Comparative constitutional federalism and transnational judicial discourse

Vicki C. Jackson*

1. Introduction

An increasingly transnational constitutional discourse has developed in recent years. On issues including the death penalty, social welfare–related rights, freedom of expression, and gender equality constitutional courts around the world are confronting similar legal issues. Increasingly, constitutional courts

* Professor of Law, Georgetown University Law Center. I am grateful to Alida Dagostino, Amber Dolman, Maria Kokiasmenos, and Emily O’Brien, for valuable research assistance; to Hope Babcock, Norman Dorsen, Steve Ellmann, Victor Ferreres, Mike Gottesman, Neal Katyal, Don Langevoort, Mike Seidman, Kim Rubenstein, Cheryl Saunders, Jane Stromseth, Bob Taylor, Mark Tushnet, David Vladek, Lorraine Weinrib; and participants in the Georgetown Faculty Research Workshop for helpful comments on prior drafts. This article grows out of a paper delivered at the McGill International Colloquium on Federalism, November 8–10, 2002, the proceedings of which (including an earlier version of this paper) will shortly appear in book form in Belgium and Canada. See FEDERALISM IN THE FUTURE: ISSUES OF METHODOLOGY, GOVERNANCE AND IDENTITY (Jean-François Gaudreau-Desbiens & Fabien Gélinas eds., Montreal/Brussels, Yvon Blair/Bruylant forthcoming 2004). I am grateful to Professor Fabien Gélinas and the other organizers of the McGill conference for the opportunities for discussion and reflection presented.

1 Compare United States v. Burns, [2001] 1 S.C.R. 283 (Can.), and Soering v. United Kingdom, 11 EUR. H.R. Rep. 439 (1989), with Stanford v. Kentucky, 492 U.S. 361 (1989) (rejecting relevance of other nations’ positions on legality of death penalty). The relevance of foreign practice remains controversial in the U.S. Supreme Court. See, e.g., Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002) (noting that imposition of the death penalty on the mentally retarded “within the world community . . . is overwhelmingly disapproved”); id. at 325 (Rehnquist, C.J., dissenting) (disagreeing that practices in other nations are relevant to the Eighth Amendment question “if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant”) (emphasis in original); Lawrence v. Texas, 123 S. Ct. 2472, 2481, 2483 (2003) (noting European Court of Human Rights case on homosexual rights); id. at 2494–95 (Scalia, J., dissenting) (treating Court’s discussion of European Court’s views as “dangerous” and “meaningless”).


refer to the decisions and reasoning of other constitutional courts—not always to agree but rather to refine and sharpen understandings, in contemporary contexts, of such basic concepts as human dignity, equality, and freedom.

Many judges and scholars celebrate this transnational constitutional consciousness. Professor Lorraine Weinrib of Canada has argued that there is a transnational constitutional method, founded in a basic commitment to human dignity and applying the principles of proportionality in measuring the lawfulness of derogations from protected rights. Professor Donald Kommers of the United States has explored how German constitutional law and its commitments to human dignity could inform constitutionalism more generally. Justice Michael Donald Kirby of Australia praises increasing judicial openness to learning from other constitutional courts, and President Aharon Barak of the Israeli Supreme Court draws widely on comparative material to offer a normative vision of the role of constitutional courts. Some members of the United States Supreme Court, including Chief Justice William Rehnquist, have embraced the possibility of considering the constitutional decisions of other nation’s courts.

The potential benefits of comparative constitutional learning are many. They include the further development of the general understandings of core concepts, such as human dignity and equality, understandings that can aid in resolving questions that arise under the many constitutions of the world invoking similar ideas in similar language of human dignity, freedom, and equality. Comparative constitutional study offers the possibility of sharpened insight into aspects of one’s own system or provisions, of how and why they work together in a distinctive way. In some cases, comparison suggests that what may have seemed essential to constitutionalism are, rather, choices made by particular polities not necessary for other reasonable

5 See Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *Defining the Field of Comparative Constitutional Law* 3 (Vicki C. Jackson & Mark Tushnet eds., Praeger 2002) [hereinafter *Defining the Field*].


8 See William H. Rehnquist, *Foreword*, in *Defining the Field*, supra note 5, at vii, viii (stating that “it’s time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process”). See also cases cited supra note 1.
forms of constitutionalism. Confronting other national court decisions and explaining disagreements with them may elicit better reasoning based on a more complete understanding of the differences between forms of constitutionalism. Comparative constitutional study may also shed light on interpretive methodologies and the implications of different methodologies for the role(s) of courts. For those interested in the operation of legal or political institutions, comparative constitutional study offers a varied field of data about the relationship between structures and outcomes, such as stability, peace, protection of civil liberties, or economic welfare. Further, comparative knowledge may serve as a substitute for experience in constitution making, experience that most constitutional decision makers in the world lack. Comparative constitutional study, however, also has its limitations—most notably, for the purposes of this essay, those deriving from the need to avoid the temptation to examine other constitutional systems only through the lens of the system one is most acquainted with, while failing to seek both critical distance from one’s own system and a contextualized understanding of other systems.

For all the richness of transnational judicial discourse about rights, there is a relative dearth of comparative judicial exploration of issues of federalism, even at a time of renewed interest in federalism associated with the wave of constitution making in the 1990s. Federal solutions have been rejected in the former Czechoslovakia, reformed in Russia, advanced in Belgium and South Africa.


11 See S. v. Makwanyane, 1995 (3) SALR 391, 404–6 (CC), (discussing appropriate role of legislative history of constitutional provisions); see also Weinrib, supra note 5, at 18 (discussing proportionality as a basic tool of constitutional analysis).

12 See generally Günter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 HAB. INT’L L.J. 411 (1985). There are other objections to the use of comparative constitutional law, including positivist and democratic objections to the legitimacy of such consideration by courts as well as concerns for jurists’ competence to understand foreign decisions properly, which are not addressed in this essay. For further discussion, see, e.g., Vicki C. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 DUKE L.J. 223, 263–71 (2001) [hereinafter Narratives of Federalism]. See also Carlos F. Rosenkrantz, Against Borrowings and Other Nonauthoritative Uses of Foreign Law, 1 INT’L J. CONST. L. (I-CON) 269 (2003) (arguing that resort to foreign law can complicate and impair development of authentic domestic constitutional law).

13 See ERIC STEIN, CZECHOSLOVAKIA: ETHNIC CONFLICT, CONSTITUTIONAL FISSURE, NEGOTIATED BREAKUP (Univ. of Michigan Press 1997).

14 Belgium’s process of constitutional change from a unitary to a federal state began in 1970; its 1993 constitutional amendments, effective in 1994, solidified and extended devolutionary
as well as, tentatively, in the U.K.\textsuperscript{15} and advocated for or in form used in such unstable and violence-ridden places as the Balkans and the Middle East.\textsuperscript{16} Federalism has come to occupy a “hot seat” on the agenda of the U.S. Supreme Court, which, since 1991, has substantially changed the prior post–New Deal consensus on federalism in the United States.\textsuperscript{17} And Canada has witnessed repeated debates and referenda on federalism and Quebec’s status.

Federalism, as a set of approaches to shared governance over the same territory, also creates opportunities and challenges for international law, some with a potential to subvert older international legal concepts of the national state. Subnational entities in many countries—including Belgium, Canada, Germany, and the United States—have sought direct participation in aspects of international relations, eroding (along with international human rights law) older notions that national states are the only actors in or subjects of international law. Subnational entities may also seek to become full-fledged nation changes to establish a federal form of government involving the centralized government, regional governments, and governments based on linguistic communities. See \textit{TREATISE ON BELGIAN CONSTITUTIONAL LAW} 5 (André Alen et al. eds., Kluwer 1992); ICL Belgium Index, available at http://www.oefre.unibe.ch/law/icl/be\_index.html (last visited May 30, 2003). South Africa’s Constitution of Oct. 11, 1996 also provides for a quasifederal form of organization. See S. Afr. Const. (1996) §§ 40–41, 60, 76, 103–4, 151 (providing for a “co-operative” form of government in which powers are shared at the national, provincial, and local level and establishing “National Council of Provinces” as part of the national legislative process); cf. Ex Parte Chairperson of the Constitutional Assembly; In Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SALR 744, 857–58 (CC) (describing drafters’ choice of “co-operative government” over “competitive federalism”).


states themselves. “Postmodern tribalism” has led to difficult conflicts that challenge the international legal norm of *uti possidetis*—the principle of the territorial integrity of existing states within former colonial boundaries. The principle of self-determination of peoples, recognized in at least two major international human rights conventions but of contested meaning, can be invoked—in opposition to the principles of territorial integrity and national state control over internal government structures—to support consociational solutions, federal devolution, or secessionary movements. According to Thomas Franck, however, the right of self-determination in international law “does not give minorities a legal right to secede…” but, rather, implies commitments to internal democracy and to the rights of minority groups to enjoy their own culture, religion, or language—commitments that federalism may be able to fulfill.

This article explores both limitations and possibilities of comparative constitutional understandings for some of the difficult legal challenges of federalism. The limitations, which may be reflected in the relatively less extensive transnational judicial discourse about federalism than over individual human rights, are framed by two phenomena described in part 2 below. First, federal systems are, in a sense, “package deals” with interlocking parts such that the interpretation of any one part is influenced by features of the whole. Second, federal systems generally emerge from historically contingent compromises.


between existing holders of power, in some contrast to adoptions of individual
rights provisions (that may be domestic versions of transnational or interna-
tional models). Because there are significant variations among the historical
compromises and “package deals” of federalism, interpretations of power-
allocating clauses in one federal constitution may be readily distinguishable
from and thus appear to have limited utility for judicial interpretation of
another, as discussed in part 3.

Yet comparative constitutional understandings about federalism can play
an important role in adjudicating questions of structural relations, whether
those questions arise for constitution drafters or for constitutional courts, as in
recent decisions on “commandeering” and secession. Comparative experience
suggests a range of variations in whether commandeering of subnational
units is permitted, and it raises significant cautions about constitutionalizing
general rights of secession. As discussed in part 4 below, both of these issues
have arisen in the space of constitutional silences and raise broad questions
of government relations. In giving meaning to those silences, comparative
experience may be of particular value in identifying ranges of consequences
from different choices. The Secession Reference case also illuminates the role of con-
stitutional ambiguity, deferred constitutional decision making, and con-
stitutionally required negotiation, thereby creating new possibilities for transnational learning and critique.

2. Federalism, package deals, and historically contingent compromise

It is not difficult to find decisions by constitutional courts in one nation
drawing on decisions by other nations’ constitutional courts, especially in
human rights cases.21 The South African Constitutional Court has referred
in detail not only to decisions but also to the reasoning of other constitutional
courts of Australia, the United States, India, Botswana, and Namibia, among
others.22 The Canadian Supreme Court in recent years has self-consciously
claimed the mantle of a cosmopolitan constitutional culture, characterizing


22 See, e.g., S. v. Makwanyane, 1995 (3) SALR 391, 412–26, 428 n.103, 431–32, 435–41, 446–47 (Chaskalson, P.), 464–65 (Didcott, J.) (CC) (discussing reasoning of U.S. death penalty cases, both majority and dissenting opinions, distinguishing death penalty decisions in India and Botswana, and discussing Canadian, German, and European approaches to constitutional “limi-
Canada as a leader in the international community against the death penalty and referring to the constitutional decisions of other courts. And even though Australia does not have a constitutional provision explicitly protecting freedom of speech, its High Court has invoked foreign freedom of expression case law in deriving constitutional protection of political speech from constitutional commitments to representative democracy.

Transnational judicial reliance on constitutional federalism decisions also exists, but appears somewhat less common in contemporary decisions (at least in readily searchable English-language cases). Justice Felix Frankfurter relied on Canadian tax immunity cases in opinions on U.S. tax immunity in the 1930s and 1940s. Justice Stephen Breyer has urged consideration of comparative federal structures in an important dissent, and there are a number of Canadian federalism cases that cite the U.S. Court’s decision in McCulloch v. Maryland.


See also McCrudden, supra note 21, at 527 (referring to “the apparently greater use of foreign case law in human rights cases”). Although I have looked primarily at English-language decisions in national supreme courts of federal nations, similar phenomena may exist elsewhere. Cf. Jonathan M. Miller, The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith, 46 AM. U. L. REV. 1483, 1561–68 (1997) (describing first case involving significant departure from the Argentine Constitutional Court’s earlier reliance on U.S. constitutional decisions as one involving a clash between provincial and national power and the meaning of the “general welfare” clause of the federal government’s powers; noting continued reliance on U.S. cases on issues of arbitrary or excessive taxation and property and contract rights).

See, e.g., United States v. County of Allegheny, 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting) (arguing that case was wrongly decided and that U.S. should have followed Canadian rule because federal systems were similar); Graves v. New York ex rel. O’Keefe, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (intergovernmental tax immunity issue presented “same legal issues” as Canada and Australia under particular provisions of their constitutions).


with some frequency, perhaps because of a specific history of modeling parts of the Australian Constitution on that of the United States. In Canada, however, it is easier, on the whole, to find discussions of U.S. “individual rights” cases than U.S. federalism cases in recent Supreme Court decisions. For

(1819)); Reference Re Alberta Statutes, [1938] S.C.R. 100, 130 (Can.) (also citing McCulloch); but cf. Bank of Toronto v. Lambe, [1887] 12 App. Cas. 575, 587 (stating, in response to argument in reliance on McCulloch that the power to tax is the power to destroy, that McCulloch “deal[ed] with the constitution of the United States,” that it “is quite impossible to argue from the one case to the other,” and that it would be an error to deny the existence of provincial power if it falls within the scope of what was granted in “the express words of an Act of Parliament” in section 92 of the 1867 British North America Act “because of some possibility it may be abused”). Until 1949, the Privy Council heard appeals from Canadian courts. (There may be distinctive uses of comparative constitutional experience in tribunals like the Privy Council or European Court of Human Rights, which review issues in different countries, but this essay does not address that question.)


31 A Lexis search in January 2003 in Canadian Supreme Court decisions for “trade and commerce w/50 commerce clause”—an effort to identify Canadian federalism cases referring to U.S. commerce clause cases—yielded only four citing cases. Two of the cases did not refer to U.S. federalism issues, and of the other two, only one discussed, briefly, a U.S. Supreme Court case to say it was not relevant. A further search for “trade and commerce w/50 interstate w/3 commerce” yielded two other decisions referring to the U.S. Constitution’s grant of power over interstate commerce to Congress, one in 1980 and one in 1883. By comparison, a Lexis search within the Canadian Supreme Court file for “freedom of expression w/50 First Amendment” yielded twelve cases, even though Canada only adopted a constitutional protection for freedom of expression in 1982. These results cannot be easily explained by the volume of federalism as compared to freedom of speech decisions in the United States Supreme Court. A Lexis search of U.S. Supreme Court cases for “freedom of expression,” yielded 225 hits and for “freedom of speech,” 577 (of which a number overlapped with the 225). A search for the phrase “commerce clause” yielded more than 1,000 hits. In Canadian Supreme Court decisions, likewise, there appear to be more references to the “trade and commerce” power (201 hits) than to “freedom of expression” (166 hits), though perhaps not so many more as one might expect given that federalism issues date to 1867 and
example, *NLRB v. Jones & Laughlin Steel*, a major U.S. federalism case decided in 1937, appears to have been cited in only three Canadian Supreme Court cases, none of which involved Canadian federalism issues. By contrast, *Board of Education v. Barnette*, a 1943 U.S. decision on religious liberty, was cited in seven Canadian Supreme Court cases. Even in decisions of the Australian High Court one sees increasing citations to foreign constitutional decisions on questions of individual rights, perhaps starting to rival citations to U.S. federalism decisions. Citations, of course, are not a complete or necessarily


34 319 U.S. 624 (1943).

35 Lexis search of “board of education w/5 Barnette” in the Canadian Supreme Court file in Lexis. Other individual rights references included *Griswold v. Connecticut*, 381 U.S. 479 (1965), on marital privacy and access to contraception, cited in five Canadian Supreme Court cases (*Griswold w/5 Connecticut*) and *Miranda v. Arizona*, 384 U.S. 436 (1966), on rights against self-incrimination, cited in nine Canadian Supreme Court cases (*miranda w/5 arizona*). (References to U.S. cases are only one measure of comparative constitutional discourse, but a relevant one in light of their historic influence, positive and negative, on constitutional thinking elsewhere.)

36 As one article notes, “the apparent adoption of [U.S.] First Amendment jurisprudence in ACTV is both new and striking given the absence of an explicit guarantee of free speech in the Australian Constitution.” Gerald N. Rosenberg & John M. Williams, *Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439, 451 n.70, 450–52 (noting
reliable measure of influence, but they do tell us something about the degree to which justices consider foreign authority on constitutional questions helpful to cite. Although this paper does not offer a comprehensive survey, it appears that constitutional courts around the world engage more regularly in transnational discourse about human rights than about other issues in constitutional law.

at least twenty citations to twelve different U.S. Supreme Court cases in Australian Capital Television Pty. Ltd. v. Commonwealth, (1992) 177 C.L.R. 106 (Austl.). A Lexis search in Butterworth’s Australian Law Reports, on June 5, 2003, for “commerce clause,” identified ten High Court decisions referring to the U.S. commerce clause, and, in a search of “First Amendment,” eighteen High Court decisions referring to the U.S. First Amendment. The High Court continues to refer to U.S. federalism case law. See S. G. H. Ltd. v. Commissioner of Taxation, (2002) 188 A.L.R. 241, 254, 257 (Gummow, J.); 267 n. 139 (Kirby, J.) (Austl.) (rejecting immunity from commonwealth tax claimed by instrumentality of an Australian state and citing McCulloch v. Maryland, 17 U.S. 316 (1819) and National League of Cities v. Usery, 426 U.S. 833 (1976)); Street v. Queensland Bar Ass’n, (1989) 168 C.L.R. 461 (referring to U.S. cases on principles of state nondiscrimination against citizens of other states). For helpful discussion, see Rich, supra note 30, at 4, 14–15, 19, 20, 22, 25–26. (The Lexis searchable file of Australian Law Reports goes back only to 1973, but in that time period, eleven High Court decisions cite to McCulloch, 17 U.S. 316 (1819) and four to Gibbons v. Ogden, 22 U.S. 1 (1824); no references to Jones & Laughlin Steel, 301 U.S. 1 (1943) were found.)
There are a number of possible explanations for the apparent difference. One explanation might be simply that there are far more countries with constitutions having individual rights provisions (and thus far more decisions on individual rights issues) than there are constitutionally federal national states. That said, Canada is a federal nation and its Court now seems to resort to comparative constitutional law in individual rights cases to a greater extent than in federalism cases. Another explanation might be that, for several reasons, courts and the judges who sit on them have come to believe that individual rights are their particular charge in a way that permits self-identification as “constitutional court judges” around the world. Newer courts in societies in which judicial review is not well-established may seek both to establish their legitimacy and to solidify a popular constituency with rulings on individual rights claims against the government. To the extent that individual rights are

39 According to the Forum of Federations, only 25 of the 193 countries in the world are federal in character, though these countries contain 40 percent of the world’s population. See Forum of Federations website, at www.forumfed.org/federalism/entrylist.asp?lang=en (last visited May 30, 2003).

40 It is also possible that resort to foreign decisions is more likely in the early years of a new constitutional regime (see McCrudden, supra note 21, at 523–24); if so, and if the federal systems with active constitutional courts are for the most part “mature” federations, in which basic questions of federalism have long been settled, perhaps they would have less occasion to consider foreign constitutional decisions. Additionally, federalism issues in Canadian constitutional law were subject to Privy Council review until 1949, an important early feature of Canadian constitutional federalism. Still another possible explanation (for the Canadian data) is that the 1982 Charter came into force when it was easier to find out about and thus refer to U.S. decisions than when the 1867 Constitution Act came into force. Yet Gibbons v. Ogden, 22 U.S. 1 (1824), was cited by at least five Canadian Supreme Court cases, all during the period 1878–1896, suggesting that differential availability of decisions over time may not be of central importance. Another possibility is that there simply is a larger number of decisions dealing with individual rights than federalism. But cf. supra note 31 (comparing number of Canadian cases discussing “trade and commerce” to number discussing “freedom of expression”).

41 See, e.g., International Commission of Jurists, described on its website as “dedicated to the primacy, coherence and implementation of international law and principles that advance human rights,” see www.icj.org (last visited Apr. 30, 2003); and the International Association of Judges, which describes itself as having as its “main aim . . . to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom,” see www.iaj-uim.org/ENG/frameset_ENG.html (last visited Apr. 30, 2003).

42 See BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 106–7 (Yale Univ. Press 1992); Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 301–2 (1997). Note, though, that some constitutional courts begin with jurisdiction primarily or only to consider intergovernmental claims. See, e.g., FR. CONST. (1958), art. 61(2) (providing that parties authorized to bring constitutionality of a statute before the Conseil Constitutionnel are limited to the president, the prime minister, the heads of the two houses of parliament, or a group of sixty members of either house of parliament); art. 41 (authorizing the government to seek review of proposed legislation deemed to trench on presidential powers); art. 37 (providing for government petitions for declassification of laws).
a greater focus of judicial energy one might imagine judges making a greater investment in comparative learning in those areas. Moreover, it may be that the media, both general and scholarly, have focused more on individual rights issues—the death penalty, abortion, free speech—and that it is easier to gather information about those issues than about issues of structure.

A further explanation may lie in the nature of comparative constitutional methodology itself, one that imposes certain cautions and limits on the usefulness to jurists of a certain class of federalism cases. Although comparison generally requires a degree of skepticism about (a) the choice of categories of comparison and (b) the context of interpretive questions, federalism questions are particularly likely to raise difficult comparability problems, for two related reasons. First, federalism arrangements are, by nature, interdependent and complex package deals. Second, these packages are likely to be the result of specific, historically contingent compromises, serving as “a practical rather than a principled accommodation of competing interests” and thus arguably less amenable to transnational understandings.

2.1. Package deals

Although different scholars use different formulations, a persistent theme in the writing about federalism is that in such systems the constitution establishes a “balance,” or a set of relationships, between different levels or structures of government. No single feature defines this balance or relationship; rather, federalism arrangements embodied in constitutions are typically what I would call “package deals.” For example, in the United States, the enumeration of the federal government’s powers is only one of several structural mechanisms for maintaining a federal balance. Others, described by James Madison in the Federalist Papers, included (a) the role of state governments in the conduct of elections for federal offices (including the selection of federal senators by state legislatures, a now-obsolete provision); (b) the likelihood that representatives (who must be “inhabitants” of their state) will feel more attachment to their own states than to the nation; and (c) the greater number of individuals employed in state government than federal government—a phenomenon still true today. Madison also suggested that fixed and regular

43 See Jackson, Narratives of Federalism, supra note 12, at 273–74 (for the quote and an earlier discussion of these points).


45 The Federalist Nos. 45, 46 (James Madison).

46 According to the 2000 Census data, total federal civilian employment (full-time and part-time) was 2,899,363 (full-time employment only was 2,425,898). Public employment (full-time and part-time) for state governments alone was 4,877,420. Public employment for state and local
elections would prevent the federal government from building up systematic extensions of military power over the states.⁴⁷ The federalism provisions in the U.S. Constitution also include the guarantee to the states of equal representation in the Senate, the requirement for both houses of Congress to concur in legislation, the provision that the equal representation of the states in the Senate cannot be modified by constitutional amendment without the consent of the affected state, the prohibition on the creation of a new state from the territory of other states without the consent of both Congress and the legislatures of the concerned states (thus securing state boundaries), the Senate’s role in confirming (or not) Supreme Court justices, and the requirement for the ratification of proposed constitutional amendments by three-fourths of the states, each acting separately.⁴⁸

The U.S. Constitution is not unique in the degree to which federalism permeates structural arrangements.⁴⁹ The same can be said for Canada, Germany, and other federal nations. Federal constitutions may include very specific rights, or prohibitions on the conduct of subnational or national governments, designed to protect distinctive interests of other constituent parts of the nation or their members, such as Canada’s provisions for minority religious education in its 1867 Constitution Act.⁵⁰ And the allocations or enumerations of powers in federal systems show considerable variations; for example, family law in the United States is often treated as “naturally” belonging to federal governments was 15,077,703 in “full-time equivalent” employment. By any measure, the numbers of federal employees in civilian employment are dwarfed by those employed at the state and local government level. See U.S. Census Bureau Website, at www.census.gov (last visited Apr. 30, 2003).

⁴⁷ The Federalist No. 46 (James Madison).

⁴⁸ For discussion, see, e.g., Richard Briffault, “What About the Ism?” Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303 (1994); Jackson, Federalism and the Uses and Limits of Law, supra note 17. Indeed, some scholars have gone so far as to argue that judicial review of Congress’s compliance with enumerated powers was generally not contemplated at the founding. See, e.g., Larry D. Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4 (1999). As discussed further below, individual rights provisions of constitutions may also be understood as systemic in character (and the result of compromise); the claim, here, is that federalism-related provisions are likely to be more so.

⁴⁹ Each state in the United States has its own constitution, as is the case in many federations; state courts may rely on international human rights norms and the constitutional decisions of foreign tribunals in interpreting their own laws. See, e.g., Sterling v. Cupp, 625 P.2d 123, 131 n.21 (Or. 1981) (citing Universal Declaration of Human Rights and decisions of the European Court of Human Rights). A full account of “federalism packages” might well include the permissible and actual variations in governance among the subnational states, a subject beyond the scope of this article.

⁵⁰ See Can. Const. (Constitution Act, 1867) § 93. See also U.S. Const. art. I,§ 9 (prohibitions on Congress); id. § 10 (prohibitions on states); U.S. Const. art. I, § 9(1) (prohibiting Congress from prohibiting the importation of slaves before 1808). As these examples illustrate, the same provisions may be a part of a federal deal and a protection of legal (but not necessarily human) “rights” (of minority religion adherents and of slave traders).
to the states, while in Germany, Canada, and Australia some aspects of “family law” are within national government powers.

Significant differences exist not only as to allocations and prohibitions of powers but also in the organization of the governmental structures of federal systems. Most federal systems have an upper house that is connected in some way to the interest of the subnational units, but the nature of this representation differs significantly as does the scope of the upper house’s role. In Canada, the Senate is far weaker than in the U.S.; in Germany, the Bundesrat’s concurrence is required for many, though not all, types of federal legislation. Federalism intersects, as well, with the division and allocations of legislative and executive power. In Germany, it is the right of the subnational governments to administer most federal laws; in the U.S., the federal government is generally prohibited from requiring the subnational units to carry out federal laws. Some have argued that presidentialism and divided government offer added security for federal systems by providing subnational units with multiple locations of national power at which to voice and express disagreement. Others would suggest that party organization in proportional voting systems may provide compensating mechanisms for the expression of disagreement. The basic point is that the balance of power in connection with federalism issues may vary depending on


52 See GG [Constitution] arts. 6, 74 (1), (2) (F.R.G.); CAN. CONST. (Constitution Act, 1867) § 91(26); AUSTL. CONST. § 51(xxi)–(xxii).

53 Canadian senators are appointed by the national government, not elected in the provinces. See CAN. CONST. (Canada Constitution Act, 1867) § 24 (appointment by the governor general); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 9.4(c) (4th ed. 1997) (noting convention that cabinet selects the senators appointed by governor-general).


55 See Printz, 521 U.S. 898. Under U.S. decisional law, Congress lacks the power, at least when acting under article I, to require states to administer federal laws, though Congress may condition acceptance of federal funds on state’s agreements to administer federal schemes. For helpful discussion, see Daniel Halberstam, Comparative Federalism and the Issue of Commandeering, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 214–15, 227–28, 235–38, 242 (Kalypso Nicolaidis & Robert Howse eds., Oxford Univ. Press 2001) (arguing that commandeering may be empowering, rather than disempowering, to subnational units as compared with directly effective national law especially where subnational governments have “corporate” representation in enacting laws they administer).


57 Cf. DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 651–52 (Univ. of California Press, 2d ed. 2000) (noting substitutability of electoral changes (e.g., aimed at producing multiethnic parties, or multi-ethnic sharing of posts), with territorial realignments, to create an “incentive structure” to defuse ethnic conflict).
the division of legislative and executive power and the form of voting systems employed. Different states’ constitutional commitments to federalism may also vary, from provisions treating their federal nature as essentially unamendable to approaches that permit substantial central government control over the existence, boundaries, and government structure of the constituent parts. Yet each of these aspects interacts with other aspects of the federal structure to form the constitutional infrastructure for the operation of constitutional federalism.

2.2. Historically contingent political compromises

Not only are federalist constitutional arrangements peculiarly interdependent, but they are also particularly likely to reflect political compromises between existing power holders. In this sense, the meaning of particular parts of the federal deal may not be as amenable to general, transnational reasoning as provisions for individual rights, although rights provisions may result from compromise as well. This claim, which I understand to be controversial, is supported by the following tentative observations.

Constitutions are created by, or require the approval of, existing power holders; existing power holders have strong incentives to be able to envision present and future balances and shifts of power depending on different structures of

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58 See, e.g., U.S. CONST. art. V (prohibiting departure from rule of equal suffrage for each state in the Senate by amendment procedure without consent of the state involved); GG [Constitution] art. 79(3) (F.R.G.) (prohibiting amendments to the Basic Law that affect “the division of the Federation into Länder, their participation in the legislative process,” or the principle laid down in the chapter on Basic Rights or of article 20, which, inter alia, states that Germany “shall be a democratic and social federal state” in which “all public authority emanates from the people”) (official translation as of March 1995).

59 See, e.g., INDIA CONST. arts. 3, 4 (authorizing national parliament to change state boundaries and to make provision for representation in state legislatures); id. art. 168 (specifying for particular states which shall have unicameral and which shall have bicameral state legislatures).

60 See Ex Parte Chairperson of the Constitutional Assembly; In Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SALR 744, 865 (CC) (stating that there are multiple “factors which have to be balanced in deciding whether the ultimate package of provincial powers under the [proposed final constitution] is substantially inferior to, or less than, that which is accorded to the provinces in the” Interim Constitution). On the possibility of individual rights as “package deals,” see infra note 75.

61 See, e.g., Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 261–63 (Can.) (suggesting that the inclusion of minority religious education provisions in the 1867 Constitution Act was a historical compromise that also represented a “broader principle related to the protection of minority rights”). Consider whether the “notwithstanding” clause of the Canadian Constitution might be regarded both as a specific historic compromise and as part of a complexly principled structure for the enforcement of rights. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. For different views, see, e.g., Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 MICH. L. REV. 245, 278 (1995); Lorraine Eisenstat Weinrib, Canada’s Constitutional Revolution: From Legislative to Constitutional State, 33 ISR. L. REV. 13, 31–32 (1999).
governance; and constitution drafters have some incentives to respond to those concerns. Thus, the South African Constitutional Court candidly explained, one of the controlling “constitutional principles” (by which the validity of a proposed Constitution would be judged) had been adopted in order “to encourage political formations which had refused to participate in the transition process to change their minds and to support the transition to a new political order.” Another interesting example occurred when the Czech Republic, in the conversion from a federal to a unitary state, provided for a bicameral legislature (including a Senate), upon dissolution of the Czech and Slovak federal republic, in part to accommodate the interests of existing deputies in the Federal Assembly of the dissolving federation. Note that power elites involved directly in constitutional drafting and design may be better able to determine the effects of structural rules than general “taxpayer citizens,” even though citizen interest in constitution making may be higher than interest in ordinary legislation.

That the drafters can envision the consequences of power-allocating provisions for their own future does not necessarily mean that they will not produce well-designed institutional structures; it does suggest, however, that the institutional design will be intimately connected with existing (and projected) distributions of power. Drafters of structural provisions have strong incentives to consider the future consequences of the rules. Granted, both

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62 Cf. The Federalist No. 1, at 1–2 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (noting as “formidable” obstacles for the new constitution are “the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments”).

63 Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SALR 744, 862 (CC). Constitutional principle CP XVIII.2 provided that: “The powers and functions of the provinces defined in the Constitution, including the competence a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.”

64 See David Franklin, Divorce Proceedings Continue Between Czechs and Slovaks: Federal Bodies Lose Relevance, 1 EUR. CONSTIT. REV., Fall 1992, at 14; Czechoslovakia, 1 EUR. CONSTIT. REV., Summer 1992, at 3; Czech Republic, 1 EUR. CONSTIT. REV., Fall 1992, at 4; Stein, supra note 13, at 286. Cf. Ivo Slosarcik, The Reform of the Constitutional Systems of Czechoslovakia and the Czech Republic in 1990–2000, 7 EUR. PUB. L. 529, 542 (2001) (noting that Senate was not filled until three years after adoption of the 1993 Constitution).

65 Cf. Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 242–51 (1986) (arguing that the public has strong incentives to devise constitutions that constrain enactment of “special interest” legislation and that constitutions are more likely to be public-regarding than statutes); 2 Bruce Ackerman, We the People: Transformations 4–5 (Harvard Univ. Press 1998) (arguing that, in “constitutional moments,” people have heightened interest in and regard for public law compared to times of “ordinary politics”).

66 One could also imagine that there would be much harder bargaining and, given uncertainties over future election results, more actual deliberation about structural allocations of power than about the identification and listing of protected rights. See infra note 68.
the design and approval of structural provisions may suffer from some of the limitations, observed in experimental psychology, that affect the ability to extrapolate readily from the “rules of the game” to the consequences for likely success in future circumstances. Understanding the connection between the principles at work in structuring governance (i.e., the rules of the game) and their results may be difficult for both constitution designers and members of the public. The drafters, however, are likely to have some self-interested incentives at work in shaping the design of governance structures that may differ from those of the general public.

Although similar considerations may affect the drafting of some individual rights provisions, there are individual rights, often included in constitutions, that stand on a different footing. Some rights—e.g., rights designed to secure freedom from torture or from arbitrary detention, freedom of expression, or freedom of religion—protect aspects of human personality far more widely shared and valued than the political offices created in governmental structures. Other individual rights, e.g., those relating to property, may be meaningfully enjoyed across a more limited spectrum of a population, depending on economic situations and understandings of property, and may be of particular concern to those who already hold more power in the design process. But

67 See Avishalom Tor & Max H. Bazerman, Understanding Indirect Effects in Competitive Environments: Explaining Decision Errors in the Monty Hall Game, the Acquiring a Company Problem, and Multi-party Ultimatum, available on SSRN, Harvard NOM Working Paper No. 02–15, 3–4, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310200 (last visited Aug. 21, 2003) (finding that decisionmakers fail to pay sufficient attention to the “rules of the game” and to the likely “decisions of other parties” in making decisions in competitive environments and suggesting that these “indirect” factors as “are typically outside of [people’s] focus” as they concentrate on only some of the information relevant to a decision, behaving “as if a more direct path exists between their decisions and the outcomes they are likely to obtain”). Cf. Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?* 79 OREGON L. REV. 61, 63 (2000) (noting that “[e]xperts who design [complex] systems commonly fail to foresee ways in which complicated processes can go awry”). To the extent that repetitive decision making and feedback may reduce certain kinds of cognitive errors, constitution drafters may be at a disadvantage only partially compensated by consideration of comparative data. Cf. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 559–60 (2002) (noting the importance of experience in reducing cognitive defects in judgment); William N. Eskridge Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002) (raising cautions about reliance on cognitive psychology but also suggesting that awareness of cognitive limits supports designs that involve multiple bodies in decisions as checks on error).

68 See, e.g., D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT’L J. CONST. L. (I-CON) 181, 188 (2003) (describing contest and compromise over property rights provision). With respect to the claim that some individual rights, e.g., freedom from torture, or freedom of religion, stand on a different footing, I recognize the difficulty in characterizing, in the abstract, the motivations of multienrollment bodies for including such provisions in constitutions: Does their inclusion reflect a principled, public-regarding view about their content? Does it reflect an awareness that the population, which must approve a proposed constitution, desires such rights and can monitor their content? Or is the influence of international and comparative models or the incentives of
because so many protections in a bill of rights appear very directly related to human flourishing generally, it may be easier (both for designers and for popular constituencies whose approval is required) to envision their operation in a variety of settings—and to predict what is desirable—than with respect to the structural “rules of the game.”

The claim that federalism provisions are more likely to reflect hard-bargained-for compromises and are thus less readily subject to transnational reasoning from shared principles is subject to challenge from many directions. All legal texts (other than theocratic or dictatorial decrees) arguably represent some degree of compromise among those empowered to deliberate and enact them—perhaps the compromises behind a federal structure are simply more transparent than those behind a constitutional bill of rights.69 Even with respect to individual rights, those holding sufficient power to draft a constitution may be differently situated from the citizenry as a whole, affecting the content of rights they want included. It might also be objected that the nature of constitution drafting will vary too much, given the variety of circumstances, to warrant such generalizations. Those who draft incremental amendments, for example, may bring to bear more of the perspective of an ongoing government; on the other hand, major constitutional changes during periods of intense crisis (as Jon Elster suggests are likely when entirely new constitutions are produced)70 may be impelled quite differently, for example, by prior failures of governance or particular forms of abuse, leading to a focus that may or may not correspond to the federalism–individual rights classification suggested above.

2.3. International Archetypes?

There is, however, an additional reason to think that individual rights clauses are more likely to be illuminated through the kind of transnational judicial constitutional discourse, discussed above, than particular federalism provisions. Modern constitutions’ bills of rights—at least in their main outline—have behind them a considerably greater degree of transnational international or supranational bodies such that bills of rights are now simply an expected part of a document called “constitution” and thus less subject to bargaining and compromise?

69 It might thus be denied that legal texts can be distinguished from each as either the product of “compromise” or “principle.” Cf. Macey, supra note 65, at 232–33, 261–68 (suggesting that judges lack capacity for distinguishing public- from private-regarding statutes). Although compromises among different groups of power holders can be identified in rights-drafting., see, e.g., Tushnet, supra note 61, at 278 (describing how Canada’s “override” clause was a compromise between the prime minister of Canada and the premier of Saskatchewan), my claim is that compromise over federalism provisions is relatively more pervasive.

consensus, as expressed in international human rights conventions.\textsuperscript{71} Indeed, international human rights norms may be playing the role of a body of archetypes against which modern constitution drafters take their measure.\textsuperscript{72} In contrast to the profusion of human rights norms, international legal norms on government organization are far less highly developed. While international law scholars debate the extent to which there is an international legal norm favoring democracy, international law on governmental organization and structure—the lifeblood of federalism—is inchoate at best.\textsuperscript{73} As I have suggested elsewhere, these differences may reflect the degree to which federalist structures are further removed from common human experiences than are the subjects of many bill of rights provisions: “The reasons for the relatively greater specificity about individual rights than about forms of governance [in international legal conventions] may have to do with the inescapable ubiquity of human beings as a central concern of any system of governance, as compared to the variability of the particular forms of political and social organization addressed by

\textsuperscript{71} See McCrudden, supra note 21, at 501 (noting that most post–World War II constitutions “have a common core of human rights provisions that are strikingly similar” and often derive from international or transnational human rights conventions). Of course, constitutions may also have more distinctive rights protections. See, e.g., U.S. CONST. amend. II (right to bear arms); MEX. CONST. art. 10 (citizens right to have lawful weapons subject to prohibitions by law); VENEZ. CONST. (1966) art. 133 (only the state can possess “arms of war” and “the manufacture, trade, possession, and use of other weapons shall be regulated by law”).

\textsuperscript{72} These international human rights norms are reflected in, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, supra note 19; International Covenant on Economic, Social and Cultural Rights, supra note 19; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/34/180 (1979), 1249 U.N.T.S. 13, entered into force Sept. 3, 1981. Sujit Choudhry, who classifies judicial uses of comparative constitutional law as universalist, dialogic, or genealogical, observes that the most widespread use of “universalist” forms of comparative constitutional analysis involves individual human rights. Choudhry, supra note 30, at 887. This phenomenon, he says, “is largely a function of the fact that the globalization of the practice of modern constitutionalism has principally involved the spread of the notion that individual rights should be legally protected against executive and legislative encroachment.” Id.

constitutions.” This variability, in turn, relates to the distinctively interdependent and variable “packages” of federalism. Even if one could agree on no other cause for the greater development of international human rights norms than historical circumstances, the presence of these international norms may contribute to the sense of what Justice Albie Sachs has referred to as a “world jurisprudence” of constitutional rights.

3. Allocations of powers and the limits of transnational discourse

Because federal constitutional arrangements are typically put together as a specific “compromise” among existing power holders and because these arrangements are typically part of a set of interrelated arrangements (a “package deal”), it can be difficult to identify particular power-allocating provisions, likely to be the subject of constitutional interpretation, that are sufficiently comparable to permit ready insight from the decisions of other constitutional courts. An example will illustrate this claim.

Section 91 of Canada’s 1867 Constitution Act (formerly the British North America Act) allocates to the national government legislative authority over the “Regulation of Trade and Commerce.” By itself, this provision bears some
resemblance to the provision of the U.S. Constitution giving Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Yet interpretations of the Canadian “trade and commerce” power have been more restrictive than interpretations of the “Commerce . . . among the several states” clause in the U.S. Constitution. Although differences in national history and in the structure of judicial review may bear importantly on a full account, differences apparent on the face of the written constitutional documents themselves suggest the complexity of any direct comparison. Unlike the U.S. Constitution, section 92 of Canada’s 1867 Constitution Act specifies the competencies of the provinces, a specification that has been invoked in Canadian case law limiting the scope of national power (for example, to prohibit federal labeling requirements for beer). The U.S. Constitution contains no reservations of specific regulatory powers to the states analogous to section 92.

Specific allocations of powers in federal systems vary as to whether they are held at the national or subnational level, further limiting the possibilities for the kind of transnational judicial discourse seen in discussions of the meaning of freedom of expression or cruel and degrading punishment. For example, in Canada the national government has an explicit power over “marriage and divorce,” while the provinces have power over the “solemnization” of marriage.

80 U.S. Const. art. I, § 8. The 1867 Act in many respects sought to create in Canada a more centralized national government than that created by the original U.S. Constitution, an intent arguably undermined by subsequent interpretations by the Privy Council. See Hogg, supra note 53, § 5.3(a), (c).

81 Compare, e.g., Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 914 (concluding that beer label requirements were “minute rules for particular trades” and thus outside federal trade and commerce power), with Wickard v. Fillburn, 317 U.S. 111 (1942) (upholding federal price regulation of wheat grown on a farm for home consumption as within the commerce clause power).

82 See Martha A. Field, The Differing Federalisms of Canada and the United States, 55 L. & Contemp. Prosbs. 107, 110 (1992) (emphasizing this difference). The Tenth Amendment to the U.S. Constitution is a general residuary clause that does not specify by subject area what powers are being “reserved to the States, respectively, or to the people.” U.S. Const. amend. X.

83 I do not mean to suggest that it is only the nature of the written constitution that affects the development of constitutional doctrine. Differences in politics, history, culture, or economics and in the constitutionally established institutions of interpretation and enforcement may play important roles in influencing the development of constitutional doctrine. Cf. e.g., Attorney General of Canada v. Attorney General of Ontario, [1937] A.C. 326, 351 (noting importance to Quebec of being able to control its distinctive jurisprudence in explaining restrictive interpretation of national legislative power in Canada); Hogg, supra note 53, §§ 1.2, 1.4, 1.5, 2.4 (describing distinctive constitutional development in Canada, in contrast to U.S., in its gradual evolution from British control to independence and in not having a single comprehensive constitutional document). My point is that even where constitutional texts allocating federal powers appear similar in language, surrounding and related provisions may provide grounds for divergent understandings.

In the United States, marriage and family relations are not explicitly referred to in the Constitution but courts derived a presumptive ban against federal courts considering questions of “domestic relations,” reflecting the assumption that family law is for the states.\(^8^5\) In Canada, the national government has power over criminal law,\(^8^6\) while in the U.S. the states have the general “police power,” including the power to make criminal laws,\(^8^7\) though the federal government can also enact criminal laws if they are within other federal powers.\(^8^8\)

Such differing allocations of specific powers (and the history that stands behind those allocations) pose challenges to transnational discourse about the meaning of any particular enumerated power. Interpretation of powers at one level may be affected by other powers enumerated to the same level.\(^8^9\) Powers held at the subnational level may be interpreted differently from powers held at the national level, if only to take account of the fact that (at least in symmetrical federations) other subnational parts must be able to exercise the same powers as well.\(^9^0\) By contrast, in modern Western constitutions human rights provisions typically constrain all levels of government. Although common methodological and interpretive questions about federalism may be identified (for example, should courts presume a fair degree of concurrency of national and subnational powers or, instead, seek clear lines of separation?), analysis

\(^8^5\) See Ankenbrandt v. Richards, 504 U.S. 689 (1992) (asserting that a “domestic relations” exception would be read into the federal courts’ jurisdiction over diverse party cases as a statutory matter, thus excluding federal courts from deciding questions of divorce, child custody, and alimony).

\(^8^6\) See CAN. CONST. (Constitution Act, 1867) § 91(27); Reference Re Firearms Act, [2000] 1 S.C.R. 783, 801, 804–5, 808–15 (Can.) (upholding gun registration and licensing statute as within federal criminal power).


\(^8^9\) See, e.g., Railway Labor Executives’ Ass’n v. Gibbons, 455 U.S. 457, 468–69 (1982) (indicating that bankruptcy clause requirement that bankruptcy laws be uniform operates to limit Congress’s power under the commerce clause). For another example, consider the possible reciprocal interpretive effects in Australia of the grants of federal power over trade and commerce (§ 51(i)), and foreign corporations (§51(xx)), and the provision of § 92 that interstate trade be “absolutely free.” See generally P. H. LANE, LANE’S COMMENTARY ON THE AUSTRALIAN CONSTITUTION §§ 18(5)(b), 51(13) (LBC Information Services, 2d ed. 1997).

\(^9^0\) See, e.g., H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949) (Jackson, J.) (noting concern for “fantastic rivalries and dislocations and reprisals” if states were allowed to establish restrictive trade barriers).

\(^9^1\) Compare Reference Re Firearms Act, [2000] 1 S.C.R. at 791, 812–15 (implying that federal power to require registration existed concurrently with provincial powers to regulate same subject for different ends), with United States v. Lopez, 514 U.S. at 552, 557, 564–68 (indicating that its holding was grounded in an effort to define an area that the states could regulate that the federal government could not). For criticism of the U.S. Court’s approach, see Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 YALE L.J. 619 (2001).
of particular powers will often be conditioned by differences in what powers are allocated to what level, as well as by the context of interdependent government structures discussed above.

Structural differences between “federal balances,” for example, in the United States and Canada, though not necessarily alluded to in judicial opinions, might bear on a constitutional court’s interpretive stance. The Canadian Senate, as noted above, is a weaker body than the U.S. Senate. Rather than being independently elected, members of Canada’s Senate are appointed by the federal government and may be deemed—from a structural point of view—less likely vigorously to represent the interests either of the provincial governments or of the people of a province; by contrast, the U.S. Senate, for its first 150 years was selected in a manner determined by state legislatures and, more recently, has been popularly elected. To the extent that the structure of a national government functions to buttress the role of the subnational units, Canadian federalism is thus, arguably, weaker and might need to rely to a greater extent on judicial enforcement of power allocating constitutional provisions. Canada, moreover, has a parliamentary rather than presidential system of governance. The hurdles national legislation faces in the U.S. involve three institutions—the Senate, the House, and the presidency—each of which represents constituencies over a different time period and which may be controlled by different political parties. In Canada, government legislative programs (at least in theory) ought to be easier to put into effect, even in the face of some provincial disagreement, a difference that might bear on the question of the degree of deference courts should give to national legislation. In short, the range of differences in the allocation of powers and

92 See Hogg, supra note 53, § 9.4(c) (indicating that “the Senate has never been an effective voice of regional or provincial interests,” in part because of acceptance that, given its appointive nature, the Senate is subordinate to the House).

93 For the recognition, in Australia, that differences between presidential and parliamentary systems may influence interpretation of federalism issues, see Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd., 28 C.L.R. at 145–46, 155 (Austl.) (explaining that U.S. federalism decisions should not guide Australian constitutional decisions because “[p]ervading the [Australian] instrument...are] two cardinal features of our political system which are interwoven with its texture and, notwithstanding considerable similarity of structural design...radically distinguish it from the American Constitution...One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government”).

94 This is necessarily an overly simplified model and does not account for the effects of differences in voting schemes, coalition governments, strength of party discipline, etc. Cf. Mark Tushnet, New Forms of Judicial Review and the Persistence of Rights and Democracy Based Worries, 38 WAKE FOREST L. REV. 813, 834 (2003) (arguing that Canada only appears to have “fewer veto points” for legislation than the U.S. and that the formal law is misleading).

95 Cf. Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1507, 1525 (1990) (arguing that more aggressive judicial scrutiny is required on review of constitutional challenges to laws enacted by popular initiative, in light of the absence of the filters provided by the ordinary legislative process).
the interpretive questions raised by the need to understand those allocations within a broader federal system are significant challenges to any easy transnational discourse about the interpretation of the powers of national and constituent governments in federal systems.

4. Relational federalism and comparative constitutionalism

Is comparative experience likely to be of more relevance to judicial resolution of issues involving not the interpretation of particular constitutional texts but the deeper questions of structural relationships left unaddressed by a constitutional text? Such issues were presented in the U.S. Supreme Court decision in *Printz v. United States* and, in Canada, in the *Secession Reference* case. In *Printz*, the relationship at issue was between national legislative mandates and state executive or administrative officers; the Court held that the Constitution did not permit national coercion of state officers to execute national law. In the *Secession Reference* case, the relationship in question was between Quebec and the rest of Canada; the Court recognized a constitutional obligation of good faith negotiation in the event of a clear majority vote on a clear question in favor of secession in Quebec. Each of these issues called for a reading of constitutional “silence”—there was no constitutional text expressly addressing the issue posed. Arguably relevant comparative constitutional experience exists, however, consisting not only of judicial decisions interpreting constitutions but also constitutional provisions establishing structural relationships and ensuing consequences and experience. On each of these issues, comparative constitutional experience can illuminate what is at stake and sharpen analysis, even if it does not supply clear answers to the constitutional questions.

4.1. “Commandeering”

The question in *Printz* was whether federal law could require state or local officials to perform background checks on gun purchasers for a five-year period until a federal system for background checks was available. The majority held not, because this was a form of prohibited “executive commandeering,” i.e., where federal mandates require that state or local officials administer a federal regulatory program. Justice Breyer, in dissent, argued that since the U.S. Constitution’s text was silent on the issue and there was no dispositive case law, European models of federalism could be consulted to assess the likely consequences of permitting or prohibiting such laws. Noting that other federal polities (including Germany) permitted or even required that national legislation be implemented by the subnational entities, Breyer concluded that the federal law challenged in *Printz* was not incompatible with healthy forms of federalism.

*521 U.S. 898 (1997).*

Justice Scalia, writing for the Court, disagreed, arguing, in part, that comparative experience was relevant to making but not to interpreting a constitution.98

Justice Breyer’s basic point on the value of comparison in understanding the consequences of different interpretations is well taken, as is the implicit suggestion that on unresolved questions it is helpful to consider the array of reasonable constitutional choices. Yet, as Justice Breyer anticipates but does not fully spell out,99 there are difficulties in relying on European experience to develop usable U.S. doctrine. Consider Germany. Unlike the U.S. Senate, the Bundesrat—whose approval is required for any law that has administrative enforcement responsibilities for the subnational units—is composed of representatives of the subnational governments who may be more likely to be attentive to financial burdens on their governments. Moreover, the German Basic Law, unlike the U.S. Constitution, requires efforts at equalization of the resources of the subnational units.100 Thus, the risks to state budgets and state control of state legislative agendas posed by federal “commandeering” in the U.S. are perhaps larger than in Germany.101 In evaluating the consequences of commandeering, then, usable U.S. doctrine would need to take into account these (and other) systemic differences. In this setting, comparative constitutional experience with federalism may pose a set of questions for domestic constitutional interpreters,102 but it is less likely to suggest what the best answer for a particular polity would be.103


99 See Printz, 521 U.S. at 977 (Breyer, J., dissenting) (acknowledging that there may be important differences between the United States, on the one hand, and Switzerland, Germany, and the EU, on the other). Justice Breyer did not discuss case law on arguably analogous (though also arguably distinguishable) issues in Canada. See, e.g., Regional Municipality of Peel v. MacKenzie, [1982] 2 S.C.R. 9 (holding that Parliament could not, under its criminal law power, require that municipalities pay for certain services for juveniles adjudged delinquent); Reference re Goods and Services Tax, [1992] 2 S.C.R. 445, 482–85 (rejecting challenge to requirement that province, like other suppliers of goods, collect a federal consumption tax; distinguishing Peel as involving a burden not “necessarily incidental” to valid federal law and noting that the collection obligation applied only “so far as the province operates as a commercial entity”).


101 Cf Printz, 521 U.S. at 975–76 (Souter, J., dissenting) (proposing that the permissibility of federal commandeering might depend on the federal government’s assuming the costs imposed on the states).

102 See, e.g., Halberstam, supra note 55. Professor Choudhry refers to this kind of reasoning as “dialogic,” in that it attempts to both compare and differentiate a domestic system from that of others. See Choudhry, supra note 30, at 860–62 (discussing Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No. 83 of 1995, 1996 (3) SALR 289 (CC), which distinguishes U.S. anti-commandeering case law).

103 For thoughtful exploration of federal “commandeering” in the U.S., Canada, and Australia, see Cheryl Saunders, Comparing Federal Constitutions, Address at the Cambridge Lectures (2003), at
4.2. Secession

In the wake of democratic change in South Africa and in parts of the former Soviet Union and Eastern Europe, and in the shadow of murderous group conflicts in many parts of the world, renewed attention has focused on governance structures and modifications of state boundaries as efforts to respond to these divisions. Although federal structures are often discussed as solutions to tribal, ethnic, or nationalist conflicts, federalism may rigidify or even exacerbate the divisions that it seeks to manage. Federal systems may facilitate secession, insofar as they provide boundaries within which plebiscites can be conducted and which can be used to define a new state, a phenomenon that has generated an important constitutional decision in Canada to be discussed below after a brief background on the debates over the justification for secession and whether secession should be constitutionalized.

4.2.1. Background

Allen Buchanan has suggested that the growth of democracy is logically related to increased interest in a “plebiscatory right to secede.” “Opt-out,”

13–17, available at http://www.unimelb.edu.au./cccs/news/Cambridge%20talk.pdf (suggesting benefits to comparison of approaches even where, as in Australia and Canada, constitutional issue is unclear or unsettled). For a case rejecting the U.S. approach to commandeering, see Ex Parte Speaker of the National Assembly; In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No. 83 of 1995, 1996 (3) SALR 289, 302 (CC) (responding to argument based on U.S. anticommandeering case law and stating: “Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution”). Although the South African Court distinguished the United States Constitution, “in which several sovereign states were brought together in a federation,” from South Africa’s, in which “the provinces…are not sovereign states…[but] were created by the Constitution and have only those powers that are specifically conferred” by that Constitution, the Court interpreted the statute not to require provincial legislatures to amend their laws and upheld provisions requiring provincial ministers to develop certain plans. Id. at 302, 304.


105 For a well-informed and cautious view about the prospects for managing ethnic conflict through geographic political divides (as well as other structural devices such as voting schemes, reserved seats, etc.), see HOROWITZ, supra note 57, at 563–652. For his description of the debate over whether federal systems should be organized along ethnic lines or in more heterogenous ways, see id. at 602 n.2.

106 See Allen Buchanan, Federalism, Secession and the Morality of Inclusion, 37 ARIZ. L. REV. 53, 55 (1995) [hereinafter Federalism, Secession] (arguing that federalism is likely to succeed as an alternative to secession “only if international law unambiguously rejects the principle that an existing federal unit may secede if there is a plebiscite in that unit in favor of secession”).

or secessionary, provisions have been defended as protection against over-reaching by central governments, as a substitute for voting power in the national legislatures to protect minority interests, or as facilitating union among wary parties. Political scientists, lawyers, and philosophers have identified a range of moral theories for when secession is justified. Plebiscitary theorists argue that liberal democracy itself entails a right to secede insofar as both are grounded in commitments to self-determination and choice; a legitimate democratic state must recognize a right of secession for groups as long as their desire to secede is clearly demonstrated and provided certain other conditions are met, including security for the human rights of members (including minority group members) in the seceding polity and a fair distribution of assets and liabilities. Another group of more restrictive theorists, including Buchanan, argue that secession is justified only as a “remedial right,” not to be available as grounds for unilateral secession from legitimate democratic states, in part because recognizing such a right would undermine democracy and majority rule by allowing participants to threaten

Political Divorce from Fort Sumter to Lithuania and Quebec (Westview Press, 1991) [hereinafter Morality of Political Divorce].


109 See Buchanan, Morality of Political Divorce, supra note 107, at 143. As Buchanan has suggested, federalism might also substitute for secession. For an extended discussion of substitutes for secession, see Buchanan, Morality of Political Divorce, supra note 107, at 143–48: cf. Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 Va. L. Rev. 1347 (1997) (exploring relationships between representation and forms of “trumps” or veto rights held by decentralized governments vis-à-vis more centralized government; also exploring exit or secession as a substitute for trumps).


111 See Wayne Norman, The Ethics of Secession as the Regulation of Secessionist Politics, in National Self-Determination and Secession, supra note 107, at 34 (noting the need for moral philosophy to fill legal vacuum and crediting Allen Buchanan with having begun the contemporary debate on the morality of secession).

112 See, e.g., Daniel Philpott, Self-Determination in Practice, in National Self-Determination and Secession, supra note 107, at 79; Will Kymlicka, Federalism and Secession: At Home and Abroad, 13 Can. J.L. & Juris. 207 (2000); Harry Beran, A Democratic Theory of Political Self-Determination for a New World Order, in Theories of Secession 32 (Percy B. Lehning ed., Routledge 1998); Kai Nielsen, Secession: The Case of Quebec, 10 J. Applied Phil. 29, 30 (1993) (analogizing secession to “no-fault” divorce but framing argument for unilateral secession in terms of a people who “perceive themselves as having a distinct culture” and predominate in a geographic district); Kai Nielsen, Liberal Nationalism and Secession, in National Self-Determination and Secession, supra note 107, at 103.
to leave if they lose. Secession, on this view, is legitimate only as a remedy, where particular forms of “just cause” exist—such as historic grievances or discriminatory treatment not redressable within the existing state; in a democratic state there should be a presumption against secession.\footnote{See generally Buchanan, *Federalism, Secession*, supra note 106, at 56 (suggesting that both secession and federalism can invite exclusionary policies to concentrate the power of homogenous groups in single geographic locations and arguing that federalism will not be a viable solution if it is seen as a “way station” to secession). He notes as a negative example the former Yugoslavia, where existing boundary units of federalism served as predicates for secession (upon votes within each division). Buchanan argues that such a view of secession “is a recipe for undermining whatever promise the federal alternative holds.” \textit{Id}. at 57. For a comment on the Badinter Commission’s views on Yugoslavia’s dissolution and its implications for international law’s treatment of the right of self-determination, see Gregory H. Fox, \textit{Self-Determination in the Post-Cold War Era: A New Internal Focus?} 16 \textit{Mich. J. Int’l L.} 733, 749–50 (1995) (book review).} Still other theorists focus on the territorial basis of national aspirations in evaluating the legitimacy of secessionary claims.\footnote{The claims of nationalist groups, or “peoples,” to secede from states in which they are a minority in order to exercise self-determination rights and to enjoy the values that go along with being an independent “state” have provided “the self-legitimization for just about every serious secessionist movement in the twentieth century.” Norman, \textit{ supra} note 111, at 35. For a defense of territorial nationalism as a basis for secession, see Margaret Moore, \textit{The Ethics of Secession and a Normative Theory of Nationalism}, 13 \textit{Can J. L. \& Juris.} 225 (2000); David Miller, \textit{Secession and the Principle of Nationality, in National Self-Determination and Secession, supra} note 107, at 62. Lea Brilmayer has argued that actual secessions are associated not with abstract rights of self-determination but with a particular group’s claim to a particular territory because of historic injustice or oppression in their loss of control over the territory. \textit{See Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int’l L. 177 (1991) (urging that secession be limited to historic claims to territory); see also Lea Brilmayer, Secession and Self-Determination: One Decade Later, 25 Yale J. Int’l L. 283 (2000).} Determining in particular cases what is a “just cause,” or who counts as a “people,” is difficult. For example, Buchanan has argued that economic policies that distribute resources from one region to another may be so unjust as to warrant secession.\footnote{See Bolton & Roland, \textit{ supra} note 110 (treating political views concerning appropriate degrees of redistribution as preferences to be satisfied by construction of government units); Buchanan, *Federalism, Secession*, supra note 106 (discussing difficulty of distinguishing resistance to economic injustice from resistance to redistributive justice as motivations for secession).} Yet the determination of what is unjust will be highly contentious, since political views about appropriate redistributive policy may vary considerably, and secession rights, if invoked by the wealthier components of existing polities, could diminish the existing capacity for distributive welfare policies. More difficult still is the determination of who would be a sufficiently impartial decision maker for deciding whether or not the requisite justifications for secession were or are present. Efforts to operationalize different moral views sometimes converge in the establishment of procedural
hurdles for establishing a right to secede, in part because of the contestability of notions of justice and the absence of an effective international body to judge the justness or legitimacy of proposed secessions. Procedural devices designed to test commitments to secession and avoid impulsive decision making include supermajority voting, or multiple votes over a period of years. These have been identified as useful tools for institutionalizing secession rights, both by those who would limit secession to special situations of remedial justification and by those who believe secession should be available more widely to territorial groups, based on commitments to democratic self-governance.

See Norman, supra note 111, at 50–51 (“just cause theory may end up grounding secession procedures that look similar to those favored by cautious choice theorists”); Philpott, supra note 112, at 86–87 (arguing that institutionalization of self-determination rights requires an impartial institutional decision maker, majority or supermajority voting, and secession only as a last resort for egregious grievances). Thus, Philpott, a leading self-determinationist, agrees with Buchanan, a leading proponent of the “just-cause remedial right only” approach, that there should be a presumption against secession, insofar as autonomy movements generally should be accommodated within an existing nation so as to assure that the adverse consequences of secessionary struggles be proportionate to the “amount of justice” being sought. His words sound at times more like a just-cause theorist than a self-determination theorist: “Secession is most justifiable when claims to self-determination are in fact enhanced by grievances that are not likely to be remedied short of full independence.” Id. at 83.

The absence of an international adjudicator with comprehensive jurisdiction and decisional legitimacy on questions of secession, see, e.g., Philpott, supra note 112, at 88 (questioning impartiality of Germany’s unilateral decision to recognize as legitimate the secession of Croatia and Slovenia from Yugoslavia in 1991), means that debate over national secession differs from debate over “exit” or secession rights in the context of local government, where the existing state can act as arbiter. For thoughtful treatments, see Richard Briffault, Voting Rights, Home Rule and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination, 92 COLUM. L. REV. 775 (1992); Georgette C. Poindexter, Collective Individualism: Deconstructing the Legal City, 145 U. PA. L. REV. 607 (1997); Gillette, supra note 109, at 1410–17. The limitation of the International Court of Justice’s compulsory jurisdiction to disputes between existing states and the unlikelihood of a United Nations organ seeking an advisory opinion on a proposed secession limit the ICJ’s capacities in this context. See Statute of the International Court of Justice, June 26, 1945, arts. 34, 65(1), 59 Stat. 1055, 33 U.N.T.S. No. 993.

Philpott, supra note 112, at 97, also proposes supermajority voting requirements for the clear expression of a desire for self-determination. Such a device is found in at least one constitution, that of Saint Kitts and Nevis, a Caribbean country of 39,000 people (that obtained independence only in 1983), which provides a right of secession to Nevis on a two-thirds vote. See Constitution of Saint Kitts and Nevis, 1983, § 113, § 115; see also infra notes 157–58. Weinstock, supra note 108, at 261, favors fairly rigorous procedural hurdles, including a ten-year waiting period after a referendum on secession fails. (It is unclear under what circumstances a constitutional provision would be agreed to with such a waiting period, since proponents of secession may not want to risk so long a wait.) A requirement for a second vote on secession at a later point in time may have the benefit of determining how long-lasting and deep-seated the unhappiness with the current state is. Cf. Daniel T. Gilbert et al., Immune Neglect: A Source of Durability Bias in Affective Forecasting, 75 J. PERSONALITY & SOC. PSYCH. 617 (1998) (suggesting that people overestimate how long an adverse event or negative information will affect them). But see infra text at notes 161–65.
Donald Horowitz, a leading scholar of ethnic conflict, emphasizes the “limits of territorial solutions to ethnic conflicts” and cautions that the increase in theories of secession might accelerate violent conflicts without improving the problems of mistreatment and subordination of minorities. Secession, especially from illiberal polities, may result in adverse treatment for members of minority groups in the new state, as well as for persons identified with the seceding state who remain behind. Moreover, secession may be inconsistent with many of the benefits of constitutional federalism, including the protection of local minorities, through national governments’ enforcing national human rights laws. Secession is sometimes analogized to divorce, or “exit” through emigration, but it is a much higher risk proposition. For unlike individual “exit”—whether from a marriage or a polity—“exit” in the form of national secessions (and except in the case of distant, typically colonial, territories) generally results in a new border between contiguous populations. Secession in such cases, unlike a divorce with a complete division of assets, is more like a form of perpetual and mandatory joint custody of populations that often have intermingled family, property, business, and other interests; risks are much higher—of irredentism, of “ethnic cleansing,” and of forced migrations to form more homogenous polities.

120 Donald L. Horowitz, Self-Determination: Politics, Philosophy and Law, in NATIONAL SELF-DETERMINATION AND SECESSION, supra note 107, at 181, 182. Horowitz’s book-length treatment of ethnic conflict concludes that the best ways to inhibit secession are (1) to assure that members of a potential secessionist regime have good opportunities outside their own region, (2) assure that the region receives investments or other economic benefits that it would lose by seceding, and (3) prevent discrimination and violence against members of the potential secessionist area. HOROWITZ, supra note 57, at 626–27. Cf. Russell A. Miller, Self-Determination in International Law and the Demise of Democracy? 41 COLUM. J. TRANSNAT’L L. 601, 608 (2003) (arguing that “self-determination,” including plebiscites on secession, has led to a “tragically undemocratic climate” of increased ethnic nationalisms).


123 See also Akhil Amar, Book Review: Civil Religion and Its Discontents, 67 TEX L. REV. 1153, 1166 n.76 (1989) (noting difference, emphasized by President Abraham Lincoln, between secession and emigration in that states could not physically separate even if they seceded).

124 See Bauböck, supra note 44, at 378 (emphasizing, among reasons for maintaining federal states, the presence of “group affiliations,” and “linkages across group boundaries”). On the effects of heterogeneous, as compared with homogeneous, subnational units in dealing with ethnic conflict, see HOROWITZ, supra note 57, at 619–21.
On the other hand, some secessions have apparently worked out well for populations in both parts of a former state; secession may offer the benefit of affording a group, particularly one that considers itself to have been disadvantaged or abused, to gain not only the benefits of self-governance (some of which can be obtained within a federal system) but the stature and dignity of national sovereignty. Kymlicka distinguishes between the West and the rest of the world, arguing that secession does not, in the West, pose a serious threat to human rights and that in a western democracy, secessionary activity cannot be opposed as illegitimate: “[t]here is no way for a free and democratic country to prevent a self-governing minority from electing secessionist parties and from holding referendums on secession.” He and others argue further that “democratic federalism only works (or works best) to inhibit secession when secessionist political mobilization is allowed.” These competing views and concerns are echoed in a debate, at the institutional level, about whether secession should be the subject of defined rights or procedures in national constitutions.

4.2.2. Constitutionalizing secession?

Although it seems clear that there are circumstances that would justify secession, the existence of moral justifications for secession does not necessarily imply that rights or procedures concerning secession should be constitutionalized. What domestic constitutions should address is distinct from the question of when secession is justified, or will occur, or will be recognized, whether as a moral matter or as a matter of international law. To the extent that including constitutional clauses authorizing or regulating secession will increase secessionary mobilizations, there is reason for concern, although some proponents of such clauses predict that they will reduce secessionary impulses.

125 The secessions of Iceland and Norway are sometimes cited as examples; consider also the U.S. and Britain.

126 See Kymlicka, supra note 112, at 218–19, 221 (arguing that secession movements in the West do not threaten the basic liberal order, in contrast to those in developing nations where fear of secession may create resistance to milder forms of territorial autonomy for national minorities).

127 Id. at 222. See Weinstock, supra note 108, at 262 (discussing similar point). These scholars’ optimism about the acceptance of secession in the West may be excessive in light of the descent of such cosmopolitan areas as Sarajevo and Beirut into bloody intergroup conflict in the latter half of the twentieth century, the Nazis’ campaign of ethnic extermination in the 1940s, or the Balkan “ethnic cleansing” of the 1990s.

128 See, e.g., Weinstock, supra note 108 (noting difference between prudence and morality in deciding how constitutions should approach secession). Secession, likewise, may be legitimate—or become legitimated—in international law even if not performed in accordance with domestic legal norms. See Statement of Experts for Amicus, reprinted in Bayefsky, supra note 20, at 67.

129 See, e.g., Kymlicka, supra note 112, at 222; Weinstock, supra note 108, at 261–62.
Although the question of constitutionalization is distinct from the morality of secession, if one believed that the principles of self-determination required a plebiscitary right to secede, then one might be more inclined to constitutionalize secession procedures than if one has a more limited moral theory for when secession is justified. But as others have argued, rights of self-determination do not necessarily entail a right of secession but may be satisfied within fair and democratic states. The question of the boundaries of a community that is democratically self-governed is one that cannot itself readily be answered solely through majoritarian methods of self-determination. Claims of democratic legitimacy are most easily made in defined political units. Where secession is on the table and boundaries are contested, democracy and self-determination by themselves do not resolve those questions—for often the subject of controversy will be the very definition of the “people” whose authority to vote is to be respected.

Arguing for constitutional recognition of secession rights under the limited circumstances prescribed by his “just cause” remedial right theory, Buchanan asserts that such an approach would regularize through law and legal institutions a presumption against secession and thus constrain its use to appropriately limited circumstances. Cass Sunstein has argued, however, that constitutionalizing a right of secession is inconsistent with the basic functions of constitutionalism as a form of precommitment that facilitates the democratic process. Constitutionalizing a right to secede, he asserts, would risk diversion from other government business, encourage strategic and shortsighted behavior, and allow too great a minority veto on ordinary decision making. Although Sunstein recognizes that there may be circumstances in which secession is justified “as a matter of political morality,” that is not sufficient to warrant a constitutional right to secede.

Daniel Weinstock agrees that the presence of moral reasons for secession does not necessarily imply that the right to secede should be constitutionalized;
conversely, the absence of moral support for secession rights does not necessarily imply that constitutions should not establish procedures for secession. On his view, there are distinct arguments for constitutionalizing the secession process because (1) secession does not “involve the violation of an absolute moral prohibition,” (2) secession movements are “inevitable,” and (3) the consequences of including procedures for secession will be better than leaving secession unregulated. Weinstock suggests that legalizing the possibility of secession may well reduce secessionary mobilizations, first, by acknowledging the possibility and thus in some cases defusing mobilization and, second, by erecting procedural hurdles to secession, such as a ten-year waiting period between referenda. The disagreements between Sunstein, on the one hand, and Weinstock and Buchanan on the other, are, to a significant degree, consequentialist disagreements both on the range of circumstances in which secession will, absent constitutionalization, become a pressing political issue and on the effects of constitutionalizing the right. Comparative constitutional experience may shed some light on the latter point.

4.2.3. Comparative constitutional experience
Successful long-term federations have generally not included explicit constitutional rights of secession. Experience further suggests that the presence of general constitutional rights of secession does not appear to have been successful either in avoiding secession (by constraining abusive behavior by the center or by reassuring minority groups), in avoiding violence, or in assuring that secession is carried out fairly and through regular procedures.

Most successful federal unions, including the United States, have not included clauses either waiving or recognizing a right of secession. According to

136 Daniel Weinstock, Constitutionalizing the Right to Secede, 9 J. POL. PHIL. 182 (2001). As Sunstein points out, Weinstock’s last two criteria are both, in a sense, consequential; while some secessionary activity may be inevitable, a key question is one of magnitudes and, thus, it would be important to examine whether the presence of constitutional procedures would increase or decrease the magnitude of secessionary activity. See Cass R. Sunstein, Should Constitutions Protect the Right to Secede? A Reply to Weinstock, 9 J. POL. PHIL. 350, 353–54 (2001).

137 See Weinstock, supra note 136, at 196–97, 201 (suggesting that his approach will diminish incentives to leave by making minority groups feel that they have more power within the polity).

138 Cf. Patrick J. Monahan & Michael J. Bryant, Coming to Terms with Plan B: Ten Principles Governing Secession (C. D. Howe Institute 1996) (stating that of eighty-nine constitutions surveyed, only seven contemplate lawful secession, while twenty-two implicitly or expressly prohibit it and the remainder are silent on the question). The authors studied countries, federal and non-federal, that provided for major decisions to be made by popular referendum, on the theory that any “procedure for secession would involve a referendum or plebiscite.” Id. The seven constitutions that were identified as having procedures for secession include Austria, Ethiopia, France, Singapore, Saint Kitts and Nevis, the former Soviet Union, and the former Czech and Slovak federal republic. Of these, Singapore’s requirement seems less directed at the possible secession than at loss of sovereignty of Singapore itself (see SING. CONST. arts. 6–8) and France’s provisions relate only to its overseas colonies; compare FR. CONST. art. 1 (France as indivisible), with art. 76
historian Kenneth Stampp, whether or not a state had a unilateral right to secede was genuinely uncertain in the pre–Civil War United States. In some respects, then the question was settled, not by constitution writing at the “founding” moment, but by the American Civil War. The current EU treaty documents do not explicitly provide for rights of secession, nor do the constitutional documents of Australia, Canada, or Germany, although each has amending procedures that arguably could be used to implement a political agreement on secession. Although some suggest that the absence of secession clauses in these constitutions is a historic anomaly due to constitutions being adopted before the rise of multinationalism, others argue that the

(contemplating vote in New Caledonia for possible full sovereignty). Moreover, only Saint Kitts and Nevis clearly contemplates a unilateral right to secede on a two thirds vote in Nevis: Ethiopia’s Constitution includes strong language of self-determination rights, including secession, but seems to require national approval, see ETH. CONST. art. 39. Austria is clearly the federal nation of longest standing on this list, but there is no right to secede in Austria nor even any explicit reference to secession, only a provision concerning change in national and state boundaries. See AUS. CONST. arts. 3, 44 (requiring two-thirds vote in House of Representatives and a majority in a national referendum for constitutional laws, including change of boundaries). In addition to the twenty-two countries that Monahan identified that, by implication, exclude secession, one might include France’s reference to itself as “indivisible.” See also C.E. [Constitution] art. 2 (Spain) (Constitution is based on the “indissoluble unity of the Spanish Nation,” in a Constitution that, although, not exactly federal, provides for certain autonomous self-governance rights).

139 See Kenneth M. Stampp, The Concept of a Perpetual Union, 65 J. AM. HIST. 5, 10 (1978) (comparing Constitution of 1789 with Articles of Confederation it replaced and which had provided that “the Union shall be perpetual” and noting that “the unionist case was sufficiently flawed to make it uncertain whether in 1865 reason and logic were on the side of the victors.”). Stampp suggests that the Articles could include “perpetual” language because states were more sovereign; but in giving the new national government strong powers “such language [was] too risky” for the Constitution, and that there was no continuity between the Articles and the new Constitution, given the method of ratifying that new document. Id.


143 Norman, supra note 111, at 55 (stating that it is a “freak” of history that most democratic constitutions in multietnic states do not contain secession clauses because they were written in a time of “nation-statism”).
“general hostility” to secession is a consequence of the importance of territorial integrity to the concept of a state (whether multiethnic or not).\textsuperscript{144}

Federal polities whose constitutions have provided for secession for the most part have neither avoided nor regularized secessions.\textsuperscript{145} The Soviet Union’s Constitution included a right of secession (in article 72), which had to be—but was not (until 1990)—implemented by law.\textsuperscript{146} The secession clause remained essentially a dead letter, even after a statute was enacted in 1990 ostensibly permitting secession through relatively complex procedures, procedures never used as the mechanism for secession.\textsuperscript{147} The newly independent states of the former Soviet Union achieved their status through mechanisms largely outside of existing Soviet law. Yugoslavia’s Constitution referred to a right to secession (Basic Principles I), but federal authorities interpreted this right as one that “could not be exercised unilaterally,”\textsuperscript{148} a conclusion that did not forestall declarations of sovereign independence by Slovenia, Croatia, and Bosnia and Herzegovina and their subsequent recognition by the world community.\textsuperscript{149} Nor do secession clauses reliably prevent violence, as occurred in the former Yugoslavia, or regularize procedures, as where the former Czechoslovakia

\textsuperscript{144} See Monahan & Bryant, supra note 138, at 7.

\textsuperscript{145} Two of the seven countries Monahan and Bryant identified as having provisions relating to secession no longer exist. See Monahan & Bryant, supra note 138, at 7 (Soviet Union and Czech and Slovak Republic).

\textsuperscript{146} Constitution of the Former USSR (1977) art. 72 (“Each Union Republic shall retain the right freely to secede from the USSR”).

\textsuperscript{147} See Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR (Apr. 3, 1990) (requiring that decision to secede must be made by a two-thirds vote of all eligible voters within the seceding entity in a referendum without campaigning and providing for up to a five-year transition after a successful vote), reprinted in Documents on Autonomy and Minority Rights 753 (Hurst Hannum ed., Martinus Nijhoff 1993); id. at 742 (stating that the 1990 law was “never utilized” because “[e]vents quickly overtook the cumbersome and lengthy procedures, which were intended to slow the process of disintegration and in particular the pending secession of the Baltic states”). Cf. Monahan & Bryant, supra note 138, at 8–9, 12 (noting that in many former Soviet republics a unilateral declaration of secession preceded any referendum).

\textsuperscript{148} See Documents on Autonomy and Minority Rights, supra note 147, at 761, citing Yugoslavia’s third period report to the UN Human Rights Committee. UN Doc. CCPR/C/42Add.9 (1992) at 4–11.

ignored its recently enacted constitutional law providing for a referendum on secession. Indeed, the levels of violence that erupted within the former Yugoslavia have given renewed force to cautionary understandings of ethnic territorial conflict.

Given the very small number of nations with secession clauses, however, it is difficult to draw firm conclusions as to their effects. The Constitution of Ethiopia has, since 1994, included a general right to secede,150 its application and success remain contested.151 Although there have been no effective new secessions since its adoption, many argue that human rights abuses and single-party dominance artificially control the devolutionary implications of the secession right.152 Thus, it is, at best, unclear whether any of the benefits hypothesized by secession theorists have accrued from the presence of a general


151 For contrasting viewpoints, see, e.g., Nita Bhalla, Many a Thorn in the Side: Ethnicity, FIN. TIMES (London), Sept. 24, 2002, at 5 (reporting that “various secessionist movements have sprung into action to take advantage of Eritrea’s independence and Article 39,” including Oromos, Somalis, and others); The Question of Ethnicity in Addis Ababa, AFRICA NEWS, Oct. 8, 2001 (praising Ethiopia’s balance between centralization and decentralization); Samuel Assefa, Ethiopia: Two Concepts of Sovereignty, AFRICA NEWS, Mar. 24, 2000 (arguing that the “virtual monopoly” on power of the governing political power has had “centralizing consequences that counteract the devolutionary effects of article 39” so that “we have not as yet seen the full force of the federal arrangement [of] the new constitution”); Michela Wrong, Politics: One-Party Culture Lingers, FIN. TIMES (London) Mar. 2, 1998, at 3 (noting both arguments: that the federal structure was “acting as a safety valve on pressures for secession” and the possibility that the presence of a single dominant party was controlling politics in the regions).

right to secede—whether in terms of avoiding secession, constraining abuse of minorities by the central government, or assuring the justness of the terms of the secession.

The adoption of very specific legal provisions concerning secession has sometimes functioned as a prelude to actual secession. It was reported that, in late 1990, Slovenia passed a constitutional law creating a right to secede from Yugoslavia and shortly thereafter it did so.153 In Czechoslovakia, a law providing for a referendum was enacted in 1991, followed by the splitting up of the state the next year (though without resort to the referendum procedure).154 In early 1990, debate began over the official name of the country, following the end of the Soviet influence. The question of secession arose (early drafts of a proposed Slovak constitution included a right to secede)155 and in 1991, a constitutional act was adopted requiring the use of a referendum if one republic sought to secede. As noted above, no referendum was held, in part because of Slovak insistence that it was not seceding but acting on its sovereignty and, perhaps, in part because the leadership knew that, based on available polling data, a majority of the population might well reject secession were a referendum to be held.156 The tiny country of Saint Kitts and Nevis poses a more ambiguous example: it obtained independence in 1983 under a constitution that authorized Nevis to secede upon a two-thirds vote by referendum. In 1998, a vote was taken that, with 62 percent voting in favor of secession, fell short of the two-thirds

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154 Czechoslovakia’s 1968 Constitution did not recognize a right of secession but did go beyond the prior Constitution in referring to the Czechs and Slovaks as two sovereign nations and by constituting an upper house in which the two parts of the country had equal representation, notwithstanding the Czechs’ numerical superiority. See generally Stein, supra note 13, at 23, 37, 49–50.

155 See Sunstein, supra note 122, at 634 n.6. The post-independence Constitution, however, does not provide for secession from its territory. See Slovak Const. art. 3 (stating that territory “is united and indivisible” and may be changed only by constitutional law); but cf. id. art. 7 (requiring that if Slovakia enters into an alliance with other states it must reserve a unilateral right to secede).

156 See Slosarcik, supra note 64, at 540; Stein, supra note 13, at 248 (reporting that in October 1992, when agreements between the two governments for separation had been negotiated, only 37 percent of Slovaks considered the separation to be necessary); McGarry, supra note 121, at 220 (describing Slovak secession as “largely an elite project” with only 8 percent in 1990 in Slovakia supporting secession). Elite opinion may both vary from and help shape public views and reactions, and political party leaders may sometimes polarize different publics on questions relating to secession. See generally Paul M. Sniderman et al., The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy 256 (Yale Univ. Press 1996) (noting “special volatility” of group rights and how English Canadians react adversely to statement made by French Canadian elites that may not reflect the views of most French Canadians, eliciting more extreme language by English Canadian leaders, and so forth).
required;\textsuperscript{157} intentions to have another referendum have been announced.\textsuperscript{158} These examples suggest that a law, even if not followed, may be able to play some role in providing for a more orderly process of secession, once the parties become convinced that it is a real possibility. Or it may be that the relative peacefulness \textit{vel non} of these latter secessionary transitions was related more to general levels of political violence and commitments to the rule of law than to any specific constitutional or legal text.\textsuperscript{159}

Designing constitutions is not an exercise in pure logic; an important purpose of a constitution is to try to facilitate workable governance for actual polities. Experience is thus of particular importance to issues of constitutional design.\textsuperscript{160} What experience suggests, albeit tentatively, is that where constitutions have provided for a general right to secession, the “right” has been contested—as in the Soviet Union and Yugoslavia—when secessionary impulses emerge. Experience also suggests that the crafting of provisions specifically to respond to particular secessionary movements has sometimes been followed by secession.\textsuperscript{161} Yet this experience is limited and may change if the global conditions for domestic constitutional law change through evolution of international or transnational legal regimes.

4.2.4. Cautions and the psychology of constitutional judgment

On so mixed an empirical record, caution is warranted before embracing legal—and, especially, hard-to-change constitutional—approaches to secession. This caution is reinforced by insights from the cognitive and behavioral


\textsuperscript{159} Cf. LESLIE FRIEDMAN GOLDSTEIN, \textit{Constituting Federal Sovereignty: The European Union in Comparative Context} (Johns Hopkins Univ. Press 2001) (finding that a commitment to the rule of law was important in the development of stable federations in Europe); cf. Nielsen, \textit{Liberal Nationalism and Secession}, supra note 112, at 106–8 (distinguishing Eastern Europe and Quebec on grounds that the former involves ethnic nationalism with risks of violence and the latter involves “liberal” or civic nationalism); but cf. Rogers Brubaker, \textit{Myths and Misconceptions in the Study of Nationalism, in National Self-Determination and Secession}, supra note 107, at 241–45 (arguing the degree of violence associated with nationalism is overemphasized).

\textsuperscript{160} On the role of experience in the design of complex systems, see Rachlinski & Farina, supra note 67, at 559.

\textsuperscript{161} Saint Kitts and Nevis involve what I would characterize as a “specific” clause. Too few nations have included either general or specific clauses governing procedures for secession to permit conclusions as to their effects. Weinstock’s suggestion that by regulating and recognizing secession as a possibility one tames the impulse to secede or, at least, avoids violence as a means towards that
sciences. First, although some proponents of a permissive right of secession assume that self-determination movements are exogenous to legal structures, sensitive institutional design must consider the capacity of law to affect or reconstitute people’s desires and values. As sociolegal research reveals law’s capacity to reshape the very categories through which individuals understand their society, law’s potential to influence the development of culture and identity raises further concerns about constitutionalizing secession rights. Professor Weinstock himself has noted the “malleability” of national identity, which, he says, is “born of identifiable political struggles and institutional contexts” and which, in turn, implies that national identity may itself be influenced by the “institution” of law.

Second, consider the incentives created by law, but now with the assumption that citizens’ identities and preferences for secession are independent of law. As Buchanan and others have observed, specifying secession procedures may create perverse incentives both for proponents of the existing state and end (see supra note 136) is intriguing—and may prove true in Saint Kitts and Nevis. But the possibility also exists that the work done to identify and articulate such a right might make it more likely that the right will be exercised, rather than less likely, as discussed in the text below.

162 Philpott, for example, states, “The question of self determination arises when, by definition, the unity of a political order has already been seriously ruptured,” apparently assuming that secessionary impulses are independent of legal regimes. See Philpott, supra note 112, at 83. See also Weinstock, supra note 108, at 261 (treating secessionist agitation as inevitable and stating that “secessionist agitation occurs regardless of the legal status which states ascribe to it”).


164 See Weinstock, supra note 108, at 254–55 (noting malleability of national identity and its relationship to cost-benefit calculations by political agents in particular contexts and arguing that if the international legal order looks for distinct national identities it will create new incentives altering the behavior of political actors). These concerns might be reinforced by findings concerning the “endowment” effect, which suggests that people tend to value more highly that which they already own or to which they have rights. See Daniel Kahneman et al., Experimental Tests of the Endowment Effect and the Coase Theorem, in BEHAVIORAL LAW AND ECONOMICS 211 (Cass R. Sunstein ed., Cambridge Univ. Press 2000); see also, e.g., Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. CHI. L. REV. 373 (1999). Whether recognition of a legal right to secede would make people value that right and thus act on it, though, is uncertain for various reasons, among them: (1) the uncertain application of the endowment effect to collective action; (2) the uncertainty about what people will assume is the baseline of current entitlement, e.g., whether seceding is the use of an existing entitlement, a “gain,” or a loss by incurring financial obligations, say, to the remainder state; (3) the uncertain application of the endowment effect to decisions that are framed as political (self-government vs. rule by others) rather than economic (e.g., willingness to buy or sell); and
proponents of secession. Proponents of the existing state may seek to hinder population movements (or encourage others) in order to prevent the requisite majority from building demographic power in a defined area, with the attendant risks of discrimination, “ethnic cleansing,” and the like; proponents of secession have similar incentives to discourage settlement and encourage population growth to increase support for secession. Professor Weinstock’s procedural rules, requiring ten years between secession referenda, may simply allow more time for this to happen.

Third, consider the possible effects of the negotiation and consideration of secession clauses at the time of drafting and adoption of a new constitution, especially if these processes occur in a crisis-ridden moment. In addition to the general difficulty they may have in appreciating how the “rules of the game” will affect results, those drafting a new constitution are likely to be primarily focused on how to make the structures of everyday governance work. Although constitutions typically provide for their own amendment and, in that sense, anticipate and provide for change, anticipating secession at the time of initiating a new constitutional regime may not be conducive to good medium-range thinking, if the participants assume they need not work out other difficulties because they have a clear exit option. Moreover,


165 See Elster, supra note 70, at 370 (arguing that experience shows that crises precipitate constitution making); but cf. ACKERMAN, supra note 42, at 46, 49–50; ACKERMAN, supra note 65, at 5, 12, 87, 346 (arguing that at least some constitution making (and amending) occurs in “constitutional moments” of heightened public-spiritedness).

166 See supra text at note 67.

167 It is easy for U.S. scholars to have in mind the U.S. founding as their factual paradigm. The American states had gained a collective identity of sorts, through the process of declaring independence and fighting a war, and were in the process in 1787 of establishing a “more perfect” and closer union. Arguments about the effect of considering a secessionary right in this kind of “founding” moment may have less force, or apply differently, in other kinds of “foundings” or, indeed, in settings where at some point in the constitutional history of a state a secessionary movement grows and seeks a constitutional amendment in anticipation of further developments. Most of the discussion in the text at this point assumes a “founding moment” that involves the drafting and construction of an edifice of government, rather than a question of amendment. But this may not be the realistic setting in which questions of constitutional secession rights arise elsewhere. See infra text at notes 180–81.

168 See ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 30–46 (Harvard Univ. Press 1970) (emphasizing the generally greater importance in
there is reason to doubt our abilities to anticipate, at any given time, how we will view important matters should circumstances change in the future.\textsuperscript{169} This phenomenon challenges any form of binding in advance—in marriage, contracts, or entrenched constitutions generally.\textsuperscript{170} But this difficulty may be of special importance to events that appear remote, as secession may appear, to a group negotiating an instrument for the future government of a specific polity.\textsuperscript{171}

politics of “voice” over “exit”). The threat of “exit” by one entire community from another (other than as a last resort defense to highly abusive conditions) may occur (or be thought to occur) in circumstances in which exploitative prospects are high and which may undermine the loyalty and commitment to the democratic majoritarian process necessary for government to work. See \textit{Buchanan, Morality of Political Divorce}, supra note 107, at 21–24, 134; \textit{see also Moore, supra note 114}, at 246–49; Sunstein, \textit{supra} note 133, at 102–3.

\textsuperscript{169} Cf. George Loewenstein et al., \textit{Projection Bias in Predicting Future Utility} 1 (Mar. 21, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 239901 (last visited July 28, 2003) (suggesting that “people underappreciate how their own behavior and exogenous factors affect their future utility, and thus exaggerate the degree to which their future preferences resemble their current preferences,” a form of “projection bias”); George Loewenstein & David Schkade, \textit{Wouldn’t it be Nice? Predicting Future Feelings}, in \textit{Well-Being: The Foundations of Hedonic Psychology} 85, 99 (Daniel Kahneman et al. eds., Russell Sage Foundation 1999) (noting that people have difficulty imagining how they will feel or behave if their emotional state is different at a future time, leading to prediction errors that are resistant to correction through experience). Although contract drafters routinely consider what happens in the event of breach, anticipating the bases for secessionary impulses and how to respond may be far more difficult, given the more encompassing relationships embraced in a national state than in a business relationship.

\textsuperscript{170} Marriage analogies loom large in the literature on secession, yet I have been unable to find systematic data on the relationship of prenuptial agreements to the duration and success of marriages (or on the orderliness or “justness” of subsequent divorce). For a suggestive study on a related point, see Lynn A. Baker & Robert E. Emery, \textit{When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage}, 17 L. & HUM. BEHAVIOR 439, 448 (1993) (reporting results of two empirical studies showing that persons who held accurate perceptions of likelihood of divorce in general nonetheless had “unrealistic” optimism about their own marriages). Noting the potential advantages of this unrealistic optimism in increasing motivation and persistence in the relationship, Baker and Emery also point out optimism’s costs, which, they suggest, prenuptial agreements on property disposition in the event of divorce might mitigate.

\textsuperscript{171} A dilemma is illustrated by juxtaposing two scholars’ views. Professor Norman notes that without secessionary activism, existing states will not “tempt fate” by including a constitutional clause regulating secession. Norman, \textit{supra} note 111, at 55. Professor Weinstock argues, by contrast, that “the time to entrench a secession provision is . . . when secession seems at most a distant possibility,” not an imminent threat. Weinstock, \textit{supra} note 136, at 198. The impartiality to which Weinstock aspires—see \textit{id. at 198–99} (suggesting that behind the Rawlsian veil reasonable people would provide for secession but not make it too easy)—is in tension with a realistic assessment of what drives people to rework entrenched constitutions. Different horns of this dilemma may be more likely in different contexts: the reluctance to deal with secession when it appears remote might be more likely in a “centralizing” federation where the political momentum behind constitution making is to form a closer union; the adverse effects (including distraction from the details of workable governing structures) of negotiating an entrenched secession clause when secession looms as a political matter may be greater in devolutionary federal constitution making.
Finally, ideology, trust, and commitment to the rule of law may play significant roles in successful federated states. As one study of twentieth-century postcolonial “centralizing” federations concluded, “the absence of a positive political or ideological commitment to the primary goal of federation as an end in itself among” leaders and people in federating units makes “success improbable, if not impossible.” An ideological commitment to the building of a national identity that can stand alongside subnational identities seems in considerable tension with negotiating rights of secession. Although constitutions are framed on the premise that people are not “angels,” no complex constitutional arrangement can work without some measure of trust or loyalty by the parts to the whole, a concept that German constitutional law expresses as *Bundestreue*, or “pro-federal loyalty.” Such loyalty and trust may be more difficult to sustain if secession is constitutionalized and available as a threat. Commitment to the rule of law in a federal democracy, associated with greater degrees of subnational compliance with national law, entails commitment to the rules by which political decisions (and winners and losers) are made, a commitment in tension with the right of a losing party to walk out on the game.

In trying to evaluate the consequences of constitutionalizing secession rights—and, in particular, whether it makes secessions more or less likely—we are faced with and must acknowledge much uncertainty. The “safety valve”

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173 *The Federalist* No. 51, at 290 (James Madison) (Clinton Rossiter ed., Mentor 1999) (“If men were angels, no government would be necessary”).

174 See *KOMMERS*, supra note 100, at 71 (translating Television I case, 12 BVerfGE 205 (1961)). See also *DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 77–80* (Univ. of Chicago Press 1994) (defining *Bundestreue* as “a duty of fidelity to the principle of federalism,” analogous to the “civil law duty of an obligator to act in good faith”). Cf. *SUNSTEIN*, supra note 133, at 104 (arguing that rights to secede, unlike other forms of veto, have a “peculiar tendency to inflame” and emotionally polarize groups).

175 Many scholars have noted the possibility of “blackmail” in the ordinary politics of a federal system if secession is regularized and held out as a possibility through constitutional provisions. On the complex question of the degree to which constitutions should seek to constrain abuse or manifest trust in the virtues of public officials and citizens, see Bruno S. Frey, *A Constitution for Knaves Crowds out Civic Virtues*, 107 ECON. J. 1043 (1997).

176 See *GOLSTEIN*, supra note 159, at 158–59.

177 Cf. *LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (Yale Univ. Press 2001) (arguing that it is a function of constitutional law to be available to “unsettle” political resolutions and provide political “losers” with the possibility of becoming “winners”); *Briffault*, supra note 118, at 779–80 (“Secession [of Staten Island from New York City] . . . [would be] troublesome because it suggests that different groups and interests in a complex urban setting cannot coexist in one democratically governed local unit”).

178 At least in a world still dominated by national states. As has been widely noted, the formation of stable supranational forms of government that provide both large economic free trade areas and
and other related arguments suggest that secession clauses may, at least in some circumstances, do more good than harm because, if secession is likely, regularizing its accomplishment through law is vastly preferable to the use of violence.\textsuperscript{179} But overall, and on the evidence to date, comparative constitutionalists should be wary of general claims in favor of constitutionalizing territorial “exit” rights for parts of a country, especially to the extent that national states continue to play primary governmental roles in the world legal order.

Debate about constitutional rights of secession, however, should not proceed in isolation from the actual and varied circumstances in which constitution-making occurs. Constitution making takes place not only in paradigmatic constitutional “moments,” through specially selected representative bodies or plebiscites, but also in more drawn-out constitutional eras (as may be occurring now in Europe), or through the ordinary constitutional amendment processes, or even through judicial decision making. The contexts in which this work occurs can vary across other axes, for example, the extent to which a federation’s constituent parts are heterogeneously populated, or whether there are many or only a few constituent parts.\textsuperscript{180} Federal constitution making may occur in many historic settings, including: (1) devolutionary federalism, where, as in Belgium, an existing unitary state devolves constitutional powers to its subnational units; (2) as a centralizing move from confederation to federation, as was the case for the United States in 1789 and Switzerland; or (3) as a gradual consolidation of former colonies into a single national state, as was arguably the case for both Australia and Canada.

While there may be important reasons to support Sunstein’s views against providing for secession in “founding” periods of federal constitution making, when the need for mutual trust and investment in building a polity is high,\textsuperscript{181} these reasons may not apply so fully in other contexts of constitution making. In some polities, secession or opt-out clauses may have been thoroughly deliberated or have been on the table for so long that their inclusion is inevitable, and comparative study may help in evaluating the benefits and risks of particular procedural devices. In some polities, secession clauses may pose lower risks (i.e., if the polity has been peacefully trending, over time, protections of human rights may lower the costs and risks of any breakup of its constituent nations into smaller units.

\textsuperscript{179} See Weinstock, supra note 108, for an excellent exposition.

\textsuperscript{180} On the distinction between “territorial federalism” and ethnicity-based or “multi-national federalism,” see Will Kymlicka, \textit{Is Federalism a Viable Alternative to Secession? in Theories of Secession}, supra note 112, at 111, 123–27.

\textsuperscript{181} As Don Langevoort has suggested to me, the best mix of “exit” and “voice” in constitutional design may differ in the periods before, and after, the early mutual investment in building a public infrastructure. For a different distinction, see Sunstein, supra note 133, at 105 (suggesting that “a weak or loose confederation” such as the EU might derive net benefits from a secession option).
toward partition). Comparative experience suggests that, along with some wariness about constitutionalizing secession rights, it may be useful to distinguish between constitutional approaches to secession in founding moments or as an a priori matter, on the one hand, and more flexible legal approaches to secession when political momentum has been substantially mobilized.

4.2.4. Constitutional options expanded

As both the Secession Reference case and the debate over the union in the American Civil War suggest, there are at least three possible constitutional approaches to secession. A constitution can provide in some way for secession (whether through designation of a right under certain circumstances or by procedures that would apply if a question arose, or both); it can prohibit secession; or it can be silent or ambiguous on the issue. Comparative constitutional experience, which is mixed, might be read to suggest that leaving the issue unresolved may, in some situations, facilitate development of a successful and stable federal system.

Consider Canada, whose constitutional text is silent on secession. The silence created the possibility that, outside of the specified procedures for amending the Constitution, secession was simply prohibited. In the Secession Reference case, the Supreme Court of Canada concluded that there were unwritten but basic “underlying principles” in the Constitution of federalism.

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182 Secessionary movements plainly may arise without regard to legal institutions; the issue may be forced on the table. If so, the work that has been done in recent years on procedures for institutionalizing legal approaches to secession could be valuable. In February 2003, for example, a new constitutional charter was agreed to for Serbia and Montenegro; it provides that in three years either party has the right to secede. It is widely expected that Montenegro will exercise this right, as the Constitution implicitly contemplates by making special provisions for the effects of Montenegrin secession on Serbia’s claim to Kosovo. See Constitutional Charter of State Union of Serbia and Montenegro, art. 60 (in effect February 2003) (unofficial translation), available at http://www.mfa.gov.yu/Facts/charter_e1.html (last visited Jun. 15, 2003); Constitution Watch, *Serbia and Montenegro*, 11–12 E. EUR. CONST. REV., Fall 2002–Winter 2003, at 47–50. The treatment of Kosovo is controversial. See S. SLAVIC REP., Jan. 16, 2003, available at http://www.rferl.org/southslavic/2003/01/1–160103.html.

183 See Sunstein, supra note 122, at 670 (apparently assuming that the alternative to a constitutional right to secede is a waiver of the right to secede, described as a “natural part of constitutionalism”). Legalization without formal constitutional entrenchment would be an important option as well, though one with which explicit constitutional prohibitions could interfere. Cf. William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (noting development of important “superstatutes” that facilitate evolution of societal and constitutional norms).

184 Cf. Franck, supra note 18, at 13 (suggesting that the “prudent path for [international] law” is to “neither prohibit nor authorize secession, except in the context of any lingering decolonization”); but cf. Weinstock, supra note 108, at 261 (suggesting that in a legal vacuum secession will seem too cost-free a political tool and thus arguing for clearly specified procedures).
democracy, rule of law, and protection of minorities.\textsuperscript{185} While no province had a unilateral right of secession, these unwritten constitutional principles would require the national government to engage in good faith (“principled”) negotiations regarding secession if a “clear majority” of Quebec voted in favor of secession on a “clear question.”\textsuperscript{186} The determination of what is a clear majority on a clear question and the nature of subsequent negotiations were, the Court indicated, political questions to be determined by political actors.\textsuperscript{187} At least in the short term in Canada, the Supreme Court’s decision appears to have been accepted, according to leading commenters, as “shap[ing] the terms of debate in a stability-promoting way.”\textsuperscript{188} And it did so by creating a third alternative out of the ambiguous silence, one that involves not rights with regard to a particular result but obligations to negotiate.

Notwithstanding the reasons for wariness about constitutionalizing secession, discussed above, once secession has become an urgent item on a political agenda some form of legal approach (which may be statutory rather than constitutional) might be necessary to avoid resort to violence. In this respect, Canada may have made an important contribution to a world constitutionalism of governance. Although the \textit{Secession Reference} opinion was silent as to the practice, or unwritten constitutional concepts, of other Western democracies,\textsuperscript{189} its elucidation of basic constitutional norms of decision making may have value to other federations. Notwithstanding the Court’s effort to anchor these values in Canadian constitutional history, the \textit{Secession Reference} case may find itself woven into future transnational constitutional conversations about how to reconcile commitments to federalism and minority rights, democracy and the rule of law. In addition, the Court’s emphasis on the obligation of principled

\textsuperscript{185} Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 240, 247–48. Note that secession with intent to engage in human rights abuses (e.g., continue slavery as in the U.S. Civil War) would not be consistent with these principles, especially of minority protection.

\textsuperscript{186} Id. at 268.

\textsuperscript{187} Id. at 270–72. Interestingly, the Court did not suggest that the “rest of Canada” should, in response to a positive referendum in one province to secede, vote, by referendum, on whether it wanted to agree to the secession. Cf. Briffault, supra note 118, at 818–19 (arguing that municipal secession should not proceed without referenda in both the seceding part of a city and the remainder of the city, with resolution by the state in the event of a conflict). But at the national level, the absence of a superior authority to resolve conflicts may make it sensible to move immediately to negotiation upon a clear, supermajority vote in favor of secession in a predefined territorial unit of the larger national state.

\textsuperscript{188} Sujit Choudhry & Robert Howse, \textit{Constitutional Theory and the Quebec Secession Reference}, 13 CAN. J.L. & JURIS. 143, 144 (2000). The Supreme Court’s decision was followed by the so-called “Clarity Act.” For discussion of the Clarity Act, and of Quebec’s response, see Cristie L. Ford, In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference, 39 ALBERTA L. REV. 511, 541 n.91, 542 n.92 (2001).

\textsuperscript{189} The case does discuss at length the question whether Quebec had a unilateral right of secession under international law and concluded it did not, given Quebec’s right to participate in the national government, and the absence of colonial or abusive behavior. See Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 275–87.
negotiation may find echoes in other federal systems, in which relationships of supremacy, hierarchy, command, immunity, and rights may be shifting or expanding to include obligations of cooperation, discussion, and negotiation.\footnote{See, e.g., Television I case, 12 BVerfGE 205 (1961), translated in KOMMERS, supra note 100, at 69–74 (describing German Court’s use of Bundestreue in condemning the national government’s failure of good faith negotiation with all Länder); Ex Parte Speaker of the National Assembly; In Re Dispute Regarding the Constitutionality of Certain Provisions of the National Education Policy Bill No. 83 of 1995, 1996(3) SALR 289, 297–98, 303–4 (CC) (noting governments’ obligations to cooperate in planning).} This approach is one that delegates substantial authority to the legislature and political processes and emphasizes intergovernmental cooperation and discussion, rather than “win-lose” determinations of rights or immunities.\footnote{See also James Tully, Introduction, in MULTINATIONALDEMOCRACIES 1, 14 (Alain-G. Gagnon & James Tully eds., Cambridge Univ. Press 2001) (emphasizing Secession Reference’s conception of democracy as entailing a “continuous process of discussion” in which members have democratic rights to initiate negotiations over constitutional change). The Court also indicates, however, that ultimately secession under the Constitution “requires that an amendment be negotiated.” Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 270.}

Although the Secession Reference decision presents itself as an authoritative articulation of constitutional principles, there are differences between a “constitution” and a constitutional law that might helpfully come into play in this setting.\footnote{Compare Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that the Court’s decision in Brown v. Board of Education was the “supreme law of the land” under article VI of the Constitution), with Edwin Meese, The Law of the Constitution, 61 TUL. L. REV. 979, 981–83 (1987) (asserting that Court decisions are not the same as the Constitution itself). As noted below, Canadian “reference” decisions are, formally, advisory. See infra note 94.} Constitutional law, made by courts in response to particular cases or occasions, can be more flexible than fixed constitutional texts.\footnote{Leaving some things unclear in a constitutional text may have other benefits as well. See Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 Mich. L. Rev. 245, 274–75 (1995) (suggesting that lack of clarity in constitutional meaning can help foster public discourse over constitutional meaning, which may be a good in itself; may help judicial decision making, to the extent courts seek to interpret constitutions in ways that correspond to a society’s deeper values; or may foster attachment to the constitution).} Moreover, whether viewed as constitutional “advice” or as constitutional law, the
Secession Reference draws on the stature of an institution that may be regarded as more impartial than other organs of the national government. Invoking constitutional court jurisdiction to resolve the procedures by which live disputes over secession can be dealt with may, in some polities, be preferable to trying to fix terms and procedures further in advance, and in the absence of major secessionary activity. To the extent that it is legitimate to be concerned with the effect of negotiating or including secession clauses at founding moments, the Secession Reference opens up the possibilities for a legalized response to the emergence of higher levels of secessionary activity after the founding period.

5. Conclusion

Transnational judicial discourse analyzing discrete constitutional texts allocating powers in federal systems may be limited by the variable, interdependent and historically contingent framework of federalism in which each text is embedded. Understanding constitutional federalism in a comparative setting may, however, be of real assistance to courts in their elaboration of federal norms in the silences of constitutional texts on issues that become important over time in the balance not mandate, a particular course of action based on a rule or principle in a judicial case or controversy.” Neal Kumar Katyal, Judges As Advicegivers, 50 STAN. L. REV. 1709, 1710 (1998). This characterization raises a number of questions, including whether the characteristics of a constitutional court that enable it to engage in binding adjudication also enable it to be a good advice giver, and whether advice giving as distinct from conventional adjudication will adversely affect judicial legitimacy. Cf. Choudhry & Howse, supra note 188, at 145 (for constitutional adjudication to be legitimate it “must be supported by reasons that justify the judicial role”). These questions transcend the issues of comparative constitutional federalism with which this essay is primarily concerned, so they will need to be addressed elsewhere.

See Michael Wilhelmson, Public Still Trusts Judiciary, Iacobucci Tells Conference, 21 LAWYER’S WEEKLY, May 21, 2001 (stating that eminent Canadian pollster, Angus Reid, found in recent polling that 70 percent of public supported the Canadian Supreme Court’s decisions in the last year and that judges ranked near the top groups in terms of public respect, “while politicians are at the bottom”).

Would constitutional amendments relating to secession have similar possibilities? The answer might depend on the nature of the mobilization required for amendment (as compared to that required for litigation) and the degree of entrenchment of constitutional provisions. Given constitutional space, legislative responses are another option.

The Secession Reference case raises important questions of the role of courts in constitutional interpretation not addressed here. For thoughtful discussion, see Choudhry and Howse, supra note 188, at 154–69 (exploring legitimacy of the Canadian Court’s resort to unwritten principles and suggesting distinction between ordinary and extraordinary constitutional interpretation).
of federal relations. Where text is silent, understanding the range of constitutional alternatives and their possible consequences through consideration of other constitutional federations’ experiences may be helpful both to clear analysis of the particular federal system and to prudent constitutional decisions.198

198 See, e.g., Saunders, supra note 103, at 18 (asserting that if constitutionality of “a federal law unilaterally imposing obligations on State officials” were at issue, there is “no doubt” that U.S. and Canadian constitutional experience would be argued about and provide “reflective value” for the Australian Court).