Raw Milk: An Examination of the Reasons for its Disparate Treatment
In the United States and Canada

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I. Introduction.

Raw milk refers to the lacteal secretions of various animals such as cows, goats, and sheep that are not pasteurized. Pasteurization\(^1\) is a “process that kills harmful bacteria by heating milk to a specific temperature for a set period of time.”\(^2\) Pasteurization also extends shelf life and destroys pathogens.\(^3\) Raw milk is also not homogenized or combined with any additives.\(^4\)

Raw milk is very controversial in the United States and Canada.\(^5\) Both federal governments have declared that it is unsafe for human consumption.\(^6\) Both are concerned with *Salmonella*, *Listeria*, and *E.coli*, which can be present in unpasteurized milk and allegedly causes numerous serious illnesses every year.\(^7\) However, on the other side of the debate there are several special interest groups and individuals who contend that raw milk

\(^1\) Louis Pasteur developed pasteurization in 1864. FDA, The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk, available at [http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm079516.htm](http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm079516.htm) (last visited Dec. 9, 2009).

\(^2\) FDA, Questions and Answers: Raw Milk (Mar. 1, 2007), available at [http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm122062.htm](http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm122062.htm) (last visited Dec. 9, 2009).


\(^5\) Most European and Asian countries drink milk unpasteurized and there is little to no argument to do otherwise.


\(^7\) *Id.*
is not only safe, but also healthier than pasteurized milk.\(^8\) They claim that raw milk has healing powers and beneficial bacteria and that it is pasteurized milk that contains a host of risks.\(^9\)

Raw milk is regulated in both the United States and Canada. However, it is treated very differently in each country. The United States prohibits raw milk from being transported in interstate commerce, which allows the individual states discretion on regulating raw milk within each state. In other words, each state can decide whether to prohibit or permit raw milk. Canada prohibits the sale of raw milk anywhere in the nation. Thus, in Canada, raw milk is banned on a national level and the provinces have no authority to say otherwise.

There are very strong arguments on each side of the raw milk debate. However, the federal governments of both the United States and Canada agree that raw milk is dangerous and a threat to public health. That leaves the question of why the United States decided to allow it to be regulated by the states and Canada chose to prohibit it on a federal level. There are several possibilities for this divergence. This paper will explore five options: (1) Federalism, (2) Popularity of raw milk, (3) Special Interest Groups and Lobbying, (4) Governmental Structure, and (5) Historical and Cultural Values.

Raw milk is a significant issue in both nations. Raw milk has been making headlines in Canada recently because of the government’s reaction to Michael Schmidt, a raw milk


\(^9\) Id.
farmer. His farm was raided after an 18-month investigation that uncovered that Schmidt was illegally selling raw milk. It is expected that the results of the trial will be announced in January 2010. In the United States, raw milk has been in the news as several states consider making changes to their raw milk legislation. In addition, there has been a federal proposal to end the ban. As neighboring nations, the United States and Canada often look to the other and therefore, what one decides on the raw milk issue may ultimately influence the other.

II. The Current Status of the Law.

A. The United States.

The United States Congress is enabled to regulate products in interstate commerce through the broad language of the Commerce Clause. In this instance, the legislature has


12 For instance, Maryland has had bills proposed allowing cow share programs and to legalize the sale of raw milk. Meredith Cohn, Raw Milk Debate, BALTIMORE SUN, Feb. 16, 2009.


14 “[The Congress shall have power] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” U.S. CONST. art. I, § 8, cl. 3.
delegated authority for products under the Federal Food, Drug, and Cosmetics Act\textsuperscript{15} to be regulated by the Food and Drug Administration (FDA).\textsuperscript{16} Congress, through the agency, has a duty to protect consumers from misleading products, as was demonstrated in *Carolene Products*.\textsuperscript{17} There, the Court explained:

> When Congress exercises a delegated power such as that over interstate commerce, the methods, which it employs to carry out its purposes, are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat. *Id.* at 31-32.

Similar rationales for why the filled milk in *Carolene Products* was banned from interstate commerce have been applied to raw milk. The government contends that the ban on raw milk has nothing to do with competition in the dairy industry.\textsuperscript{18} Additionally, as will be explained later, there is a fear that raw milk could be confused with pasteurized milk and that labeling does not adequately remedy the issue.\textsuperscript{19} Therefore, there is a rational basis for the federal ban on raw milk in interstate commerce.

\textsuperscript{15} 21 U.S.C. § 300 *et seq.*


\textsuperscript{17} *Carolene Products Co. et al. v. United States*, 323 U.S. 18, 65 S.Ct. 1.

\textsuperscript{18} Although it does not explicitly state that industry competition is not the reason behind the ban, it can be inferred from the text. Requirements Affecting Raw Milk for Human Consumption in Interstate Commerce, 52 Fed. Reg. 29,509 (Dep’t of Health & Human Serv. Aug. 10, 1987).

\textsuperscript{19} Requirements Affecting Raw Milk for Human Consumption in Interstate Commerce, 52 Fed. Reg. at 29,513.
The prohibition on raw milk in interstate commerce is a federal regulation. The Food and Drug Administration promulgated it. FDA is a branch of the Department of Health and Human Services. FDA is tasked with protecting and advancing the public health by assuring the safety of food, drugs, and medical devices.\textsuperscript{20}

Before an agency can issue a rule, it must go through the notice and comment process. The agency posts notice of the proposed rulemaking in the Federal Register. The public is then allowed to comment on the proposal. The agency must acknowledge any relevant comments made by the public. A notice of the final rule is also published.\textsuperscript{21}

FDA's proposal to require all milk shipped in interstate commerce to be pasteurized was published in the Federal Register on September 9, 1972.\textsuperscript{22} FDA explained that it believed that the only way to destroy pathogen microorganisms found in milk was through pasteurization.\textsuperscript{23} FDA explained that the legal basis for the rule is the Public Health Service Act\textsuperscript{24} and the Federal Food, Drug, and Cosmetic Act.\textsuperscript{25} The Public Health Service Act "authorizes the Department of Health and Human Services to make and enforce such regulations as are necessary to prevent the introduction, transmission, or spread of

\begin{footnotesize}
\textsuperscript{20} FDA, Centers & Offices, available at http://www.fda.gov/AboutFDA/CentersOffices/default.htm (last visited Dec. 9, 2009).

\textsuperscript{21} Keith Werhan, Principles of Administrative Law 3-10 (2008).

\textsuperscript{22} Milk and Cream, 37 Fed. Reg. 18,392 (Dep't of Health, Education, and Welfare Sept. 9, 1972).

\textsuperscript{23} Milk, Lowfat Milk, and Skim Milk, Pasteurization Requirements for Milk Products for Consumer Use, 52 Fed. Reg. 29,509 (Dep't of Health and Human Serv. Aug. 10, 1987).

\textsuperscript{24} 42 U.S.C. § 216, 243, 264, and 271.

\textsuperscript{25} 21 U.S.C. § 300 et seq.
\end{footnotesize}
communicable disease from foreign countries into the states or from one state into another state.”26 Prior to the raw milk regulation, only five products were prohibited under the Act: shellfish, turtles, psittacine birds, lather brushes, and garbage. 27 The portion of the Food, Drug, and Cosmetic Act that authorizes regulation of raw milk allows for the control of adulterated foods. 28

In the Federal Register, FDA addressed the comments of one opponent of the ban. Steuve’s Natural (formerly AltaDena Dairy) provided several reasons why FDA should not ban certified raw milk. Steuve claimed that FDA was “singling out raw milk” for “unwarranted, selective treatment” by public health authorities “because other ready-to-consume foods are, naturally or by virtue of cross-contamination, major sources of disease and are not subject to strict Government regulations.” Steuve went on to explain that contaminated pasteurized milk posed a much greater risk than unpasteurized milk. Additionally, Steuve questioned whether pasteurization significantly decreases the amount of negative microorganisms in milk. 29 FDA found all of Steuve’s remarks to be “unconvincing” because it felt that “the known, documented health risks associated with the consumption of raw milk” were more persuasive. 30 The Center for Disease Control and

26 42 U.S.C. § 264(a)


30 Id.
Prevention\textsuperscript{31} also stated that “other ready-to-consume foods of domestic animal origin are subjected to processing procedures designed to render them safe for consumption and are microbiologically monitored for adequacy of processing.”\textsuperscript{32}

FDA also addressed a proposed alternative to the ban. An unidentified party suggested that the FDA label raw milk to ensure that consumers were informed of the inherent risks of ingesting raw milk. However, FDA found that labeling would be ineffective because it is traditionally intended to warn against misuse or abuse, but in the case of raw milk the dangers were a result of customary use.\textsuperscript{33} FDA added that the parties that are most at risk of getting sick from raw milk, the elderly and children, were the most likely not to have the ability or opportunity to read the labeling.\textsuperscript{34}

The regulation’s movement through the administrative process allowed a lot of insight into the FDA’s reasons for banning raw milk. However, it wasn’t until FDA’s decision was challenged in court that all of the relevant information was made available.\textsuperscript{35} The United States District Court of the District of Columbia reviewed the rule banning interstate sales of raw milk.\textsuperscript{36} The case was brought before the Court because FDA had

\textsuperscript{31} The Center for Disease Control and Prevention is part of the Department of Health and Human Services. CDC, About CDC Organization, available at http://www.cdc.gov/about/organization/cio.htm (last visited Dec. 9, 2009).

\textsuperscript{32} Milk, Lowfat Milk, and Skim Milk, Pasteurization Requirements for Milk Products for Consumer Use, 52 Fed. Reg. at 29,512.

\textsuperscript{33} Id. at 29,513.

\textsuperscript{34} Id.


failed to finalize the rule it proposed in 1972. The plaintiffs, a public interest organization known as Public Citizen, brought an action to compel the thirteen year pending rulemaking proceeding to require that all milk and milk products sold in interstate commerce be pasteurized. In the opinion, the Court addressed the reasons enumerated by FDA for banning the interstate transportation of raw milk. The Court rejected that a federal regulation was not proper. It also stated “it is undisputed that all types of raw milk are unsafe for human consumption and pose a significant health risk.”37 The Court held that FDA was to be compelled to promulgate the regulation prohibiting raw milk in interstate commerce because of the overwhelming evidence indicating that it was necessary to protect public health. The Court also found that a rule banning the intrastate shipment of raw milk would not be necessary to carry out an interstate ban. FDA also agreed that the federal interstate ban was the best way to deal with the problems caused by raw milk and the “appropriate way to use Federal resources.”38 All of that resulted in the current regulation pertaining to raw milk in interstate commerce which is entitled: “Mandatory pasteurization for all milk and milk products in final package form intended for direct human consumption” and states:

No person shall cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale of other distribution after shipment in interstate commerce any milk or milk product in final package form for direct human consumption unless the product has been pasteurized or is made from dairy

37 Public Citizen, 653 F. Supp. at 1241.
ingredients (milk or milk products) that have all been pasteurized, except where alternative procedures for pasteurization are provided for by regulation.\textsuperscript{39}

Some farmers have devised what is known as cow sharing to circumvent the prohibition on the sale of raw milk in their states. Cow sharing is a system where a farmer owns a herd of cows and allows people to buy a portion of the herd. In some cases, the farm is considered a cooperative. Members pay for the upkeep of the land and animals in exchange for the products produced, including raw milk. This system is permitted in some states, however, others have ruled against it. In \textit{Oyarzo v. Maryland Department of Health and Hygiene},\textsuperscript{40} the Maryland Appellate Court held that the Department of Health and Mental Hygiene acted within its authority when it prohibited raw milk distribution plans. It was illegal to sell raw milk in Maryland at the time of the controversy.\textsuperscript{41} In that case, a dairy farmer sold fractional interests in his dairy herd. The agistor fees were exchanged for raw milk.\textsuperscript{42}

Clearly the United States government feels that the consumption of raw milk is very dangerous for humans. Thus, this paper will explore various reasons for why the United States government allows regulation of raw milk on a state level. There are basically four different ways that the individual states have decided to regulate raw milk. Some have

\textsuperscript{39} 21 C.F.R. § 1240.61.

\textsuperscript{40} 187 Md.App. 264, 978 A.2d 804 (2009).

\textsuperscript{41} It is still illegal to sell raw milk in Maryland; however, the state is currently considering changing the law. Meredith Cohn, \textit{Raw Milk Debate}, BALTIMORE SUN, Feb. 16, 2009.

\textsuperscript{42} An agistor is one who charges to take in cattle owned partially or in whole by someone else and care for them.
banned it completely, some allow it in limited products such as raw cheeses and yogurt, some completely allow it, and some only allow it if the person drinking the milk owns the cow. The overall trends will be discussed fully in section IV.

B. Canada.

The Canadian government has the authority to make illegal the manufacture or sale of dangerous products, adulterated products or misbranded products. This power is granted by s.91(27) of the Charter, which allows punishment for conduct that is dangerous to human health, known as the criminal law power. The Supreme Court of Canada case, *Margarine Reference*, reaffirmed that a dangerous product satisfies the requirement of a typically criminal public purpose. In that case, the Court rejected a ban on margarine because it found that the product was not unsafe. The real intention of the ban was to produce an economic benefit to competitors. *Margarine Reference* also "hold(s) by implication that the manufacture and sale of food and drugs may be regulated provincially as coming within property and civil rights in the province under s.92(13)." However, currently it is regulated federally.

The Food and Drugs Act authorizes the ban on raw milk in Canada. The prohibition of raw milk is a federal regulation that is administered by Health Canada.

Health Canada describes itself as, “the Federal department responsible for helping Canadians maintain and improve their health, while respecting individual choices and circumstances.”\(^4\) Health Canada has explained that its reason for completely banning raw milk is to protect Canadians. Its primary concerns are the bacteria in raw milk that pasteurization would kill or minimize. Most notably, Health Canada is concerned about \textit{Salmonella, E. coli} and \textit{Listeria}. It believes that any “perceived” health benefits of consuming raw milk is greatly outweighed by the risks.\(^4\) Oddly, Health Canada has chosen not to outlaw unpasteurized juice, although it warns against its consumption. It has found similar risks with unpasteurized juice as with raw milk.\(^5\)

Canada has taken a strong stance in enforcing the ban on raw milk. The Food and Drugs Act\(^5\) gives the power to “seize and detain for such time as may be necessary any article by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or the regulations has been contravened.”\(^5\) This power was exercised to the full extent when the Ministry of Natural Resources, Provincial Ministry of Agriculture, Ministry of Health, the local Health unit, the Ministry of Finance and the


\(^5\) \textit{Supra}, note 47.

\(^5\) R.S., 1985, c. F-27, s. 23(1)(d).
Canadian Food Inspection Agency raided Michael Schmidt’s farm. They arrived with 25-armed officers who confiscated dairy products and equipment. Michael Schmidt received 20 charges under the Health Protection and Promotion Act and the Milk Act.53

III. Federalism.

Both the United States and Canada are federations. However, variations in their structures of federalism are not the reason that they deal with raw milk differently from each other. Legally, the United States could have completely prohibited raw milk through a federal regulation rather than permitted the states to each decide. FDA has “expressly avoided regulating raw milk in intrastate commerce, [therefore] there is no federal supremacy issue to hamper the states’ allowance of raw milk sales.”54 However, nothing prohibits the United States government from deciding to federally ban raw milk. The only reason articulated by the government for not doing so was presented in Public Citizen v. Heckler. In that case, the Court stated, “decisions on interstate bans should be left to the states, since such bans do not enhance the effectiveness of an interstate ban.”55 Thus, it appears, that the United States reason was a policy decision not required by federalism.

Similarly, Canada could have handled raw milk differently. The Canadian government did not need to find raw milk to be dangerous and completely ban it under the criminal law power. The provinces would then have been able to decide whether to

prohibit or permit raw milk within their own boundaries. It could have not banned it at all by not declaring it to be dangerous. Canada also could have just banned raw milk in inter-provincial commerce but allowed the individual provinces to regulate it intra-province (possibly through the property and civil rights powers of the provinces). Finally, it could have provided that raw milk not be sold in inter-provincial commerce if the receiving province didn’t allow it using the trade and commerce power.56

Given that there were so many alternatives, it is clear that a policy choice was made when Canada decided to declare raw milk unsafe. Like the United States, it was not bound by federalism. Thus, there must be another explanation for the incongruent approaches for regulating raw milk in the United States and Canada.

IV. Popularity of Raw Milk.

An important question in this discussion is whether there is a national consensus on raw milk in either country. The answer could explain why the United States allows the states to regulate it when Canada has federally banned it. If Americans were split on the issue, a workable solution for the federal government would be to leave it to the states to decide. On the other hand, if even just a few Americans were adamant about raw milk and the federal government did not want to be the party to disappoint them, leaving the decision for the states also would have been an adequate solution in those circumstances. If there are just not many Canadians interested in raw milk or those that are interested are

56 Email from Stephen Ross, Professor of Law, Penn State Law, to Christine Arena, Student of Law, Penn State Law (Dec. 6, 2009, 10:59:00 EST) (on file with author).
not vocal enough then perhaps that is why the federal government issued a nationwide ban.

A. The United States.

There are several indications of the popularity of raw milk in the United States that this paper will address. First, a majority of the states allow the sale of raw milk. Second, there are legislative proposals to lift the federal interstate ban. Finally, there exists a myriad of enthusiastic interest groups and individuals in support of raw milk.

Twenty-eight states allow the sale of raw milk for human consumption. Five allow it for animal consumption. There are also states that do not permit the sale of raw milk but condone cow shares. Even if the latter group is not included, a majority of the states allow raw milk for sale in some capacity.

As previously mentioned, a bill was proposed to allow the transfer of raw milk through interstate commerce. On January 28, 2009, House Representative Ron Paul (R-TX) introduced H.R.778 to eliminate the ban on the interstate commerce of raw milk. The bill is entitled “To authorize the interstate traffic of unpasteurized milk and milk products that are packaged for direct human consumption.” It is awaiting review by the House Committee on Energy and Commerce. There is much support for the bill, including

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59 Id.
Farm-to-Consumer Legal Defense Fund’s petition urging supporters to encourage their local representatives to become co-sponsors of the bill.\textsuperscript{60}

It is clear that raw milk has gained attention and prominence in the United States. \textit{The New York Times} has written several articles on the matter.\textsuperscript{61} Numerous Web sites have been launched for the sole purpose of promoting raw milk. There are consumers that risk their farms and their reputations to pursue raw milk. The number of underground, black market raw milk rings has been growing in the States.\textsuperscript{62} Web sites on the issue include Realmilk.com, Rawmilk.org, and Rawmilkfacts.com. There are also well-known organizations behind raw milk such as the Weston A. Price Foundation and the Farm-to-Consumer Legal Defense Fund.\textsuperscript{63} It seems that raw milk is popular in spite of the warnings of the government.\textsuperscript{64}

B. Canada

Canadian officials seem reluctant to even acknowledge that Canadians have any interest in raw milk. At a conference for the International Association of Food Protection, which was held in Canada, a representative from AgCanada spoke for three minutes and

\textsuperscript{60}Farm-to-Consumer Legal Defense Fund, Help HR 778 Get Co-Sponsors to End Raw Milk Ban, \textit{available at} \url{http://www.ftcldf.org/petitions/pnum987.php} (last visited Dec. 10, 2009).


\textsuperscript{63}Both of those organizations show their support on Realmilk.com.

\textsuperscript{64}Addie Broyles, Austin360.com, \textit{Raw milk popular despite FDA worries}, May 13, 2009.
said that raw milk will never be allowed in Canada. There are many Canadians who hope that statement is incorrect. A province-by-province analysis of the opinions of raw milk reveals a lot of consumer and producer support and interest in the product.

The popularity of raw milk in Canada is also evident through the number of cow shares that have developed recently. There is one cow share that boasts that it provides raw milk for over 300 families from “Chilliwack to Vancouver.” It is also the biggest cow share in Canada and is able to sell raw milk for three times more than what homogenized milk costs. They are able to do this because their customers are informed about the benefits of raw milk and the misinformation provided by the government and willing to pay extra for what they consider to be a superior product. In addition, there have been reports of black markets for raw milk in Canada, which are continuing to grow.

The only opposition to raw milk that could be found in either country was by the federal government and the milk industry. It seems the support for raw milk is about equal in both countries. Thus, the question of why raw milk receives dissimilar treatment in each country still remains.

V. Special Interests Groups and Lobbying.


68 Jennifer Tryon, Black market for raw milk growing in Canada, CTV NEWS, Dec. 18, 2002.
It is important to understand how a bill becomes a law in Canada to fully comprehend how lobbying works on the federal level in Canada. Although officially the Governor General appoints members of the core-executive or Cabinet, the Prime Minister advises him and, therefore, is the “de facto appointer.” A bill is then introduced, often by a member of the Cabinet. The Cabinet Committee then considers the bill. Once the Cabinet approves the bill, it is sent to the House of Commons. The Prime Minister imposes party discipline on the Members of Parliament (MPs). Once the House approves the bill it is sent to the Senate. The Senate “approves” it although this action is more of a traditional gesture than a valuable approval and it does not always occur. Finally, the Governor General, the Crown’s representative, approves the bill if the Prime Minister is still in power. The individual MPs have little say due to the heavy influence of the Prime Minister. Therefore, the most efficient route for a lobbyist in Canada is to persuade MPs to support her cause so that they can convince the Prime Minister and Cabinet ministers to also get on board. Basically, lobbyists must start from the bottom up and hope that lower members will keep to their promises to persuade those ranked above them.  

Lobbying is notably different in the United States. The differences have been attributed to “the nature of society, relationships between private groups and the state, the structure of authority and the role of political elites.”\(^\text{70}\) In terms of social theory, Canada is considered a consensual model, whereas the United States is conflict model. That means


that private groups in Canada are considered to be “equally legitimate” to the government when it comes to making proper policy decisions. In the United States, government is looked at as “some alien apparatus requiring constant surveillance by outsiders.”\textsuperscript{71} The conflict model requires that groups compete to have their interests addressed and voices heard.

The structure of authority and the role of political elites also explains how lobbying in the two nations differs. Although, there is also party affiliation in the United States, Congress members are not as expected to vote on party lines as is the case in Canada. Senators and House Representatives have more leeway to vote individually than MPs. Additionally, in Canada citizens “give full power of attorney to a small committee each four years or so, well knowing that virtually nothing he can do in the interval will have much effect on the group to who he has given his blank check.”\textsuperscript{72} Canada’s system, modeled after the British Parliamentary system, allows the majority government to take unpopular actions. They may not be reelected but it is rare for the next government to reverse their policies.\textsuperscript{73} Furthermore, the “system of interest group politics is more fully developed” in the United States.\textsuperscript{74} All of those factors make lobbying more effective for groups in the United States than in Canada. Nonetheless, there are other factors that impact the analysis of the dissimilar treatment of raw milk in Canada and the United States.

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\textsuperscript{71} Id.
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\textsuperscript{73} Michael Adams, Fire and Ice: The United States, Canada, and the Myth of Converging Values, 110 (2003).
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\textsuperscript{74} Presthus, \textit{supra} note 64, at 57.
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VI. Governmental Structure.

Another reason that the United States may have “punted” the regulation of raw milk to the states is the traditional respect for the autonomy of the states. The U.S. Constitution provides that all powers not enumerated to the federal government are left to the states. Alexander Hamilton emphasized the importance of the states maintaining their individuality and autonomy in the Federalist Papers 33. Each state is recognized as having its own traditions, values, and culture. Each even has its own constitution with independent and enhanced protections for civil liberties. In addition, the United States has recognized the role of the states as laboratories. This encourages states to “experiment” with different laws and regulations to see how they would work before applying them on a national scale.

The British North American Act formed a strong central government for Canada. Unlike the United States Constitution, the Act gives limited power to the provinces, leaving what is not enumerated to the federal government. Residual power in the U.S. goes to the states. This approach favors power in the federal government over the provinces. It may provide insight as to why Canada has decided to regulate raw milk federally. In addition, it has been said that with few exceptions, “there is no reason to believe that the Canadian federal government will be more or less hospitable to the rights of citizens than provincial governments.” This is quite the opposite in the United States. Most likely, an individual will be afforded greater rights and protections from his state. This is especially true in

75 See Hogg, supra note 45 at 121.
constitutional law. State constitutions have the ability to expand the minimum protections enumerated in the federal constitution. This is possible for many reasons including the fact that the states are not restricted by federalism concerns, the supremacy clause does not prohibit it, and each state is unique and its constitution is an independent and adequate sources of rights.77

**VII. Historical and Cultural Values.**

There are some inherent differences between Canada and the United States. One such difference centers on the founding ideology of each nation. The United States was established through revolution and conquest. Canada could have joined the colonies in revolting against England but relied instead on compromise in forming the nation.78 Americans have a sense of entitlement—they feel that their interests and desires are worth fighting for at any and all costs. Canadians, on the other hand, are more reluctant to engage in controversy to secure their rights.

Several cultural differences between Americans and Canadians were enumerated in Fire and Ice:

American is a more competitive society than Canada. It is more innovative. It is also more violent and more racist. Americans worship money and success more than


78 See [ADAMS, supra note 67, at 124.](#)
Canadians do. Americans are more willing to take risks in the hope that they might win than to insure against disaster in the dear that they might lose.\textsuperscript{79}

This passage is demonstrative of the contrasting natures of Americans and Canadians. The governments of each nation must recognize the attitudes of their people and respond accordingly. Therefore, one explanation for the dissimilar approaches to raw milk may be as simple as the American government knew that American raw milk supporters would stand-up and fight for their right to raw milk, whereas the Canadian government knew it was less likely that the Canadian raw milk drinkers would cause any such disturbance so they decided to “play it safe” with a federal ban.

Although there are contrasting historical and cultural factors, the values of Americans and Canadians in this context are quite similar. Citizens of both nations value the right to choose what they consume.\textsuperscript{80} Prohibiting raw milk is inconsistent with other policies in both nations. Canada allows the consumption of unpasteurized cider even though it does not recommend it.\textsuperscript{81} The United States allows its citizens to consume undercooked meat, such as rare hamburgers, and raw fish, such as sushi. Therefore, the value of the right to choose what to eat is not what separates the United States and Canada

\textsuperscript{79} Id. at 115.


on the issue of raw milk. It is actually a value that unites supporters of raw milk on both sides of the border.

VIII. Conclusion.

Federalism is not the reason that raw milk is treated differently in Canada from the United States. Popularity is also not to blame: raw milk is as popular in Canada as in the United States. Although the effectiveness of lobbying seems to partially explain why the United States has not completely banned raw milk as Canada has, the most plausible reasons for the divergence are most likely the differences in government structure and the historical and cultural values. In other words, the reason for the incongruence is not a concrete constitutional or political one but due to the historical, moral, and sociological differences between the United States and Canada. They are sister states but also foreign countries. Both countries agree that raw milk is dangerous for human consumption and would prefer that it be banned entirely. However, each had to make decisions that reflected the structure of their government, including the distribution of powers, and cultural and societal norms and values.