [certain] portions of the territory ... [but] these aboriginal rights do not include commercial practices" (*Delgamuukw* (Trial), *ibid.* at 462). The majority in the British Columbia Court of Appeal found that the plaintiffs had "unextinguished non-exclusive aboriginal rights, other than a right of ownership or property right ... of a *sui generis* nature" (*Delgamuukw* (C.A.), *supra* note 285 at 547). In contrast to the majority decision in the Court of Appeal, a refreshingly different approach to the question of aboriginal title, that does not tie the exercise of imperial sovereignty to the extinguishment of native title, can be found in the majority decision in *Mabo* v. *Queensland* (1992), 107 A.L.R. 1, 175 C.L.R. 1 (H.C.). For a thorough and interesting discussion of the recognition of Common law indigenous title gained by occupation and use, see K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 96.

[297] S. Venne, "Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze" (1993) 4 Const. Forum 43 at 44.