Helen Irving[*]

FEDERALISM IS A FEMINIST ISSUE: WHAT AUSTRALIANS CAN LEARN FROM THE UNITED STATES COMMERCE CLAUSE

ABSTRACT

Federalism is a constitutional model designed to accommodate regional self-government within a national framework, and which distributes powers to make laws between the two levels of government. The merits of this model have been the subject of much debate since the first modern federal constitution was drafted more than two hundred years ago. In recent years in particular, questions have been raised about the capacity and suitability of federalism to serve and respond to other forms of demographic diversity. In the United States and, to a lesser extent, Australia, feminist scholars have also begun to question the gendered assumptions built into the federal distribution of powers and the value of federalism in serving the interests of women. The case of *United States v Morrison* (2000) in which the interpretation of the *United States Constitution's* 'Commerce Clause' was at issue provides a focus for this analysis, and serves to illustrate the proposition that federalism is a feminist issue. This article explores the reasoning in *Morrison*, explains the feminist critique of the case, and suggests ways in which Australians may learn from it, in understanding federalism 'non-categorically.'

INTRODUCTION

The merits of federalism have been debated since the first modern federal constitution was drafted in the United States in the late 18th century. Only in recent years, however, has the impact of federalism on women been given significant attention in legal circles.[1] This, it should be emphasised,

---

* Associate Professor, Faculty of Law, University of Sydney.

1 Much of the analysis of federalism and feminism has been driven by political scientists, including Louise Chappell and Marian Sawer in Australia, and Jane Mansbridge in the United States. Their work has explored the impact of federal systems on women, with respect to policy, programs, and access to decision-making. For example, see Louise Chappell, 'Federalism and Social Policy: The Case of Domestic Violence' (2001) 60 *Australian Journal of Public Administration* 59. In Australian constitutional law, Kim Rubenstein has been a pioneer, including in her early work with Deborah Cass, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3; reworked for Helen Irving (ed), *A Woman's Constitution?: Gender and History in the Australian Commonwealth* (1996), 108. This collection also includes a re-worked early piece of my own, 'A Gendered Constitution? Women, Federation and Heads of Power' (1994) 24 *The*

is not the first time the matter has been raised. In the 1890s, women in the Australian colonies subjected the Commonwealth of Australia Constitution Bill to a gendered analysis. Rose Scott, a womanhood suffrage leader in New South Wales, opposed federalism on the ground, among others, of its tendency to reduce women's power by centralising men's power. Scott also claimed that federation would allow men to 'lay [their] hands' on matters of intimate concern to women – marriage, and custody of children, among others – without giving them political representation.[2] On the pro-federation side, Maybanke Wolstenholme, a fellow suffrage leader in NSW and editor of the *Woman's Voice*, wrote of federation as an opportunity for 'our great men' to think of 'our little children, and the necessity of educating them so that we may become a nation united'.[3]

Also in this era, temperance advocates, both in Australia and the United States, mounted a campaign that incorporated a 'feminist' perspective on the federal distribution of powers. Claiming a causal relationship between alcohol consumption and domestic violence, unemployment, the neglect of families, and child abuse, they identified constitutional powers as a solution.[4] In Australia, during the Constitution's framing, temperance campaigners called for an express provision giving the States the power to regulate the sale and consumption of alcohol, exempt from the guarantee of free trade and commerce within the Commonwealth to which the framers of the *Constitution* were committed. They succeeded, with the inclusion of section 113 in the *Constitution*.[5]

In the United States, temperance organisations campaigned for a constitutional amendment to achieve national prohibition. They succeeded in 1919 with the Eighteenth Amendment.[6] In the decade that followed, women's organisations[7] were

---

University of Western Australia Law Review 186. Kim Rubenstein's convening of the 'Federalism-Feminism' workshop in 2004, and more recently, the 2006 workshop, *Governing (and Representing) Women: Local, National and Global Approaches*, Centre for International and Public Law, ANU, has played an invaluable role in bringing political scientists and constitutional lawyers together. I am grateful for Kim's leadership in this field, and for generously sharing her ideas with me.

2 Speech, 1898, Rose Scott paper, MSS 38/27 Mitchell Library, State Library of NSW.

3 *Woman's Voice* 1895. Mitchell Library, State Library of NSW.

4 The international dimension of this campaign is described in Ian Tyrrell, *Woman's World/Women's Empire: The Woman's Christian Temperance Union in International Perspective, 1880-1930* (1991).

5 Section 113 provides: 'All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.'

6 The Eighteenth Amendment reads: 'After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited'. The Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933.

among the advocates of its repeal, again on 'feminist' grounds, bringing together social critique of the effects of prohibition and an analysis of federalism. The Twenty First Amendment in 1933 saw the power to regulate alcohol shift to state legislative hands, [8] following a formula similar in effect to section 113 of the *Australian Constitution*.[9] These early examples serve to illustrate not only a feminist consciousness of federalism's impact upon women's lives, but the mutability of categories of constitutional powers. The regulation of alcohol trade, seen first as a matter for the states was re-classified as a national or federal matter, then returned to the states. Women's constitutional campaigns were important in driving these shifts.

But for all this, and despite the long-held sense among women activists that constitutional powers impact differentially as to gender,[10] jurisprudential analyses of both the gendered assumptions built into the federal model, and the impact of federalism in practice, are relatively recent.

I UNITED STATES V MORRISON

In 2000, a case that came before the Supreme Court of the United States served as a catalyst for much of this intensified analysis. *United States v Morrison*[11] concerned the validity of a section (s 13981) of the United States *Violence Against Women Act* 42 USC (1994) ('VAWA'). The section purported to create a federal civil cause of action for 'crimes of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.'[12] Its purpose was to provide victims – women – with the opportunity to bring actions for damages against alleged perpetrators of gender-motivated violence, where state criminal procedures had failed, or state civil actions were unavailable.

In 1994, Christy Brzonkala, a student at Virginia Polytechnic Institute (Virginia Tech), alleged that she was raped, assaulted and verbally abused by two fellow students, one of whom was Antonio Morrison. Brzonkala reported the attack to police, but prosecution did not proceed. Following a complaint by Brzonkala brought before Virginia Tech's disciplinary 'Judicial Committee', Morrison was

---

7 For example, The Women's Organization for National Prohibition Reform, founded in 1929 'to rescue America's families and communities from the ravages of ten years of alcohol prohibition', http://wonpr.org/ (24 August 2007).

8 Section 2 reads: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof, is hereby prohibited'.

9 Above n 5.

10 Among the United States literature on the long history of a feminist perspective on constitutional design, see Akhil Reed Amar, 'Women and the Constitution' (1994-95) 18 *Harvard Journal of Law and Public Policy* 465.

11 529 US 598 (2000).

12 VAWA s 13981(d).

sentenced to a two semester suspension of his studies. Later, Brzonkala learned from a newspaper report that he had succeeded in having his suspension lifted. Relying on s 13981 of the VAWA, she now sued both Morrison and Virginia Tech in a District Court of Virginia. At this point, the United States intervened. The District Court held that Congress lacked authority to enact the section.[13] The decision was reversed in the Court of Appeals for the Fourth Circuit,[14] and then reinstated in the full Court of Appeals.[15] In 2000, the Supreme Court granted certiorari.[16]

The VAWA had been passed by Congress in 1994.[17] It included a range of measures, including State educational programs on gender-motivated violence, and funding for emergency accommodation for women. The constitutionality of these measures was not in doubt. The power to enact such laws lay in the Fourteenth Amendment's provision for 'the equal protection of the laws' which, over the years, had underpinned a raft of federal measures supporting women's equality and prohibiting sex discrimination.

Congress, however, could not rely on the Fourteenth Amendment for passage of s 13981. The Amendment binds the states alone and, since 1880, it has been interpreted not to extend to private actors or private remedies; in 1948 the Supreme Court affirmed that the Fourteenth Amendment 'erects no shield against merely private conduct, however discriminatory or wrongful.'[18] Lacking an equal rights provision in the *Constitution*,[19] Congress had relied instead upon Article I, section 8, cl 3 – the Commerce Clause – which empowers Congress to pass laws regulating inter-state commerce (and, relying on the 'necessary and proper' clause,[20] to regulate intrastate commerce incidentally). No limitation lies in the Commerce Clause with respect to private conduct or private actions. Violence against women, the United States maintained, had a detrimental impact upon interstate commerce; s 13981 was one means of redressing this. Here the issue of federalism arose.

Since the late 1930s, the Commerce Clause has served as the power for many federal initiatives in which seemingly remote connections between the regulated conduct and interstate commerce were successfully made out. Embracing the 'co-mingling' doctrine (rejected in Australia with respect to section 51(i), the 'trade and

---

13 *Brzonkala v Virginia Polytechnic and State Univ.,* 935 F Supp 772 (WD Va. 1996).

14 *Brzonkala v Virginia Polytechnic and State Univ.,* 132 F3d 949 (CA4 1997).

15 *Brzonkala v Virginia Polytechnic and State Univ.,* 169 F3d 820 (CA4 1999).

16 *United States v Morrison*, 529 US 598 (2000).

17 It was reauthorised in 2000 and in 2005.

18 *Shelley v Kramer* 334 US 1, 13 (1948).

19 The Equal Rights Amendment (ERA) was passed by Congress in 1972, and sent to the states for ratification. It was ratified by 22 states (out of the required 38) in the first year; but by the (extended) deadline of 1982, still fell 3 states short of victory. See Jane Mansbridge, *Why We Lost the ERA* (1986).

20 Article 1, section 8, clause 18.

commerce' power), the Court permitted the regulation of a broad range of activities, including activities of a non-commercial nature, subject to the relatively modest test that the activity in question had a 'substantial effect upon' interstate commerce. Furthermore, non-commercial activities that had no direct connection with either commerce or interstate matters could be brought under the Commerce Clause if, when aggregated, they could be shown to have a substantial economic effect.

In the leading case, *Wickard v Filburn*,[21] a federal law regulating the domestic consumption by individuals of wheat grown on their own farm was upheld by the Supreme Court. *Wickard* stands as authority for the proposition that, even where the individual conduct is confined to the intrastate, it is the *aggregate* effect of such conduct – albeit individual, domestic and private – on interstate commerce that brings it validly under the Commerce Clause. Indeed, in *Wickard* it was the *negative* aggregate effect, since the connection with interstate commerce was established through reasoning about the effect of removing quantities of home-grown wheat from the commercial market.

In the 1960s, the scope of the power was extended further. In *Heart of Atlanta Motel*[22] the Court upheld provisions of the federal *Civil Rights Act* 78 Stat 241 (1964), passed in reliance on the Commerce Clause, and affirmed a prosecution for racial discrimination in motel accommodation. In the same year, in *Katzenbach v McClung*,[23] a small restaurant in Alabama was also successfully prosecuted for racially discriminatory conduct because, although its custom was almost entirely local, it purchased much of its food and supplies interstate.

Thus, both discrimination against individuals on the grounds of their identity or status, and localised, non-commercial activities, even 'negative' activities, had been successfully regulated by federal law supported by the Commerce Clause before 2000. The Court in *Morrison* nevertheless distinguished such cases. The relevant conduct in the earlier cases, it held, was identifiably commercial or related to something commercial, even if only negatively and indirectly, whereas the suppression of crime and vindication of its victims were 'truly local.' Here the Court took a federalist position. In the words of Rehnquist CJ for the Court: 'The *Constitution* requires a distinction between what is truly national and what is truly local.'[24]

A shift in thinking about the Commerce Clause had already been signalled some years earlier. In 1995, in a landmark case, *United States v Lopez*,[25] the Supreme Court struck down a federal law that made it an offence knowingly to possess a firearm in a school zone. Gun ownership, Congress maintained, involved

21 317 US 111 (1942).
22 379 US 241 (1964).
23 379 US 294 (1964).
24 529 US 598, 617-8 (2000).
25 514 US 549 (1995).

commercial activities and had a substantial economic effect. Guns were bought and sold across state borders; they were used in criminal acts which impacted upon interstate commerce, and so on. The Court rejected the argument. Chief Justice Rehnquist, for the Court, stated that, if the government's claim were accepted, 'we [would be] hard pressed to posit any activity by an individual that Congress is without power to regulate.'[26] Congress, Justice Thomas added, had improperly turned the Commerce Clause into a 'blank check'.[27]

Ten years later, however, in *Gonzales v Raich*, the Court upheld a federal law[28] under the Commerce Clause banning the use of marijuana, even where States had legalised its use for medical purposes.[29] In the words of the Court:

> In assessing the scope of Congress' authority under the Commerce Clause, we … need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.[30]

A single question, then, might have been asked of section 13981 of the VAWA. Did Congress have a 'rational basis' for concluding that gender-motivated violence, without a state-enforced remedy, substantially impacted upon interstate commerce? A very large volume of data collected by Congress was advanced to support the proposition: statistics were provided about the rate of violent attacks on women and the inhibiting impact of violence or the fear of violence on women's ability to seek employment, to travel for reasons of employment, and to take part in economic activity. In addition, evidence was advanced by Congress that sexual assault was rarely prosecuted under state law, that those who were prosecuted were rarely convicted, and if convicted, they were rarely imprisoned. If imprisoned, they were rarely imprisoned for a significant period of time. Victims very rarely collected damages.

The Supreme Court concentrated instead on the question of the 'natural' or 'true' distribution of powers in a federal constitution. If, Rehnquist CJ stated, local matters (contrary to the Founders' 'undeniable' intention) could be regulated by powers intended to be exercised in respect of matters that were 'truly national', Congress would be allowed 'to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption'.[31]

---

26 Ibid 564.
27 Ibid 602.
28 *Controlled Substances Act* 21 USC sections 801ff (1970).
29 545 US 1 (2005).
30 Ibid 22.
31 529 US 598, 615 (2000).

In a five-four judgment, the Supreme Court held that the connection between gender-motivated crimes and interstate commerce had not been made out. 'Gender-motivated crimes of violence', said the Court, 'are not, in any sense of the phrase, economic activity.'[32] Even the violence itself, it seemed, was essentially local. The provision purported to provide a remedy where state laws were inadequate, but, Rehnquist CJ observed, it differed from other remedies previously upheld, because it applied uniformly around the nation, even though the problem addressed did not exist in all or even most states.[33] Even if violent crime could be shown to have a connection to interstate commerce, 'gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.'[34]

To summarise the Supreme Court's reasoning in *Morrison*: violence against women was neither sufficiently commercial nor sufficiently national. Failure of a state to provide or enforce a remedy against such violence – in other words, negative action, inaction or neglect on the part of the state – did not come under the relevant definition of 'state action' prohibited by the Fourteenth Amendment (itself expressed negatively, namely, *denying* 'to any person within its jurisdiction the equal protection of the laws'). Women's common experience of either violence or the inhibiting fear of violence was too private to attract a public remedy, and insufficiently systemic or inter-connected for its impact to be aggregated and for it thus to acquire a national character attracting a private remedy. There was, in short, no federal constitutional power to support such a provision.

In Australia, recourse to the trade and commerce power in support of federal initiatives against sexual violence or sex discrimination would be even less likely to survive a constitutional challenge, but such a challenge need probably not arise. The Commonwealth *Sex Discrimination Act 1984*, for example, is supported not by the trade and commerce power, but by the external affairs power, section 51(xxix), and gives effect in Australian legislation to the objectives of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW').[35] It permits private actions and is not confined to the conduct of public or official persons.[36]

---

32 Ibid 613. There was robust dissent. Justices Souter, Stevens, Ginsburg and Breyer found the connection between commerce and violence animated by gender-animus to be adequately demonstrated, and held that Congress had a 'rational basis' for concluding that there was a substantial economic impact.

33 Chief Justice Rehnquist meant, of course, the problem of lack of state remedy, not the lack of violence, but in fact this variation had been accounted for in the Act, giving victims a choice of state or federal forum and ruling out forum shopping.

34 529 US 598, 615 (2000).

35 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

At least one American feminist, commenting on *Morrison*, has suggested that the *United States Constitution's* treaty power could serve as a source of power for an expanded Congressional role in taking action against sexual violence.[37] However, the United States's reluctance to ratify conventions – part of its reluctance to engage with or domesticise international law – makes such a scenario unlikely at present.

Does this all mean that, more than 200 years after the list of 'national' powers was written into the *United States Constitution*, despite the numerous changes that have occurred since that moment (including with respect to women's membership of the constitutional community), nothing can be done federally to redress a deficit in state law with respect to the prosecution of perpetrators of gender-motivated violence?

II HEADS OR TAILS: POWERS OR INTERPRETATION?

Morrison raises two separate (albeit inter-related) questions about the impact of federalism on women. One concerns the way in which specific heads, or subjects of power, are identified and allocated to either the national/federal legislature or to the regional/state legislature at the point of drafting a federal constitution. The question here is whether the identification of powers and their federal distribution incorporate a gendered historical assumption about the 'natural' or 'true' spheres of power. Such a question, which is one of constitutional *design*, would lead to the simple conclusion that there is a federal power deficit in the *United States Constitution*.

The second is a question of *interpretation*, both of legislation and of constitutional powers. The question here is this: in characterising a law to bring it under a head of federal power, should the Court determine whether the law itself is 'national' or 'local'? Should it take into account the experience of women, in doing so? Should it, for example, treat a law addressing the lower rate of women's participation in commerce as a law with respect to interstate 'commerce' and therefore a federal matter, or only characterise a law in this manner where it regulates actual participation? Would the High Court of Australia – to analogise from a recent

---

The Keating Government's *National Strategy on Violence Against Women* (1992-96), and the Howard Government's *Partnerships Against Domestic Violence*, depended principally on the Commonwealth's power to make grants to the states, under section 96 of the *Constitution*, as well as funding across existing Commonwealth portfolios. The Howard Government established the Ministerial Conference of Ministers responsible for women ('MINCO').

36 Australian controversy about the employment of the external affairs power to 'nationalise' subjects that would otherwise be a matter for state jurisdiction is, of course, relevant here, and allows us to draw an analogy with the US controversy.

37 Catherine A McKinnon, 'Disputing Male Sovereignty: On *United States v Morrison*' (2000) 114 *Harvard Law Review* 135, 177.

example[38] – characterise a law that sought, for example, to overcome obstacles to women's employment by corporations (the majority of private employers in Australia) as a law with respect to 'corporations', thus bringing it, at least in most instances, under section 51(xx) of the *Constitution*?

And, in interpreting existing powers, should the courts construe their scope or meaning according to measures or criteria that take into account the different 'meaning' such powers may have for women? For example, do the subjects of 'commerce' or 'trade' refer only to positive activities that are recognisable within existing formal markets? Or, might women's indirect contributions to such markets or their contribution to a non-market economy or, alternatively, their absence from formal markets, be included under the constitutional subjects of 'commerce' and 'trade'?

Might economic independence, a critical aspect of women's overall independence and agency, be considered 'commercial' so that laws enabling or encouraging women to take part in the economy or commerce were supported by such powers? Or even, as in s 13981, allow victims of gender-motivated violence to sue for and receive damages (and thus contribute to mitigating the negative impact that the experience of violence has on economic independence) be characterised as laws with respect to 'commerce'?

This idea that an *absence* from a subject might bring the 'absent' conduct under the relevant head of power, may not be appropriate for certain 'subject powers' (lighthouses, for example),[39] and to promote this as an approach to characterisation would undoubtedly encourage fears that federal powers would become entirely untrammelled. To paraphrase Rehnquist CJ in the Australian context, it would invoke the spectre of our being 'hard pressed to posit any activity … that the Commonwealth is without power to regulate.' But such an interpretive approach *is* relevant to subjects of power that are concerned essentially with *processes* or *relationships*. Trade or commerce, after all, are not *things* or objects (like lighthouses); they are processes or relationships of exchange. For example, federal legislative initiatives to stimulate Australia's export trade, where the 'mischief' includes absence or under-development of a particular export market, can, it seems, be validly characterised as laws with respect to interstate or international 'trade and commerce'.[40] This is little different from treating the under-representation of

---

38 The Workplace Relations Amendment Challenge: *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2007) 231 ALR 1.

39 Section 51(vii) of the *Australian Constitution* reads: 'The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … Lighthouses, lightships, beacons and buoys'.

40 As Fullagar J famously said in *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 598 '[b]y virtue of [the trade and commerce] power all matters which may affect

women in commercial or economic activities, due, for example, to the impact or apprehension of violence, as a valid subject for legislative initiatives supported by the 'trade and commerce' power.

III HEADS OF POWER

The *United States Constitution* is old. Its words have scarcely altered since the time of its framing in the late 18th century. They reflect ideas of an earlier era about the distribution and the nature of governmental power, and importantly about the scope of the *national*. Certain subjects ended up belonging to the federal legislature, while others were 'reserved' for the states (or not identified as subjects for legal regulation at all). What drove this particular choice?

A case such as *Morrison* invites a perspective going well beyond the question of what is essentially 'commercial.' It opens the larger question: are any subjects essentially or 'truly' national, or federal? Where is women's place in the national or federal scheme?

No doubt, many constitutional lawyers and political scientists with an interest in federalism would be sceptical about the need to ask such questions. The project of examining constitutional powers from a gendered perspective is so unorthodox or 'tributary' (as opposed to mainstream) in constitutional law, that it may appear as special pleading, or worse, a blatant invitation to judicial activism. But federalism is a constitutional scheme for recognising and accommodating *differences* – differences in needs and interests arising from geography, and variations in expectations, opinions and cultural identities that supposedly accompany these. To ask whether federalism adequately serves other types of difference – like gender – is doing no more than exploring federalism within its own logic.

Since the first full constitutional review in Australia in 1929,[41] questions have been asked about the adequacy of the *Constitution's* federal scheme for managing modern Australian society. Developments in technology and communications, new perspectives on what is political, as well as international pressures, have created many new subjects for policy. Should these be regulated by national or state laws? Are there corresponding deficiencies in the existing list of Commonwealth heads of power? Are the geographical divisions that were originally organised into the political units of the states still appropriate? Does federalism itself still make sense, given the interstate, indeed global character of so many of our transactions and affiliations today?

---

beneficially or adversely the export trade of Australia … must be the legitimate concern of the Commonwealth. Such matters include … anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it.'

41 Commonwealth of Australia, *Royal Commission on the Constitution* (1929).

Some of these are functional questions, to do with efficiencies and capacities. Many, however, are normative. Changes in patterns of life are nothing new and how we respond to these changes in conceptualising the constitutional distribution of powers is revealing of normative choices. It is never simply a matter of objective identification, of determining what the 'truly' national or 'truly' local require, and classifying powers accordingly. What makes something national, rather than local or regional, is the decision at a particular moment in time that its regulation deserves a uniform approach or a maximum allocation of funds, or a national prioritisation of effort.

Deciding what goes into the federal constitutional box has not merely been a matter of imagining the theatre of war, diplomacy and trading, as opposed to that of ordinary, daily life. For example, in the second Federal Convention, in 1897-98, the framers of the *Australian Constitution* noted that working men were mobile, that they crossed borders in search of work, and that employment and awards increasingly had a multi-state or inter-state character. Thus they decided to give the Commonwealth power over 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.[42] Additionally, powers to create national invalid and old age pensions were allocated to the Commonwealth,[43] in recognition of the transient patterns of employment and the needs of men, during or at the end of their working lives.

Here, the framers asked themselves the question: how might the federal distribution of powers impact specifically on the lives and shared experiences of ordinary men? In *Morrison*, feminists invited the Supreme Court of the United States to consider this question with respect to the lives and shared experiences of ordinary women.

Historically, however, the activities that have been identified as national have tended (although not exhaustively) to be associated with the sphere of masculine activities. The belligerent powers, the outward-looking, border-crossing, 'big-picture' powers – defence, international affairs, immigration, trade – have been allocated to the federal. Over time, the national sphere has expanded, and certain matters once associated with the local or 'domestic' now find themselves among the federal powers. In Australia, the addition of a raft of social welfare powers to section 51,[44] following the successful referendum of 1946 is a case in point. At the

---

42 Section 51(xxxv). National regulation of labour in the United States developed in the late 19th century, through diversity jurisdiction, federal antitrust laws, and with some strikes condemned under the Interstate Commerce Act 1887. 'When modes of production changed and important exigencies calling for national involvement arose, the federal government massively intervened into labor-management relations in the late nineteenth and early twentieth centuries.' Federal administrative agencies and federal statutes set wages and hours. Jill Elaine Hasday, 'Federalism and the Family Reconstructed' (1997-98) 45 *UCLA Law Review* 1297, 1390.

43 Section 51(xxiii).

44 Section 51(xxiiiA).

same time the meanings attached to powers have expanded, and the scope of federal power has greatly enlarged. Nevertheless, the 'tendency' persists, as noted by Sally Goldfarb, 'to regard all legal matters involving women as domestic relations matters',[45] and this creates problems for federal laws in addressing the needs and interests of women in the absence of an express 'gender equality' power. Given this, the High Court's willingness to expand the scope, or denotation, of powers through interpretation becomes critical.

IV CHARACTERISATION AND INTERPRETATION

'Categorical federalism,' as Judith Resnik has so aptly named it,[46] suggests that there is a single distributive logic in federalism, a logic drawn from a pre-determined federal-state binary. As Resnik writes, categorical federalism's method 'assumes that a particular rule of law regulates a single aspect of human action'; it identifies authority with either state or national government 'and then uses the identification as if to explain *why* power to regulate resides within one or another governmental structure'; and it presumes 'exclusive control' by the level of government to which it is allocated.[47] The categorical perspective assumes that the framers of a federal constitution identified spheres of power that are fixed and eternal to the field to which they refer. It prioritises the naming of subjects of power, over the characterisation of laws with respect to those subjects.

However, while recognising that the boundaries of a subject are not infinitely moveable, characterisation need not be rigid, even where the subjects of power are fixed and where constitutional alteration is difficult. Indeed, it has never, in practice, been static in either Australia or the United States.[48] The recent success of the Commonwealth's 2005 amendments to the *Workplace Relations Act 1996* is only the latest example of an expansion of the legislative boundaries of a power.[49] Drawing principally upon the corporations power, section 51(xx), the Commonwealth has now reached into areas of working life that, hitherto, were thought beyond national powers.

The type of law that can fairly be described as a law with respect to 'commerce' or 'external affairs' or 'corporations' (or many other subjects) has fluctuated, expanded, and altered character over the decades. These fluctuations have shifted

---

45 Sally Goldfarb, 'The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism' (2002) 71 *Fordham Law Review* 57, 67.

46 Judith Resnik, 'Categorical Federalism: Jurisdiction, Gender, and the Globe' (2001) 111 *Yale Law Journal* 619.

47 Ibid 620 (original emphasis).

48 As is clear with the Commerce Clause cases. Further, as Resnik, ibid, shows, areas of law that were categorically identified as 'truly local' in *Morrison* – family life and criminal law – have long histories of *federal* regulation in the United States.

49 *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2007) 231 ALR 1.

the 'federal balance' between national and state legislative powers. The question for a feminist analysis of federalism is this: what factors have been taken into account by the legislatures and affirmed by the courts in driving these changes?

If laws respecting negative roles or absences from an activity or sphere of conduct described by a constitutional subject cannot be characterised as laws with respect to that subject, then the federal legislature will have difficulty defending the constitutionality of many laws that address women's experiences or social profile. This is because women remain under-represented in many of the spheres of activity that are – for historical reasons – inscribed in federal constitutions as subjects of federal power. Indeed, it is characteristically a woman's experience to be 'outside' as often as 'inside' a subject of power.

Given the apparent difficulty, for example, in characterising a law creating a private cause of action for gender-motivated violence as a law with respect to 'interstate commerce', how might we uncover a generalisable principle of characterisation or statutory interpretation that assists a feminist reading of otherwise rigid constitutional subjects of power?

V CONTEXTUAL FEDERALISM

The core purpose behind the constitutional model of federalism is to empower the national legislature to do those things that are best done at the national level and best regulated uniformly, while allowing those matters best regulated at the local or regional level to lie outside national powers. Our point of departure is to think of this federal distribution of powers not in categorical terms, searching for what are 'truly national' *subjects*, but with respect to this purpose. This means thinking about national *impact* and national *interests*. National subjects may be identified by looking for common and shared – national – needs and interests, rather than by beginning with the naming of national subjects. This approach does not obliterate the national-local distinction, but allows us to think about it in *contextual* terms.

Rather than thinking of the federal distribution of powers as a matter of fixed or 'true' identity, the impact or interests involved need to be considered. These are not rigid. They will shift between levels, evolve in scope, and often overlap. Local initiatives, for example, may need national funding; national projects may depend upon local implementation. To determine whether a subject requires the exercise of national powers, in the words of Goldfarb, the Courts need to focus 'on whether [the federal legislature has] a rational basis for concluding that federal intervention was justified because the problem being addressed lay beyond the capacity of the states to resolve.'[50]

---

50 Goldfarb, above n 45, 147.

In considering whether the impact or interests involved are national or local, the experience of women needs to be factored in. This may lead to a conclusion that the law in question has *no* discernible difference in impact on women as opposed to men. It may, alternatively, lead to the conclusion that the experience of women is a national matter (as is the experience of men) and that it is in the national interest to identify particular needs among women arising from their shared experience, and to consider the impact on women of a particular law with respect to these needs.

An example of this approach lies, paradoxically, in one of the early Commerce Clause cases in the United States, where a departure from the 'freedom of contract' thinking that characterised the now notorious 'Lochner Era' was permitted. In 1905, in *Lochner v New York*,[51] federal laws limiting the hours of work in bakeries to sixty per week were struck down by the Supreme Court as breaching an inherent limitation on Commerce Clause power. Even here, however, the Court recognised exceptions to and legitimate limitations on untrammelled freedom of contract. These were the so-called 'police powers' that could be exercised where public morals, health, safety, and order were at stake.

Three years later, in *Muller v Oregon*,[52] the Supreme Court upheld a federal law mandating a maximum ten hour working day in factories and laundries *for women*. It was here that the famous 'Brandeis Brief' (using social facts in legal argument) was first deployed. Louis Brandeis, for the State of Oregon, offered copious social and medical data to demonstrate a connection between long hours and a detrimental effect on women's health. His argument was persuasive. In the words of Justice Brewer for the Court, 'as healthy mothers are essential to vigorous offspring, the physical well-being of women [is] an object of public interest and care.'[53] The fact that the Court's views were deeply influenced by gender stereotypes and framed in patronising language is beside the point. The Court was persuaded that something with a very localised operation, and subject to great regional varieties, could legitimately be treated as national, and brought under a federal head of power. The national was legitimately understood to correspond to the particular interests of women.

There is nothing, *a priori*, commercial or interstate in hours of employment, any more than there is something interstate or commercial, *a priori*, in gender-motivated violence without state-enforced remedy. However, if we think in terms of national impact, national issues and interests, adding to this a consideration of whether the federal legislature had a 'reasonable basis' for concluding that there was such a connection, and we frame our understanding of the 'national' to include women (who are, after all, at least one half of the nation), and if we do not rule out 'negative' action or absence from a field of conduct, we may find that a law comes

51 198 US 45 (1905).
52 208 US 412 (1908).
53 Ibid 422.

under a federal head of power whereas, confining ourselves to a categorical understanding of the scope of the power, we would find otherwise.

'Categorical federalism' assumes an inevitable tension, even conflict, between the levels of government. In addition to thinking of federal distinctions in terms of national impact and national interests or needs (which, unlike fixed categories, may shift and evolve), we can identify multi-faceted ways in which 'dynamic interaction across levels of governance'[54] operates. What Goldfarb describes as a 'vision' of 'cooperative rights federalism'

> recognises that under some circumstances, states' rights and individual rights are complementary rather than mutually exclusive, and federal legislative action can therefore enhance both the rights of the states and the rights of individuals.[55]

With the VAWA, Goldfarb observes, Congress recognised that the states needed help in protecting women, both through federal initiatives and funding. They also recognised the need, as we have seen, for a private cause of action that was, in many cases, unavailable in individual states.

The idea of cooperative federalism is familiar in Australia. It is, of course, not an exclusively feminist idea, although its 'vision' is especially compatible with an understanding of the relationship between feminism and federalism, bringing together national experiences – experiences on a scale that require national remedies – and localised events or experiences. Such is the character of much that relates specifically to women's lives, including gender-motivated violence.

The *Australian Constitution* is structurally conducive to at least some degree of cooperative federalism. It has provisions that are absent from the *United States Constitution*. Among others, the reference power (s 51(xxxvii)) allows the states to 'refer' powers to the Commonwealth where their capacity to exercise such powers is weak or where national uniformity in laws is desired but the Commonwealth lacks express powers. The power to vest federal jurisdiction in State courts (s 77 (iii)), permits cooperation in judicial federalism.

However, the High Court's jurisprudence, like that of the Supreme Court, has been limited in recognising the vision Goldfarb suggests. This is most starkly illustrated in 1999 in the 'cross-vesting' case[56] in which, despite state wishes and cooperative endeavours, the Court struck down the cross-vesting of state jurisdiction in federal courts.[57] It is a matter of interest that the cross-vesting scheme had been devised, in

---

54 Resnik, above n 46, 624.

55 Goldfarb, above n 45, 61.

56 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

57 The 'cooperative vision' is, however, illustrated in Kirby J's dissent: '[a] legislature cannot, by preambular assertions, recite itself into constitutional power where none

part, to facilitate the hearing of state matters, including relating to domestic violence, in the course of Federal Family Court hearings.[58]

In Australia, to think in terms of national interests as a matter of policy is unfamiliar to constitutional jurisprudence. The High Court does not permit itself to ask whether a law serves the *national interest* in the sense of being 'good for' the nation. It asks only whether a law is a law 'with respect to' a head of power. A feminist perspective on federalism must be compatible with such jurisprudence. It cannot ask the courts to substitute political judgments about the desirability of legislation for judgments about law. However, as suggested above, it can ask questions about the scope, or 'denotation' of a power which include an examination of the part or place of women.[59] In the characterisation of a law to bring it under a head of power, an approach that includes recognition of the female dimension in a subject of power may lead to a different conclusion from one that fails to do so, even where the characterisation is otherwise orthodox. To take the example of the VAWA again, if the relative *absence* of women in interstate commerce, or obstacles facing women's participation in commercial activities had been understood to come under the subject of commerce, then a law such as s 13981 may have survived its constitutional challenge.

Australian constitutional jurisprudence is not unfamiliar with the type of inquiry that involves thinking about scope or dimensions when it comes to constitutional limitations on the exercise of power. Assessing 'appropriateness' and 'proportionality' is a process that brings the courts into the liminal space between the doctrinal and the political. It provides a useful parallel for seeing how the meaning of a head of power, or the characterisation of a law with respect to a

---

exists. Yet the agreement of all the democratically elected legislatures of Australia that a system of cross-vesting is necessary to help avoid inconvenience and expense, and to remove injustices and uncertainties occasioned by jurisdictional conflict, provides at least persuasive evidence that the legislation serves a practical national purpose', ibid 602.

58 It is also a matter of interest that s 51(xxxvii) has been employed, among other things, to refer State power to the Commonwealth over 'parental rights, and the custody and guardianship' of *ex-nuptial* children, in order to address the deficiency of the Commonwealth's marriage and divorce powers (ss 51(xxi) and (xxii)) that confine federal power to the children of a legal marriage, thus allowing custody and guardianship disputes over ex-nuptial children to be heard in the Federal Family Court.

59 As it did in asking what were the 'essential', connotative features of jury trial for the purpose of section 80 of the *Constitution*, in *Cheatle v The Queen* (1993) 177 CLR 541. Here, the High Court identified some 'undesirable aspects of trial by jury in 1900', to include the exclusion of women. It went further, to consider the status of a claim that the requirement that 'jury trial' be truly representative of the community should require the exclusion of women (and unpropertied men). Such a claim, the Court concluded, would be 'absurd', since 'in contemporary Australia, the exclusion of females … would itself be inconsistent with such a requirement', at 560, 561.

power, might be taken to include its impact on or responsiveness to women's experiences, without at the same time drawing the courts into political judgments about the law's desirability. In determining whether exceptions to limitations on legislative power are 'reasonably appropriate and adapted to the fulfilment of a legitimate purpose',[60] what the court is doing is asking about scale and scope, as well as whether the parliament had a 'reasonable basis' for its legislative action.

In processes of characterisation where proportionality or 'sufficiency of connection' are involved, we see another example of the assessment of legislative 'reasonableness'. For example, in the *Workplace Relations Amendment* challenge,[61] the question for the Court was, put simply, whether the regulation of terms and conditions under which individuals are employed, by defining an employee as an employee of a corporation, brings the law under the corporations power (s 51(xx)). In other words, can a law regulating the relationship of employment be fairly described as a law with respect to corporations? Is there a sufficient (one might also say reasonable or proportionate) connection between the individual employee and the constitutional corporation?

The High Court majority said yes. So, might this process of characterisation be different if the class of 'employees' were understood not to be gender-less but specifically to include female employees (of corporations)? Certainly, among the criticisms made of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), women's lower bargaining power and relative vulnerability to a negative outcome in individualised Workplace Agreements have been stressed.[62] The assessment upon which such criticisms are based falls within the realm of politics and would not in itself alter the character of the law with respect to the subject of the power, unless characterisation were tailored to the logic of 'national impact' or 'national interests'. From that perspective, powers granted to and exercisable by the Commonwealth are powers to regulate 'national', not local matters. They are powers whose exercise is responsive to national issues, conducive of the national welfare, or relevant to fields where the states do not have the capacity to act. Here, it might be argued, the use of a national power – the corporations power – to regulate the conditions of individual employment might not be 'appropriate and adapted' unless in doing so – in the aggregate – the national welfare was thus addressed.

---

60 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

61 *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2007) 231 ALR 1.

62 Marian Baird, Rae Cooper and Damian Oliver, *Down and Out with Work Choices: The Impact of Work Choice on the Work and Lives of Women in Low Paid Employment*, University of Sydney, Report to the Office of Industrial Relations, Department of Commerce, NSW Government, June 2007.

CONCLUSION

This type of jurisprudence is, as yet, too unfamiliar in Australian constitutional law (or, alternatively, all too familiar in its resemblance to the pre-*Engineers* doctrine of 'reserved states powers'[63]) for such an approach to hope to succeed. But, accepting the validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) does not exhaust the feminist assessment of the role of the corporations power in Australia's federal system. What's sauce for the constitutional gander may be sauce for the constitutional goose.

At some point in the future, under a different Commonwealth government, the subject of 'corporations' may be validly understood to include measures taken to *increase* or *enhance* women's corporate employment. It is hard to see how the High Court – even a Court whose Justices would recoil from the approach suggested in this article – could now conclude otherwise.

Principles of constitutional interpretation have changed and developed in Australia (as in the United States) and approaches that were once ruled inadmissible – for example, judicial reference to the framing of the *Constitution*, and even to the debates of the Federal Conventions of the 1890s – are now accepted on the bench. Just as categories of federal power themselves are not frozen in time (despite the wishes of 'categorical federalists'), the parameters of characterisation and interpretation evolve. It is this that we in Australia can learn from the United States, and teach it in return.

63 John M Williams, 'The *Constitution* and the *Workplace Relations Act 1996*' (2006) 4 *The Economic and Labour Relations Review* 16.