**Secession Reference (Unwritten Principles)  
-**fundamental, organizing principles that are not explicitly referred to  
-enforceable by courts (unlike conventions)  
-lets courts fill gaps in the constitution, giving them flexibility to deal with situations not expressed in the text (judicial activism?)  
-Federalism: powers divided between fed and prov  
-Democracy: important to individual and how to structure institutions  
-constutionalism and rule of law: constutionalism is entrenchment, give constitution supremacy. Rule of law is that everything is done subject to provision of constitutional law/rules  
-Protection of minorities  
-principles exist in symbiotic relationship; no principle trumps or excludes the other  
-Christie: rule of law will not be seen to give you anything, it’s more “at least this, but certainly not that”

**Justiciability  
-**is the court an appropriate institution?  
-is the issue/case/question something that can be legitimately and appropriately decided by court?  
-is the question too political  
-does it demand an expertise that judges don’t have  
-does it ask judges to step outside what we think is appropriate for judges  
-apart from s.36, we have justiciable constitution  
-courts cannot determine government spending  
-judicial review is generally about Charter issues or division of powers.  
-Imperial Tobbacco: judicial independence – you need both the reality and appearance of the independence in the judiciary. Legitimacy nd stature of adjudication depends on this  
-judges interpret the law while legislature determine the content, it’s ont up to the court to engage inc consideration of wisdom or value of legislation

**Living Tree Doctrine (Persons Case)  
-**one should not apply to the Canada of today things that come out of different circumstances and time. A rejection of the historical argument in favour of t4extual argument.  
-constitution is tree planted, capable of growth. As Canada changes, that change will be reflected by/in its constitution.

**Theories of Federalism**-centralist mode: strongest level of govn’t is the central one, which is what the drafters of the BNA Act intended.  
-Compact theory: federal government is the creation of provinces delegating a bit of their power. as such, it is secondary to the provinces  
-Two-nation theory: federalism is two nations coming together to make up the Canadian state.  
-Coordinate federalism: each government is equal, no hierarchy, each are supreme within their own jurisdiction, neither consistently trumps.  
-Symmetrical vs. Asymmetrical: symmetrical is that provincial power is same for every province. Asymmetrical is that in some circumstances, some provinces may have more jurisdictions than others

**Simeon Framework/Motivating Concerns in Arguments about Federalism**-constellations of values and perspective, competing. Engaged in same conversation, but do not speak to each other, they have parallel conversations on same issues. Even in same tracks, there are different perspectives.  
-Community: tend to be territorial. Perspectives emphasizing communites and those values have visions that evoke national communit or community of province.  
-Functionalism: what’s the most efficient and effective division of labor in determing what level of govn’t should be doing what. Emphasis on economic goals and what level of govn’t is most capable to do what.  
-Democracy: how we set up division of powers should be responsive primarily to importance of participation, responsiveness, and representation. Whether we want minority rights protected against majority or majority will to be respected  
-there are many gaps in constitutional argument where these values and perspectives from judges become important and fill those gps  
-Subsidiarity (ties to democracy and community)

**Bobbit’s arguments of constitutional interpretation**-historical argument: the intent of the drafters  
-textual argument: consideration of the present sense of words of the provision in question  
-doctrinal argument: argument of previous cases  
-prudential argument: argument about costs and benefits, questions of effect and functionality  
-ethical argument: appeal to what we think we are, our society’s characteristics  
-structural argument: inferences from existence of constitutional structures and the relationships the Constitution ordains between them, simple logical moves from entire constitutional text.

**Classical and Modern Paradigm (Ryder)**-classical paradigm: watertight compartments in division of powers. Clear-cut line, strictly policed boundary between federal and provincial jurisdictions with strict understanding, not a piece of fed can stray into prov jurisdiction and vice versa  
-Modern paradigm: overlap is inevitable in a functioning modern state, there must be some shared responsibility and tolerance for impact of the other jurisdiction.

**Pith and Substance (Swinton)**-characterizatin of the law in question, looking at the dominant aspect  
-text is primary  
-not a formally logical process, polices of justice shape how test is worked through by particular judges  
3 steps:  
-identify the matter of a piece of legislation, the essential core  
-look at the scope of the possible places in s.91 or s.92 it could fit in  
-bring first two stages together to determine where this matter fits in.  
-if it ends up in a head belonging to the enacting govn’t, it’s intra vires. Otherwise, ultra vires

**Mutual Modification P&S (Parsons)**-old method, never overturned, but out of favour  
-classical paradigm: if a matter falls in a head of power in s.91 or s.92, you don’t even have to look at the other jurisdiction, as it won’t be there. Premised on idea that there’s no sharing or overlap  
-if a head of power falls in one jurisdiction/list, by definition, it won’t fall on the other  
-fit is not a question of degree. It either fits or it doesn’t fit

**How to Determine the Matter (Morgentaler)**-look at extrinsic factors (speeches, timing, context)  
-Intrinsic factors: statute itself, what its terms are, what it says  
-legal effects: look at text of the statute, four corners of the legislation, legal effects  
-practical effects: what impact the legislation is actually having

**Doctrine of Colourability (Morgentaler)**-govn’t tries to do something it doesn’t have jurisdiction to do but colors it in a way to make it look like it’s something that falls within their jurisdiction  
-law looks like something on its face, but is really about something else  
-in Morgentaler, govn’t says it’s too obvious, not devious enough to be colorable.  
-Unemployment Insurance: frame the matter as generally as possible  
-heads of power must evolve with the times (Unemployment Insurance)

**Incidental Effects (General Motors)**-as long as the dominant aspect/matter is in the jurisdiction of the enacting government, other aspects it has will, if they are not as important, be tolerated as incidental effects.  
-must be incidental, minor, secondary, and not at all dominant.

**Double Aspect Doctrine**-not a doctrine that leads to a conclusion, just a characterization of a situation  
-Lederman: subjects which in one aspect and for one purpose fall within s.92 may in another aspect and for another purpose fall within s.91. Subject credibly to regulation from either government  
-Multiple Access: same activity, but different ways of slicing it. From those different perspectives/aspects, its subject to regulation from both levels of govn’t. Two pieces of legislation work concurrently and in harmony  
-it’s a field of law that could’ve been passed by either govn’t. Where both pieces of leg are valid.

**Necessarily Incidental Doctrine (CNL test)**1. Look at the validity of the challenged provision. Pith and substance analysis of the impugned provision alone (tho Dickson doesn’t do this). If it does intrude on the other jurisdiction, how much does it intrude: minimally, moderately, or highly?  
2. Look at whole statute minus the provision and see if it’s valid. Do a P&S for the rest of the statute.   
3. Look at relationship between the provision and the statute. Level of intrusion determines the kind of fit needed. If highly intrusive, provision must be “truly necessary” for rest of statute to work. If moderately intrusive, then “necessarily incidental” to the statute. If it’s minimally intrusive, then merely requires a “rational functional connection.”  
-necessarily incidental is for dealing with a piece of a statute that clearly isn’t valid, dealing with whether something with a dominant purpose that’s clearly invalid can be rendered valid by connection to something larger that’s clearly valid.  
-incidental effect is where the dominant purpose is valid, but in addition this purpose, it has other tangential purposes in the other jurisdiction.

**Interjurisdictional Immunity (Canadian Western Bank)**-McKay: fed doesn’t actually need to have legislation in the area for it to be immunized (leaves a gap)-there is good reason to have a doctrine of interjurisdictional immunity  
-protects both federal and provincial jurisdiction  
-it is the undertow to dominant tide of constitutional interpretation, so apply with caution  
-standard is whether the legislation IMPAIRS a minimal, unassailable core of federal jurisdiction  
-do paramountcy first, as that actually requires fed to have legislation  
-IJI is generally restricted to precedent, situations where it has already been successfully invoked and core has been recognized in the past. Court is hesitant to recognize new cores.  
-A core is what makes the grant of jurisdiction meaningful.  
-COPA: preferable to do paramountcy first.  
Two stage test (CWB):  
-determine if the provincial law trenches on the protected core of a federal competency  
-determine if the provincial law’s effect on that core is sufficiently serious (impairment) to invoke IJI  
-think about whether the core has been protected in precedent. Doesnt apply in situations of double aspect. Core cannot be broad and amorphous.

**Presumption of Constitutionality (McKay)**-if there are two equally plausible interpretations or constructions of a statute, but one is unconstitutional, you go with the one that’s constitutional.  
-province cannot due through general words what it wouldn’t be able to do through specific words

**Federal Paramountcy**-requires to be legislation from both jurisdictions  
Two steps  
1. Each law must be held to be valid and an independent enactment (do P&S for each)  
2. If both are valid, see whether there’s a conflict between them. If there is, fed law trumps and prov is inoperable to the extent of the conflict. (this means that if the fed is amended, repealed, etc, prov kicks in.)

**Ross (occupying the field)**-if fed is doing something in that field of human activity, implication is that prov can’t be.  
-Ross clarifies by saying that for occupying the field to work, fed parliament must state its intention to be exclusive, exhaustive piece of legislation in the area.

**Multiple Access (Impossibility of Dual Compliance)**-conflict test: is it impossible to simultaneously comply with both pieces of legislation?  
-identifical legislation from both govs is the “ultimate harmony”  
-“do x” and “don’t do x.” However, if one piece of legislation is just more strict than the other, this isn’t impossibility, just follow the stricter of the two.

**Frustration (Mangat, Bank of Montreal)**Rothman’s: if there is no impossibility of dual compliance, then check for frustration  
-whether following the provincial law will lead to frustration of the intent behind the federal law.

**Permissive vs. Mandatory Rules (Spraytech)**-permissive is unlikely to set up a positive right so unlikely to lead to a conflict  
-permissive federal legislation is hard to frustrate. It just says you “CAN” do something, not that you must. The govn’t is thus taken as being neutral about whether you do what is permitted.  
-doesn’t set up impossiblility of dual compliance either, as govn’t is onlysaying you can do something, if you don’t do it, you’re dual complying to both.

**Criminal Law Form**-Margarine Reference: a prohibition backed up by penalty; it must have a criminal purpose  
-Firearms Reference: federal laws are penal, provincial laws are regulatory  
-Firearms reference: criminal law is about public considerations, provincial is about private considerations  
-Morgentaler: more significant punishment can leade to it look more like criminal punishment than if it’s just something like a license being denied.  
-RJR: Exemptions can be tolerated: legislators may use exemptions to delineate the logical and practical limits of a crime. (though dissenting opinion in RJR thinks this is damning, criminal can’t have exemption  
-where there is a clear criminal purpose, they’re allowed some regulatory provisions.  
-regulatory law: powers of licensing, preventative measures, inspections, can be problematic  
-civil remedies may raise concerns, but it has been upheld  
-doesn’t matter if it’s complex legislation (Firearms Reference)

**Hydroelectric Form Requirements**-it must not be fundamentally regulatory  
-the more elaborate the regulatory scheme, the more likely that it isn’t criminal  
-exemptions relating to the prohibitions can be problematic, but not damning  
-criminal law typicall involves a self-applied prohibition, doesn’t need a discretionary opinion or an intervening agency to determine whether there has been an offence.  
-equivalency provisions raise presumption that it is regulatory, this is when people are exempted due to an equivalent statute being in play  
-regulatory: looks more like control than prohibition of a substance  
-if it’s really broad coverage, it looks provincial, must have precise target  
-criminal law gives an assertion of national values

**Criminal Law Purpose**-Margarine Reference: large, public matters are criminal, significant private focus may disqualify  
-RJR: not frozen in time, the govn’t can create new crimes, you don’t need to have an affinity to a traditional criminal law concern.  
-Firearms Reference: you have terrible legislation that is still valid  
-public safety is a valid criminal purpose that can make regulatory aspects secondary (Firearms Reference)  
-Regulation of something of a dangerous nature can be criminal (Firearms Reference), purpose of public safety is trumping the regulatory aspects here. Registration schemes can be criminal law if it’s about something of a dangerous nature  
-it’s about whether the intrusion into the province is incidental or disruptive.

**Ancillary Power (signs that something is provincial)**-provincial head of power that lets it assign penalties to its laws  
-however, punishing where an activity is injurious to public looks like criminal  
-McNeil: provincial regulations/penalties are more aimed at prevention than prohibition, they prevent it from ever happening, as opposed to coming in and punishing/ticketing after the fact  
-McNeil: regulating private theatre premises, not to do with punishment of public crime, private premises and that it has to do with a private business makes it provincial  
-Dupont: fact that legislation is temporary makes it more likely to be provincial  
-provincial laws tend to be about property, particularly private property (Westendorp)

**Commissions if Inquiry (Chatterjee)**-provinces get broad powers of investigation  
-not a specific crime, but broad ongoing issues. A focus on a specific instance/individual may be outside provincial jurisdiction (starr)  
-cannot allow a bypass around protections granted to the individual under the Criminal Code

**Residual Theory of Pogg and the Gap Branch**  
-anything not granted under s.91 or s.92 is granted to the fed under the pre-amble.  
-Gap branch: drafting oversights, things drafters had not thought of, but had they tought of it, they would have covered it. This is uncontroversially a part of POGG. It cannot be historically new.  
-Labour Conventions: fed can’t extend its jurisdiction by signing on to international treaties.

**Emergency Branch (Laskin in Anti-Inflation)**-delayed response does not disentitle  
-ability to opt in or out, optional, doesn’t disentitle it  
-doesn’t have to effectively deal with the problem or if it only covers part of what the emergency is abou  
-don’t have to actually signall in the bill that you’re dealing with an emergency. That it is a serious national concern is enough  
-key concern: was it a rational response on the part of parliament? Reasonable politician standard. Must be a rational basis for this legislative decision, a reasonable decision by legislators  
-it must be temporary  
-must be something with an emergency/crisis nature. Calmer sense of emergency is ok, need ont be war/famine/pestilence. Economic crisis is sufficient.

**National Concern Branch**  
-new matter must not swallow up all prov jurisdiction or destroy equilibrium of division of powers  
-Crown v. Zellerbeck: must be a new matter. Either historically new in that it didn’t exist at confederation, or it only existed as a local/private matter at confederation and has newly become a national concern, changing social or cultural manifestation  
-CZ: singleness, distinctness, indivisibility that distinguishes it from matters of provincial conern. Can’t be a fuzzy permanent grant that can alter grow and infringe more of provincial jurisdiction.  
-CZ: scale of impact must be reconcilable with division of powers.  
-CZ: provincial inability test: in determining distinctness and indvisibility, see if this is something provinces can’t deal with, conceptually across the board. Formal and functional: whether it’s something the provinces can’t do and won’t do.  
-Indivisibility: coheres as a single thing, not five separate powers thrown together.  
-Distinctiveness: distinct from prov jurisdiction, no blurred edges that can grow

**Sparrow Test (Aboriginal Rights, s.35 analysis)**1. is there an existing aboriginal right? (show that it has not be extinguished...extinguishment requires clear and unequivocal expression of intention to extinguish by the Crown)  
2. has there been a prima facie interference with that right?  
3. can the govn’t justify it under s.1?

**Van Der Peet (determining if something is an abo right in step 1 of Sparrow Test)**-may be a modern form of practice, tradition, or custom existent prior to contact, but there must be continuity  
-has to be something that makes that society distinctive, a defining attribute, if not present, the society would be fundamentally altered  
-integral to society in pre-contact times  
-articulated in light of the specific abo group making the claim  
-must be of independent significance to the band, not incident or piggy-backed on some other practice  
-European cultural relevance is okay, unless practice exists solely because of Euro influence  
-take into account relationship to the land  
-doesn’t have to be unique from all other cultures, just one that makes the culture what it is.  
-Sappier: doesn’t have to be the one thing on which they depend for survival, only has to be a factor  
1. Identify the precise nature of the claim (Sappier...must be specific, not just use of resource, but how, where, and what, must specify purposes behind the use)  
2. Is the practice integral to the distinctive culture?

**Modification to this if determining abo title**-instead of looking at integral practice, look at occupancy of the land in question  
-must have occupied pre-1846/sovereignty  
-continuous occupation, though doesn’t have to be unbroken continuity  
-occupancy must be exclusive, other people can be there, but must have ability to exclude

**Justifying the Infringement   
-**Sparrow: must be a valid objective underlying infringement and a compelling and substantial government purpose/objective. Sparrownarrows this only to conservation, otherwise abo have priority  
-Gladstone: internal limitation vs. External limitation. If externally limited, doctrine of priority in all cases save conservation will not be required.  
-externally limited: govn’t must show the allocation of the resource is respectful to abo interests and that govn’t has engaged in consultation, compensation for resources taken, and accommodation, an attempt to respect the abo rights as much as possible.

**s.1 justification (Sunday Times requirements)**-Accessibility: put on formal notice about the rights infringement, that its articulated in the formal pronouncements of the state and legally authorized. No problem if in statute or common law utterance  
-Precision: an intelligible standard that the law establishes with sufficiently precise boundaries.  
-balance precision with need for legislation to be flexible to accommodate unforeseen circumstances  
-courts will be more lenient to statutes and common law regarding precision, but not admin tribunals  
-Nova Scotia Pharmaceutical: Vagueness: vague about what the limitation is. Need to be accountable. A concern of fundamental justice, it should be knowable. Flexibility is allowed but not vagueness, which can become overbreadth.  
-court prefers to look at vagueness in minimal impairment stage of Oakes test.  
-go through Oakes test (substantial objective, rational connection, minimal impairment, proportionality)

**Oakes Test details**-Big M: objective will never be found pressing and substantial if that objective itself breaches a right  
-Dagenais: proportionality stage is weighing the deleterious effect/infringement both against the stated objective, and the salutary/actual effects of the legislation. Courts usually skip straight to salutary  
-Edmonton Journal: look at effects and infringement contextually, not abstract, when weighing them

**s.1 deference factors**-Irwin Toy: where there’s a polycentric, complex social problem (lots of different groups with interests in the problem that need to be mediated)  
-where there’s indeterminate social science evidence or an absence of it  
-where the govn’t is protecting a vulnerable group  
-less deference: where govn’t is a singular antagonist against a lone individual (stepped away from)  
-Thompson Newspaper: court puts less emphasis on the polycentrism, as ever problem is this.  
-Moon: wehre the value of speech is high, govn’t gets less deference

**Charter Application (goes standing – application – rights analysis (is the right protected, then is there an infringement) – s.1 – remedy)**-Dolphin Delivery: application applies to government (legislative and executive branch)  
-does not apply to judiciary except that they develop principles in line with values of the Charter  
-does not apply between private individuals, or purely private actions between private actors  
-applies to statutes, or common law where the dispute involves a government actor  
-does not apply to common law dispute between private actors

**Government Control (determining Govn’t actor)**-charter can apply to the charactor of the actor or the action  
-McKinney: must be direct, not indirect, control  
-is the actor performing a quintessential govnerment function? If so, counts as government actor for this purpose (this was never expanded on after McKinney)  
-McKinney: not sufficient to argue that the entity is performing a public function, must be govn’t one  
-McKinney: look at composition of the governing body. Here, 14 of 16 board members were not appointed  
-Stoffman: must be routine and daily control. Appointment isn’t enough if they aren’t accountable to the govn’t and still have autonomy despite being appointed.  
-Douglas College: if removable at govn’t’s pleasure, may be govn’t actors  
-Godbout: municipalities are subject to the Charter, they are performing a govn’t role. Prov von’t cannot delegate their power to avoid Charter, cities are exercising authority prov would otherwise exercise itself.  
-Swain: criminal cases are subject to Charter because Crown prosecution’s involvement is sufficient

**Govn’t Actions**-Eldridge: look at characteristics of the action and see if it’s fulfilling a govn’t policy or program.   
-govn’t is retaining responsibility for those actions  
-Slate: statutory powers of compulsion and coercive power from statute is govn’t action  
-Vriend: an omission or failure to act can still have the Charter applied to it, application of Charter is not limited in s.32 to positive obligations alone. That said, easier if there’s a clearly disadvantaged group

**BC Government Employees (public cast)**-even if it’s a common law situation between private actors, Charter may apply if the case is “public” or has a public cast to it. Here it was the access to court houses.

**Charter Values (Hill)**-where it’s purely private dispute under common law principles, can make charter value argument  
-argue that the common law principles resolving the dispute are not being developed in line with charter values. It’s not a strict s.1 analysis, just weighing charter values in very general terms against the principle of common law that’s used here and say it’s not balanced appropriately.  
-show charter value is violated and not being appropriately balanced  
-Problem: how to distinguish a right from a value?

**Purposes of Freedom of Expression (Keegstra)**-democracy: free flow of ideas is required in democracies  
-search for truth: marketplace of ideas facilitates the emergency of truthy  
-as a good in itself: expression is how we self-fulfill and self-realize.  
-Dolphin Delivery: expression is both speech AND conduct

**Rights Analysis step 1: does the activity fall under freedomof expression?**-this assessment is value neutral, doesn’t matter what the content is  
-Irwin Toy: it must be an activity that conveys or attempt to convey some meaning  
-if it’s violent in form, it doesn’t work. Can be violent in content though.

**Rights Analysis step 2: is there an infringement?**-Irwin Toy: first check whether government has infringed purposely (it intentionally ends to stop the expression)  
-if not, see if it infringes in effect (law doesn’t express intention to, but in carrying through the law, expression will be limited or burdened).  
-if you’re showing infringement in effect, must show how this effect infringes in such a way that touches on one of the Keegstra reasons for expression’s protection

s**.1 Justification**-Irwin Toy: character of speech is hugely important and determines deference/strictness of s.1 test.  
-how valuable is the speech and how closely is tied to the Keegstra points? The farther removed it is, the easier it is to justify an infringement  
-if the speech is protecting a vulnerable group, it will be harder to justify infringement. Competing values and polycentrism also make for harder test.

**Commercial Speech**-Rocket: there is value to it, though it may be easier infringed due to the profit motive. That said, it is protected due to its informing consumers and allowing them to make informed choices.  
RJR: disagreement over whether it is of little value due to profit motive, or some value due to informative aspect  
-RJR: partial bans are easier to justifiy in minimal impairment stage – ban only one type of ad as opposed to all three (lifestyle, brand preference, and information). Cannot stop consumers from getting information that will them regarding access to a legal product

**Forced Expression**  
-RJR: silence is protected, forced is expression is a violation. Can’t force someone to speak  
-RJR: McIntyre says no one would have though this to have been their speech anyway, but majority disagrees: forcing someone to say something is an indignity  
**Consumer Backspeech**-consider what resources the person has before limiting the right – may not be minimal impair if that’s their only means  
-protected due to the informational needs of listeners.