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Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society

This Article explores the use of federalism and secession as tools for managing regional conflict within pluralist governance, drawing on underappreciated features of the American experience. Epic struggles to balance autonomy with interdependence have taken on new urgency as dissatisfaction with globalization inspires political cataclysms unimaginable just a few years ago—including ‘Brexit’ from the European Union and American threats to leave NATO. The same impetus toward devolution also surfaces in heated intra-national conflicts. Recent calls for secession in Catalonia, Iraqi Kurdistan, Scotland, Québec, South Sudan, and even from within the United States reveal multiple political contexts in which questions have been raised about how best to balance competing claims for autonomy, interdependence, political voice, and exit.

As devolution movements destabilize institutions once thought impenetrably secure, scholars around the globe are tapping the wisdom of the Westphalian and post-Westphalian worlds to better

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understand the available tools for managing these conflicts. In support of that goal, this Article probes the American experience for lessons on managing endemic tensions between autonomy and interdependence in societies composed of different regional, cultural, and ideological subcommunities. It explores American secession in contexts familiar and controversial, from the subnational to the national level, from the American Revolution to the Civil War and beyond. It assesses the unique advantages of U.S. federalism for mediating opposing forces of political entropy, which operate to pull the component pieces of pluralist nations apart, and political gravity, which pull them together in pursuit of common goals.

Like all systems of federalism, the U.S. model cultivates the “sweet spot” between competing claims for local autonomy and national interdependence, allocating sovereign authority among levels of government where each best advances the overall goal. While the American model is not suitable in all contexts, the availability of nested political sites for regional expression, interjurisdictional innovation, and negotiated governance have helped fortify the American Union against the kinds of conflicts that can foment fragmentation.

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INTRODUCTION: AUTONOMY AND INTERDEPENDENCE
IN PLURALIST SOCIETY

This Article explores the use of federalism and secession as tools for managing regional conflict in pluralist institutions of governance, drawing on underappreciated features of the historic and modern-day American experience. The struggle to balance competing claims for autonomy and interdependence in governance is epic, but it has taken on new urgency as waves of popular dissatisfaction with globalization inspire political cataclysms that would have been unimaginable just a few years ago. In 2016 alone, these included the British referendum to withdraw from the European Union¹ and the election of Donald Trump to the U.S. Presidency on a platform of disengagement from such international federations as the North Atlantic Treaty Organization (NATO).²

Yet the impetus toward devolution also surfaces in conflicts between competing intra-national constituencies, cleaving along regional, cultural, ethnic, religious, linguistic, and ideological lines. In the dominant circles of international law, secession is disfavored—viewed as an extra-legal alternative that goes beyond the requirements of generally accepted principles of self-determination (at least absent gross violations, alien subjugation, international exploitation, or a colonial context).³ Nevertheless, recent calls for secession in Catalonia, Iraqi Kurdistan, Scotland, Québec, and South Sudan reveal multiple political contexts in which related questions are being raised

¹ Steven Erlanger, *British Stun World with Vote to leave U.E.*, N.Y. TIMES, June 24, 2016, at A1.

² Scott Bauer, *Paul Ryan Defends NATO*, U.S. NEWS & WORLD REP. (July 26, 2016, 1:40 PM), <https://www.usnews.com/news/politics/articles/2016-07-26/in-break-from-trump-paul-ryan-defends-nato-trade-deals> (discussing reactions to presidential candidate Donald Trump’s criticism of NATO, NAFTA, and the TPP).

³ *In re Secession of Québec*, [1998] 2 S.C.R. 217, 222 (Can.). The Supreme Court of Canada reviewed the dominant international law position on when secession is justified in its 1998 decision that Québec was not entitled to unilaterally secede—but that the rest of Canada must do more to resolve the grievances fomenting discontent in Québec. *Id.* (stating “a right to secession only arises under the principle of self-determination of people at international law where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination or [international] exploitation; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, people are expected to achieve self-determination with the framework of their existing state.”).

about how best to balance competing claims for autonomy, interdependence, political voice, and exit.⁴

In the United States, a genuine secession movement by the Alaskan Independence Party was judicially quelled as recently as 2010, highlighting the durability of the issue even in the modern United States.⁵ And while calls for full secession are seldom given much credence in the American political context, calls to further devolve regulatory authority occupy hallowed positions in major American political party platforms.⁶ Devolution claims, often framed in terms of “States’ Rights,” have become customary on the political right—but in the wake of the 2016 Presidential Election, they are increasingly heard on the left as well.⁷ A group of California citizens seeking their own independence from the United States have organized a “Calexit” campaign, seeking a 2019 referendum on California’s exit from the American Union.⁸

⁴ See *infra* Part III.

⁵ See *infra* notes 34–37 and accompanying text (discussing the Alaskan secession movement).

⁶ See, e.g., Rayna Casey et al., *A Rebirth of Constitutional Government*, in REPUBLICAN PLATFORM 2016 9, 15–16 (Bill Gribbin & Eric Ueland eds., 2016), <https://prod-cdn-static.gop.com/static/home/data/platform.pdf> (pledging “to restore the proper balance and vertical separation of powers between the federal government and state governments—the governments closest to, and most reflective of, the American people. We encourage states to reinvigorate their traditional role as the laboratories of democracy, propelling the nation forward through local and state innovation.”).

⁷ See Jessica Bulman-Pozen, *Rites of Dissent: Notes on Nationalist Federalism*, 59 ST. LOUIS U.L.J. 1133, 1143 (2015) (“Even the most extreme state-centric tools of federalism, secession and nullification, have been repurposed as tools of national partisan struggle in recent years.”); see also Charles C.W. Cooke, *Post Election, Progressives are Embracing Conservative Traditions*, L.A. TIMES (Dec. 13, 2016, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-cooke-left-embraces-conservatism-20161213-story.html> (discussing progressives’ post-election embrace of federalism).

⁸ YES CALIFORNIA’S CALEXIT BLUE BOOK: ANSWERS TO YOUR QUESTIONS ABOUT INDEPENDENCE, YESCALIFORNIA.ORG, https://d3n8a8pro7vhmx.cloudfront.net/yescalifornia/pages/1/attachments/original/1482608371/Calexit_Book_1.1.pdf?1482608371 (last visited Oct. 13, 2017) [hereinafter CALEXIT BLUE BOOK]. The relationship of the Calexit movement to Russian interference in U.S. politics arose after Calexit’s early leader decided to move from California to Russia. Madison Park, *Calexit Leader Quits Secession Effort to Make His Home in Russia*, CNN (Apr. 19, 2017, 12:00 PM), <http://edition.cnn.com/2017/04/19/politics/calexit-leader-russia/>. However, the movement has continued in his wake, calling for a ballot initiative designed to “put California on the path towards becoming a fully-functioning sovereign and autonomous nation, whether within continued association with the United States of America, or as an independent country.” Jim Miller, *Calexit Plan is Back, but It’s Toned Down*, SACRAMENTO BEE (May 19, 2017, 5:31 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article151659877.html> (quoting the California ballot measure).

As secession and devolution movements threaten to destabilize federations once thought impenetrably secure—from the European Union to the United Kingdom to NATO—scholars around the globe are tapping the wisdom of the Westphalian and post-Westphalian worlds to better understand the available tools for managing regional governance conflicts.⁹ New scholarship exploring how different nations have managed these conflicts, some more and some less successfully, promises to broaden the perspectives of researchers, government officials, and citizens struggling to resolve sovereignty conflicts with full appreciation for the underlying principles they represent.

In support of that goal, this Article shares the American experience of devolution conflict, probing our experiments with both federalism and secession for lessons on managing the endemic tension between impulses toward autonomy and interdependence in societies composed of different regional, cultural, and ideological sub-communities. It explores secession in contexts both familiar and controversial, from the American Revolution through the Civil War, addressing secession at both the national and subnational levels.

It also considers the development of American federalism, from a model emphasizing vertical separation toward one that harnesses inevitable jurisdictional overlap to cultivate opportunities for collaborative and competitive engagement. It assesses the unique advantages of American federalism for mediating the opposing forces of political entropy, which operate to pull the component pieces of pluralist nations apart, and political gravity, which pull them together in pursuit of common goals. It considers both the successes and limits of the American model, identifying those aspects that are instructive for governance elsewhere and those that may be inapplicable abroad. Finally, it reflects on the way that federalism can act as a double-edged sword—or perhaps more accurately, a simultaneous sword and shield—providing a potential conduit for claims to secession at the same time that it functions as a safety valve to defuse the same impulses.

Beginning with a historical account of secession in the United States, Part I reviews American secession movements at both the subnational and national level, with special focus on the paradigmatic

⁹ *See, e.g.*, 2 THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN (Alberto López Basaguren & Leire Escajedo San Epifanio eds., 2013) (international compendium of secession scholarship).

cases of the American Revolution and the American Civil War. Both examples demonstrate the deep regional tensions that can surface within a larger overall polity, reflecting the challenges of pluralist societies more generally. The southern states' failed attempt to secede during the Civil War led to the formal disavowal of secession in the United States—leaving us to grapple with the meaning of what had already happened during the Revolutionary War, when the American colonies unilaterally separated from Great Britain.

After considering the meaning of these wrenching moments in American history, Part II turns to our preferred means of mediating regional conflict, the institution of constitutional federalism. By dividing sovereign authority between local and national levels of government, federalism creates multiple simultaneous forums for political contest, competition, and collaboration that have diffused regional tension through engaged multilevel governance. Like all systems of federalism, the U.S. model cultivates the “sweet spot” between competing claims for local autonomy and national interdependence, allocating sovereign authority among levels of government where each best advances the overall goal. The availability of nested political sites for regional expression, interjurisdictional innovation, and negotiated governance have many benefits, including fortification of the American Union against the kinds of conflicts that might otherwise lead toward fragmentation.

Part III acknowledges the aspirations and the limitations of the American model, and perhaps all federal systems, in coping with regional tension. Federalism offers useful tools for navigating the political forces of entropy and gravity that operate in all pluralist societies, but of course, it cannot solve all problems. This Part reflects on the challenges facing all federal unions, as well as the differences between the American model and alternatives that may better suit unions confronting more substantial regional diversity or entrenched regional conflict. The Article concludes with brief reflections about when secession is more and less justified, based on the relative strength of competing claims for autonomy and interdependence.

I

SECESSION IN THE UNITED STATES

In the political context, “secession” refers to the circumstances by which a new sovereign territory is carved out of an existing sovereign territory, so that each continues thereafter as a separate political

entity.¹⁰ This meaning of the word did not take hold until well into the nineteenth century, after several such circumstances had arisen,¹¹ and it does not appear widely in the literature until the twentieth century. But with regard to that meaning, the U.S. model of secession initially appears straightforward. Consistent with the dominant stance on secession in international law,¹² the formal American model can be summarized as: “no secession.”¹³ The U.S. Constitution includes no right of secession, the Supreme Court has conclusively disavowed it, and the United States has never recognized claims for secession from the overall Union as legitimate.¹⁴ Today, most Americans will live out their lives without ever seriously considering the possibility that the nation might cleave into parts.¹⁵

Nevertheless, a scratch below the surface reveals that secession and the debates that surrounds it have played a vibrant role in American political culture throughout much of the nation’s history. It has done so at both the national level, where secession conflicts have been most conspicuous, and at the subnational level, where proposals for secession continue to this day. This section briefly reviews the American experience of subnational secession before taking on the weightier matters of national-level secession.

¹⁰ See David Armitage, *Secession and Civil War, in* SECESSION AS AN INTERNATIONAL PHENOMENON 37–54 (Don H. Doyle ed., 2010); ALEKSANDAR PAVKOVIĆ & PETER RADAN, *CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION* 5 (2007) (“Secession is the creation of a new state by the withdrawal of a territory and its population where that territory was previously part of an existing state”); Donald W. Livingston, *The Very Idea of Secession*, 35 SOC’Y 38, 45 (1998) (“Secession, however, is not revolution because it does not attempt to gain control of the government of a unitary state; rather it attempts to limit the jurisdiction of that government over the territory it occupies.”). *But see* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177 (1991) (discussing the difficulty in establishing a working definition of “secession” for U.N. purposes).

¹¹ See Livingston, *supra* note 10, at 38.

¹² See generally *In re* Secession of Québec, [1998] 2 S.C.R. 217, 222 (Can.) (discussed *supra* note 3).

¹³ See *Texas v. White*, 74 U.S. 700, 725 (1868) (holding that the union of states created by the American constitution is indestructible).

¹⁴ *Id.*

¹⁵ That said, the idea continues to surface. See, e.g., CALEXIT BLUE BOOK, *supra* note 8; *infra* notes 34–37 and accompanying text (discussing the Alaskan independence movement).

A. *Subnational Secession: Then and Now*

The Constitution may deny it at the national level, but secession has played a formative role in U.S. history at the subnational level. Prominent American states have subdivided into two, and municipal governments below the state level continue to divide and reconstitute as their citizens' interests in autonomy and interdependence evolve. While most of the secession discourse presumes it as an exclusive feature of national level governance (regarding the creation of new nation states), the conversation about American secession rightly includes the subnational level, given the unique status of the American states within the U.S. system of constitutional federalism.

Under the U.S. model of dual sovereignty, the fifty states possess their own sovereign authority to govern in realms of law that have not been enumerated to the national government.¹⁶ The source of state sovereign authority—the common law police power to regulate for the public welfare—exists separately from the authority conferred on the national government by the American Constitution, and it cannot be fully displaced by that national authority.¹⁷ Each state is thus a sovereign entity in ways that render them distinct from the regional subdivisions of a nonfederal nation. For that reason, when an American state splits in two, that process shares certain features with national-level secession, creating a new sovereign territory with powers distinct from both the original state and the central government.

Indeed, states have subdivided on several notable occasions over American history, for reasons ranging from administrative concerns to avulsive political conflict. For example, North and South Carolina separated peacefully in 1712 due to the slow separation of interests over time, as their economic concerns grew increasingly differentiated.¹⁸ The Carolinas subdivided while still colonies of Britain, distinguishing their separation from true subnational secession within a federal system, but the new American states continued to subdivide as boundaries were solidified and new territories acquired. For example, several of the original American colonies had been granted territory extending from the Atlantic Ocean

¹⁶ See, e.g., ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 7–8 (2012) [hereinafter RYAN, TUG OF WAR].

¹⁷ *Id.* at 8–10.

¹⁸ *Creating the Carolinas*, U.S. HISTORY (2016), <http://www.ushistory.org/us/5c.asp> (last visited Jan. 28, 2016).

to an undefined point westward—“from sea to sea”—and new states were created as boundaries were settled and the western territories became new states.¹⁹

More dramatic movements for state-level secession took place on the eve of the American Civil War of the 1860s. Citizens in the mountainous regions of Tennessee and Virginia advocated for separation due to deep political discord over the positions taken by their states about slavery and national-level secession.²⁰ In 1861, shortly after the state of Virginia joined the Confederate States in their effort to secede from the rest of the United States, the westernmost portion of the state succeeded in breaking off to form West Virginia.²¹ Notably, West Virginia became the only state to secede from the Confederacy in order to rejoin the United States, and it was admitted back into the Union as an independent state in 1863.²²

Subnational secession has also taken place for more prosaic administrative reasons, as in the case of the 1889 separation of North and South Dakota. The Dakotas split on the eve of statehood in order to break the oversized territory into smaller units, on the theory that smaller administrative chunks would be more amenable to good governance within the federal system.²³ Nationwide, municipalities below the state level continue to form, dissolve, and separate for reasons of good public administration.²⁴ However, new intrastate subdivisions remain subordinate to the full sovereign authority of the state, with much less regulatory independence than the states vis a vis

¹⁹ See PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49–52 (1968) (describing subdivision of the original western territories of Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia).

²⁰ SCOTT REYNOLDS NELSON & CAROL SHERIFF, *A PEOPLE AT WAR: CIVILIANS AND SOLDIERS IN AMERICA’S CIVIL WAR, 1854-1857* 55 (2007) (“By the middle of 1861, in both Tennessee and Virginia, mountain politicians planned a secession of their own and sought to create two independent states: East Tennessee and West Virginia. The Virginia movement succeeded, partly because of support from the federal army. The newly formed United States Army of the Ohio, officered by Major General George McClellan, crossed the Ohio River into Virginia in May 1861.”).

²¹ *Id.*

²² *West Virginia Statehood*, W. VA. ARCHIVES & HIST. (2015), <http://www.wvculture.org/history/archives/statehoo.html> (last visited Oct. 14, 2017).

²³ See generally *North Dakota and South Dakota Were Admitted to the Union November 2, 1889*, AM’S STORY FROM AM’S LIBR., http://www.americaslibrary.gov/jb/gilded/jb_gilded_dakotas_1.html (last visited Oct. 14, 2017).

²⁴ See, e.g., *Formation of Local Governments*, FLA. STAT. § 165 (2005) (Florida statute governing the formation, dissolution, incorporation, and merger of municipalities).

the federal government (and for that reason, intrastate separation has less significance for the larger secession discourse).

Since the separation of the Dakotas, the era of state-level secession in the United States has slowed down considerably, and as a practical matter, has probably ended. Nevertheless, the idea of subnational secession is still periodically raised in various U.S. political contexts. For example, there have been news-making proposals to break the state of California into “the Californias.”²⁵ With some thirty million residents, California is the most heavily populated of all U.S. states, and its economy, if separated from the rest of the American economy, would be the sixth largest in the world.²⁶ Proposals have ranged from dividing California into two, four, or even six separate states—usually to advance different regional interests in different parts of the large state.²⁷ Some proposals to divide the state may also be designed to limit the jurisdiction of the influential Ninth Circuit Federal Court of Appeals, which is heavily influenced by litigation in southern California but binds judicial policy in many other western states.²⁸ Proposals to split California have been made as recently as 2011, but they have never gained much political traction, and success in the foreseeable future seems very unlikely.²⁹

The likelihood of national-level secession in the United States seems even lower, and yet even that idea is occasionally raised in the political sphere. For example, voices within the state of Texas semi-

²⁵ Jennifer Chaussee, *Billionaire’s Breakup Plan Would Chop California into Six States*, REUTERS (July 14, 2014, 6:25 PM), <http://www.reuters.com/article/us-usa-california-breakup-idUSKBN0FK03P20140715>.

²⁶ *California Passes France As World’s 6th-Largest Economy*, FORTUNE (June 17, 2016), <http://fortune.com/2016/06/17/california-france-6th-largest-economy/>.

²⁷ See Chaussee, *supra* note 25.

²⁸ See generally Eric J. Gribbin, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351 (1997) (stating that the connection between breaking up California in order to break up the Ninth Circuit hinges on the large volume of litigation generated in southern California in comparison with the rest of the circuit, combined with the desire to limit the precedential effect elsewhere of California-based Ninth Circuit decisions. The Ninth Circuit carries a very heavy load in comparison to other Circuits, but proposals to divide the Circuit by removing California have been unpersuasive, in part because southern California has historically generated more litigation than the rest of the Circuit combined. Creating a Thirteenth Circuit including only California would create a lopsided result, with an ongoing overload in the new Thirteenth Circuit and an unduly light load in the remaining Ninth Circuit. However, breaking California into pieces would enable the creation of a Thirteenth Circuit that includes only southern California, creating a more balanced judicial load while limiting the influence of those decisions elsewhere.).

²⁹ Daniel B. Wood, *51st State? Small Step Forward for Long-Shot ‘South California’ Plan*, CHRISTIAN SCI. MONITOR (July 12, 2011), <http://news.yahoo.com/51st-state-small-step-forward-long-shot-south-233234624.html>.

regularly threaten to secede from the rest of the nation, often on the eve of a presidential or gubernatorial election.³⁰ According to the usual script, a Texan public figure opines that Texas should secede from the Union if the federal government declines to adopt his or her policy preferences³¹—and the rest of the nation then performs its nonplussed response, generally with tongue-in-cheek applause, wishing Texas well on its way out.³² But apart from a few fireworks in the news cycle and on late-night comedy, nothing ever actually happens; it is mostly empty political theater, and everyone seems to know it.³³ The theatrical public responses to Texan secession banter underscore the sense that, for all practical purposes, secession no longer seems like a viable option in U.S. political culture.

In the early 2000s, however, a small but sincere secession movement arose in Alaska, where the Alaskan Independence Party secured one hundred signatures in support of a ballot referendum proposing Alaskan secession from the United States.³⁴ The Alaska Independence Party seeks to establish Alaska as an independent nation, according to libertarian principles of limited governance, privatization, tax abolition, home schooling, and gun rights.³⁵ The ballot initiative was rejected by the elections authority and ultimately the courts, on grounds that a ballot initiative cannot be certified for extraconstitutional purposes.³⁶ As the Supreme Court of Alaska

³⁰ 'Texas Secession' Resolution to be Placed Before Texas GOP, NEWS RADIO 1200 WOAI (Nov. 12, 2015, 11:00 AM), <http://www.woai.com/articles/woai-local-news-sponsored-by-five-119078/texas-secession-resolution-to-be-placed-14117190/>.

³¹ See Alexander Mooney, *Texas Governor Says Secession Possible*, CNN (Apr. 16, 2009, 11:56 AM), <http://politicalticker.blogs.cnn.com/2009/04/16/texas-governor-says-secession-possible/> (discussing statements by Texas Governor Rick Perry declining to rule out the possibility that Texas may one day secede from the union).

³² See, e.g., Shadee Ashtari, *10 Things We'd Lose if Texas Actually Seceded*, HUFFPOST (Nov. 5, 2013, 6:05 PM), http://www.huffingtonpost.com/2013/11/05/texas-secede_n_4213506.html (suggesting, in jest, that America might be better off if Texas followed through on its threats to secede).

³³ See Peter Weber, *What Would Happen if Texas Actually Seceded?*, THE WEEK (Nov. 26, 2012), <http://theweek.com/articles/470115/what-happen-texas-actually-seceded> (observing that secession talk is usually for the purpose of registering political disappointment, rather than to signal a genuine attempt at withdrawal).

³⁴ *Kohlhaas v. State*, 223 P.3d 105 (Alaska 2010).

³⁵ *Alaskan Independence Party Platform*, ALASKAN INDEP. PARTY, <http://www.akip.org/platform.html> (last visited Mar. 11, 2016).

³⁶ *Kohlhaas*, 223 P.3d at 111–13.

ultimately concluded in 2010, “secession from the Union is clearly unconstitutional.”³⁷

The unambiguous response to the Alaska initiative reinforces that the formal U.S. model of national-level secession remains: “no secession.” Here in the United States, goes the political wisdom, we simply don’t do secession—never will, never have.

Or have we?

B. The American Revolution

Notwithstanding the unambiguous judicial message on national-level secession, it may be that national secession actually has played an important role in American history—at the very beginning of the story, when the original thirteen colonies separated from the rest of the United Kingdom. The American Declaration of Independence of 1776, claiming the right of the American colonies to separate from the rest of Britain as fully sovereign territories,³⁸ has been recognized as “the first formal secession proclamation in world history.”³⁹ In the Revolutionary War that followed, the colonies succeeded in establishing political independence, ultimately joining with one another to form the United States.

Of course, most Americans think of these events not as secession, but as revolution (as the name suggests). And indeed, the American Revolution spawned a set of ideas that were revolutionary in every sense of the word: the written Constitution, the Bill of Rights, the institution of federalism itself—all were paradigm-shifting innovations in governance that have forever altered the path of the American experience, and arguably, that of the world.⁴⁰

³⁷ *Id.* at 113.

³⁸ THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

³⁹ *Cf.* Armitage, *supra* note 10, at 48.

⁴⁰ *Cf.* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) (arguing that nevertheless, the interpretation of this historical period remains a subject of intense interest and contestation by historians, who have continued to debate the ideological roots of the American Revolution in the European Enlightenment, the remnants of feudal aristocracy in the early American experiment, and other interesting possibilities that go beyond the scope of this treatment). *See, e.g.*, Bernard Bailyn, *Political Experience and Enlightenment Ideas in Eighteenth-Century America*, 67 *AM. HIST. REV.* 339, 341 & n.1 (1962) (listing other scholarly literature interpreting, disputing, and reinterpreting the intellectual history and ideological progeny of the American Revolution); Thomas C. Barrow, *The American Revolution as a Colonial War for Independence*, 25 *WM. & MARY Q.* 452 (1968) (grappling with the question of “just ‘how revolutionary’” was the American Revolution); ROBERT R. PALMER, *THE AGE OF THE*

Yet if we define “revolution” in existential terms as the full rejection of the pre-existing order,⁴¹ the answer to the question of what happened in 1776 is less clear. After all, if we set aside the ravages of the war itself and compare ordinary life in the times immediately before and after the Revolution, very little changed in most people’s day-to-day lives. The sovereign changed, but not much else. The relative continuity of the American experience is especially profound in comparison to other nations that have experienced truer revolutions—such as the Chinese Revolution in 1949, or the French Revolution in 1789—in which virtually all aspects of the pre-existing order really did change.⁴²

In this regard, comparing the American Revolution in 1776 and the nearly contemporaneous French Revolution in 1789 is informative. The American Revolution rejected British sovereignty, but it preserved a surprising degree of the rest of the existing order. The colonists rejected the British monarchy, but they preserved British common law and the common law system, which remains at the core of American law today.⁴³ For the most part, they held on to the British system of property rights, and they protected those private property rights that had been previously recognized by the former British Crown (which had given very limited credence to the rights of indigenous inhabitants).⁴⁴ The religious order, to the extent there was

DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800 I (1959) (relating the American Revolution to European predecessors).

⁴¹ See “*Revolution*,” MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/revolution> (last visited Oct. 14, 2017) (defining revolution as “2a: a sudden radical or complete change b: a fundamental change in political organization . . . c: activity or movement designed to effect fundamental changes in the socioeconomic situation d: a fundamental change in the way of thinking about or visualizing something: a change of paradigm”).

⁴² See generally FRANK DIKÖTTER, *THE TRAGEDY OF LIBERATION: A HISTORY OF THE CHINESE REVOLUTION 1945-1957* (2013); CHRISTOPHER HIBBERT, *THE DAYS OF THE FRENCH REVOLUTION* (William Morrow & Company, Inc. 1980).

⁴³ See, e.g., LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 32 (2002) (“The colonies won independence after a long war; but unlike say the French or the Russian revolutions, there was no sharp *legal* break with the past. The common law system (American style) remained intact. Indeed, in some sense, the aim of the Revolution was continuity, not overthrow: continuity of the colonial traditions, laws, and ways of life.”).

⁴⁴ See, e.g., *Johnson v. McIntosh*, 21 U.S. 543 (1823) (affirming American accession to British sovereign property, under the original principles of British law, and highlighting the unfortunate results for indigenous inhabitants). See generally JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES POLICIES, AND PRACTICES* (6th ed. 2014) (identifying the roots of various American common law doctrines in British common law).

one, was unchanged before and after the revolution, and pre-existing social relationships were largely maintained.⁴⁵

By contrast, the French Revolution changed nearly everything about the status quo.⁴⁶ Like the American Revolution, the French Revolution advanced new ideologies of liberalism, secularism, and human rights that would forever change the world.⁴⁷ But in addition to these revolutionary ideas, the French experienced revolution in virtually every aspect of public life. Not only was the monarch removed from power, the entire political and social order was transformed. Feudalism was abolished, and the property and privileges of the nobility were attacked.⁴⁸ The religious hierarchy was overthrown, and political power was massively shifted from the Church to the secular state.⁴⁹ Women marched on Versailles to protest widespread poverty.⁵⁰ Laws were rewritten, debt was forgiven, and divorce legalized.⁵¹ Even the Roman calendar was rejected after the French Revolution, in favor of a new calendar beginning at the year zero, to honor the nation's new start.⁵²

Perhaps most powerfully illustrating the point, after the French Revolution, King Louis XVI was beheaded.⁵³ After the American

⁴⁵ See FRIEDMAN, *supra* note 43, at 32.

⁴⁶ See generally 2 THOMAS CARLYLE, *THE FRENCH REVOLUTION: A HISTORY* (1867).

⁴⁷ *THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY* 7–12 (Lynn Hunt ed. & trans., Bedford Books of St. Martin's Press 1996).

⁴⁸ JOHN HALL STEWART, *A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION* 107 (The MacMillan Company 1961).

⁴⁹ PETER MCPHEE, *FRENCH REVOLUTION 1789–1799* 199 (2002) (noting that “[t]he Revolution had created a secular state; although the Restoration was to pronounce Catholicism the state religion, an important legacy of the Revolution was the creation of an ethos among public functionaries that their primary allegiance was to the ideal of a secular state which transcended particular interests. Never again could the Catholic Church claim pre-revolutionary levels of obedience or acceptance among the people.”).

⁵⁰ ALBERT SOBOUL, *THE FRENCH REVOLUTION 1787–1799: FROM THE STORMING OF THE BASTILLE TO NAPOLEON* 156 (Alan Forrest & Colin Jones trans., Random House 1974).

⁵¹ WILLIAM DOYLE, *THE OXFORD HISTORY OF THE FRENCH REVOLUTION* 121 (3d ed. 1990).

⁵² MATTHEW SHAW, *TIME AND THE FRENCH REVOLUTION: THE REPUBLICAN CALENDAR, 1789–YEAR XIV 1* (2011) (“Together with reshaping the political world, the revolutionaries endeavored to define the republican age with a new system of days, months and years, commemorating the nation's achievements and laying the groundwork for a new future, free from the delusions of the past.”).

⁵³ HILAIRE BELLOC, *THE FRENCH REVOLUTION* 124 (1911).

Revolution, King George III of England continued to reign over the British Empire—just not the American colonies.⁵⁴

Thus, if we understand revolution as a full rejection of the existing order, and not just a political parting of the ways—then the American Revolution seems a surprisingly weak candidate. But if the American Revolution wasn't a real revolution, what else could it have been? One answer, although lawyers and legal academics rarely talk about it this way, is that we might understand the American Revolution as something more akin to secession.

Little in the legal discourse supports this view—no doubt because the courts have so flatly denied the possibility—but political theorists and historians have long debated whether the means by which the American colonies accomplished their independence should be viewed more as secession or revolution. The discourse has roots in the period of the Revolution itself, evident in the contrasting reflections of contemporaneous commentators like Thomas Paine,⁵⁵ Edmund Burke,⁵⁶ and Thomas Jefferson.⁵⁷ These figures fell along a spectrum between extremes, in which Paine saw himself as fomenting revolution,⁵⁸ Burke defended the American Revolution as sensibly constrained in contrast to full-out Revolution,⁵⁹ and Thomas Jefferson moved over time from advocating reform from within the British Empire toward genuine revolutionary zeal.⁶⁰ Debate over how best to characterize what happened then continues just as fervently into modern times.⁶¹

⁵⁴ *George III (r. 1760–1820)*, THE ROYAL FAMILY, <https://www.royal.uk/george-iii-r-1760-1820> (last visited Oct. 14, 2017).

⁵⁵ See THOMAS PAINE, *COMMON SENSE* (1776) (championing the idea of full American independence from Britain).

⁵⁶ See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION OF FRANCE* (J.C.D. Clark ed., Stanford Univ. Press, 2001).

⁵⁷ See generally DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* (1994).

⁵⁸ PAINE, *supra* note 55, at 68 (“The laying a country desolate with fire and sword, declaring war against the natural rights of all mankind, and extirpating the defenders thereof from the face of the earth, is the concern of every man to whom nature hath given the power of feeling . . .”).

⁵⁹ See BURKE, *supra* note 56 (contrasting the worthiness of the restrained campaign for American independence from Britain with the disastrous chaos of the French Revolution).

⁶⁰ MAYER, *supra* note 57, at 25–30 (reviewing the transformation of Jefferson’s ideas from support for “British America” to support for American independence).

⁶¹ See generally Daniel McCarthy, *Was the American Revolution Secessionist?*, AM. CONSERVATIVE (Oct. 5, 2014, 5:03 PM), <http://www.theamericanconservative.com/mccarthy/was-the-american-revolution-secessionist/>. Cf. Brooks D. Simpson, *The*

Today, many scholars hold fast to the idea that the American Revolution was not just revolutionary,⁶² but radical.⁶³ For example, historian Gordon Wood characterizes the Revolution as one “as radical and social as any revolution in history” because, in destroying the monarchy, the colonists set in motion a change that would fundamentally redefine society—albeit in a process that would take decades to fully unfold.⁶⁴ By the early nineteenth century, however, he argues that “American society had been radically and thoroughly transformed,” noting such examples as the destruction of the aristocracy and the advancing position of women.⁶⁵ “One class did not overthrow another; the poor did not supplant the rich[,]” he notes, “[b]ut social relationships—the way people were connected to another—were changed, and decisively so.”⁶⁶ Framing the Revolution in these dramatic but favorable terms is consistent with the cultural origin story that most Americans hold dear.

Others, including conservative icon Russel Kirk and his followers, prefer to cast the American Revolution in much more moderate terms, contrasting the worthy American movement with (what they considered) the undesirable chaos of revolutionary France.⁶⁷ Drawing on the reflections of Edmund Burke, Kirk specifically characterizes what happened in 1776 as “a revolution not made but prevented.”⁶⁸ Conservative philosopher Donald Livingston similarly defends the Revolution as a “secession,”⁶⁹ in direct contrast to the comparatively distasteful concept of revolution:

Secession is often confused with revolution and civil war. The latter two presuppose the modern unitary state. Lockean revolution is an attempt to overthrow the government of a unitary state that has

American Revolution . . . Not the American Secession, CROSSROADS (Oct. 11, 2012), <https://cwcrossroads.wordpress.com/2012/10/11/the-american-revolution-not-the-american-secession/>.

⁶² See, e.g., CRANE BRINTON, *THE ANATOMY OF REVOLUTION* (1952).

⁶³ See generally WOOD, *supra* note 40.

⁶⁴ *Id.* at 5.

⁶⁵ *Id.* at 6, 8.

⁶⁶ *Id.* at 6.

⁶⁷ RUSSELL KIRK, *THE CONSERVATIVE CONSTITUTION* (1990) [hereinafter KIRK, *CONSERVATIVE CONSTITUTION*] (explaining why the American Revolution should not be seen as a revolution according to the modern meaning of the word); RUSSELL KIRK, *PROSPECTS FOR CONSERVATIVES* 28–39 (1956) [hereinafter KIRK, *PROSPECTS FOR CONSERVATIVES*] (discussing the American Revolution as a conservative endeavor).

⁶⁸ KIRK, *CONSERVATIVE CONSTITUTION*, *supra* note 67, at 19 (grounding his analysis in the contemporaneous account of Edmund Burke).

⁶⁹ See, e.g., Livingston, *supra* note 10, at 40–42.

violated its trust. Secession, however, is not revolution because it does not attempt to gain control of the government of a unitary state; rather it attempts to limit the jurisdiction of that government over the territory it occupies. This is a serious matter, but it is not revolution. Its name is “secession.” And the sort of arguments that would justify secession are categorically distinct from the arguments that would justify revolution.⁷⁰

It may be that characterizing the American Revolution as a secession appeals to conservative thinkers of subsequent times⁷¹ because that better aligns this iconic moment of American history with the principles of conservative political theory. Broadly speaking, conservative theorists prefer the maintenance of order to abrupt and destabilizing changes.⁷² For them, framing the American Revolution as a secession enables a much more favorable view of the protagonists of the Revolution, George Washington and his contemporaries. For example, Russel Kirk has argued at length that the American Revolution was a conservative endeavor to protect the rights of English subjects, and that the “founding fathers” embodied the essence of conservatism.⁷³ Perhaps characterizing the founding fathers of the nation as noble, conservative heroes who changed the minimum possible to achieve the necessary goal of independence is more appealing than associating them with a more revolutionary framework, in which they might be viewed as less honorable freedom-fighting terrorists.

Still others recognize the possibility that the Revolution resists categorization because it was more than one thing at a time. For example, Professor David Armitage considers the possibilities for

⁷⁰ *Id.* at 45.

⁷¹ Of course, the most conservative thinkers at the time of the actual Revolution were probably the Tories—English loyalists who returned to England or fled to Canada—who took a decidedly different view of the Revolution. *See, e.g.*, THOMAS B. ALLEN, *TORIES: FIGHTING FOR THE KING IN AMERICA’S FIRST CIVIL WAR* (2010).

⁷² *Cf.* KIRK, *PROSPECTS FOR CONSERVATIVES*, *supra* note 67, at 38–39 (defining conservatism to include a preference for order and deep respect for the past, and “[a] prejudice against sudden change, a feeling that it is unwise to break radically with political prescription, an inclination to tolerate what abuses may exist in present institutions out of a practical acquaintance with the violent and unpredictable nature of doctrinaire reform.”); *see also* William F. Buckley Jr., *Our Mission Statement*, *NAT’L REV.* (Nov. 19, 1955, 8:00 AM), <http://www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr> (noting that the journal of conservative thought “stands athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it”).

⁷³ *See* KIRK, *PROSPECTS FOR CONSERVATIVES*, *supra* note 67, at 28–39 (discussing the American Revolution at length).

characterizing the American Revolution as a rebellion, a secession, and a civil war—concluding that it was both a civil war and a secession, with the Declaration of Independence as its pivotal act.⁷⁴ We ordinarily understand secession to involve one polity breaking off from another, with no requirement for a change in the form of governance, whereas a revolution implies a dramatic change in governance but says nothing about breaking off. By this logic, France could only have experienced a revolution, while the United States might have experienced both.

And yet still others see the American Revolution as a species within the larger genus of anticolonial political movements, with independent justification that effectively distinguishes them from all other categories.⁷⁵ To this end, Thomas Barrow argues that “colonial wars for independence or ‘liberation’ are generally different from revolutions of the French or Russian variety,” with an “inner logic of their own,” concluding that “after all, the American Revolution was just that—a colonial war for liberation.”⁷⁶

In fact, many political theorists resist the characterization of the American Revolution as a secession for exactly this reason. For them, a critical component of the analysis is the overarching political context in which the early American conflict unfolded: that of European imperialism.⁷⁷ These scholars view secession as something like a political divorce—a separation that happens between parties of relatively equal political standing. But the power dynamics in imperial relationships are different from those between competing parts of a single polity, such as those between the joined territories that would later divide into Norway and Sweden, or Slovakia and the Czech Republic. By this view, the wresting of independence by a colony from an imperial power is an inherently revolutionary act.⁷⁸

⁷⁴ Armitage, *supra* note 10, at 47.

⁷⁵ See, e.g., Barrow, *supra* note 40, at 454 (arguing that the American Revolution was a colonial war for liberation, and noting that “[c]olonial wars for independence have an inner logic of their own”); see also LOUIS HARTZ, *THE FOUNDING OF NEW SOCIETIES: STUDIES IN THE HISTORY OF THE UNITED STATES, LATIN AMERICA, SOUTH AFRICA, CANADA, AND AUSTRALIA* (1969) (analyzing the American Revolution through his theoretical inquiry into the process of postcolonial development and in terms of “fragmentation” from European traditions).

⁷⁶ Barrow, *supra* note 40, at 454.

⁷⁷ See, e.g., Simpson, *supra* note 61.

⁷⁸ See, e.g., Bernard Bailyn, *Political Experience and Enlightenment Ideas in Eighteenth-Century America*, 67 *AM. HIST. REV.* 339 (1962); cf. PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776* (1991).

When a colony throws off the yoke of dominant imperial power, goes this wisdom, it is making revolution. Accordingly, framing the American Revolution as a secession elides the political dynamics underlying the significance of the change.⁷⁹

Some who reject the secession theory of the American Revolution are also suspicious of its strategic use by those hoping to justify the attempt at secession to which we turn next—that by the southern states over national conflicts involving the institution of slavery. The concern is that characterizing the favorably-viewed American Revolution as a secession from Britain confers legitimacy on the later attempt by the Confederate states to secede from the Union⁸⁰—an attempt that, by most contemporary perspectives, wants for legitimacy.⁸¹

In the end, of course, much of this debate is over semantics: everything in it hinges on how we define “secession” and “revolution,” and work like Armitage’s reminds us that it is entirely possible to understand the American origin story as an example of both. Perhaps the Declaration of Independence was a secessionist act, creating an American independence in theory that was ultimately consummated by revolution. Today, the debate is rhetorical at most, but ironic nonetheless—in that a nation that has so clearly concluded that secession is constitutionally unavailable may have, itself, been conceived in secession. In the end, perhaps all we can do is consider whether the anticolonial movement that resulted in what we call the “American Revolution” also had an underappreciated secessionist element.

Either way, it is interesting to note the strong emotional valance that seems to attend the vocabulary we use to describe our national origins. For some Americans, on both sides of the issue, whether this aspect of American history is framed as a secession or a revolution appears to make an identity-implicating difference. (And this almost certainly tells us more about ourselves than it tells us about anything in the historical record.)

⁷⁹ See Barrow, *supra* note 40, at 454.

⁸⁰ See, e.g., Livingston, *supra* note 10, at 45 (characterizing the American Civil War not as a civil war but as an act of secession, and comparing it in kind to the American Revolution).

⁸¹ See, e.g., Simpson, *supra* note 61 (critiquing efforts to legitimize the Civil War, or other modern attempts at secession, by characterizing the American Revolution as a secession).

C. *The American Civil War*

We now turn to the more obvious, and perhaps the more important moment in American history that implicates secession: the American Civil War.⁸² In the early 1860s, the southern states attempted to withdraw from the United States to form a separate nation, resulting in the bloodiest war ever fought on U.S. territory.⁸³ The Civil War represents the culmination of a conflict between northern and southern states that had been brewing since the beginning of the nation's history over the institution of slavery. The southern states had developed agricultural economies that hinged on forced labor by slaves imported from Africa and their progeny, born domestically and held in captivity.⁸⁴ Most northern states did not use slave labor, and many northerners had urged the end of slavery since the Revolutionary era.⁸⁵

While the northern and southern states were united in their effort to achieve independence from Britain, they remained divided over the role of slavery in the new United States. The dispute could not be reconciled at the Constitutional Conventions, and evidence of the ongoing conflict mars the original American Constitution.⁸⁶ Mixed messages about the legitimacy of slavery can be found in various parts of the early text. The Preamble promises the blessings of justice and liberty for all,⁸⁷ but these promises were clearly not intended for

⁸² For a modern intellectual history of the Confederate secession movement, see Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate Constitution* (U. Chi., Working Paper No. 512, 2015); see also Armitage, *supra* note 10, at 46 (noting that the American Civil War may have been more of a rebellion than a civil war, because the Confederacy sought sovereignty only over its own territory, and not the nation as a whole).

⁸³ See generally THE U.S. MILITARY ACADEMY, *THE WEST POINT HISTORY OF THE CIVIL WAR* 28–29 (Clifford J. Rogers et al. eds., 2014).

⁸⁴ See, e.g., Drew Gilpin Faust, *The Rhetoric and Ritual of Agriculture in Antebellum South Carolina*, 45 J.S. HIST. 541, 544–58 (1979) (“By the early nineteenth century the South had thoroughly committed itself to an economic, social, and racial order based on profitable staple-crop agriculture carried out by a labor force of black slaves.”); Peter Kolchin, *Reevaluating the Antebellum Slave Community: A Comparative Perspective*, 70 J. AM. HIST. 579, 587 (1983) (discussing the shifting American slave population from imported persons to those born into captivity).

⁸⁵ See, e.g., William G. Shade, *Antislavery*, in 1 *DICTIONARY OF AMERICAN HISTORY* 208 (Stanley I. Kutler ed., 3d ed. 2003).

⁸⁶ See *infra* notes 87–91 and accompanying text.

⁸⁷ See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

those held in bondage (nor, until much later, for women, indigenous people, and others).⁸⁸ Slavery was not expressly permitted by the original Constitution, but neither was it prohibited—and the institution of slavery was implicitly legitimized by a number of clauses acknowledging it as a constituent part of American society.

For example, the original Constitution included the now notorious “Three-Fifths Clause,” which clarified that slaves would be counted as three-fifths the value of free persons (excluding Indians) for the purpose of legislative districting.⁸⁹ The Constitution allowed Congress to ban the slave trade after 1808, reflecting the preferences of the northern states.⁹⁰ But reflecting the preferences of the southern states, the same clause expressly allowed the slave trade at least until then, and it implicitly allowed the continued use of domestically born slaves thereafter. The early Constitution also mandated the return of fugitive slaves to their owners,⁹¹ a point that would particularly inflame relations between northern abolitionists and southern slaveholders in the coming years.

Unresolved tensions over slavery simmered for almost a century until they finally boiled over on the eve of the Civil War. Regional conflict intensified as the United States extended westward, and the north and south clashed over whether the practice of slavery would be permitted in new states.⁹² After heated debate in Congress, a legislative compromise was enacted in 1820—the Missouri Compromise—that would allow slavery to continue in the south, but

⁸⁸ See U.S. CONST. amends. XIII–XV. Nonwhites did not gain equal liberties with whites until the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, ratified in 1865, 1868, and 1870, respectively. See *id.* Women were granted voting rights by the Nineteenth Amendment, ratified in 1920. U.S. CONST. amend. XIX.

⁸⁹ U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons.*”) (emphasis added).

⁹⁰ U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .”).

⁹¹ U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

⁹² *E.g.*, SUSAN DIXON, THE TRUE HISTORY OF THE MISSOURI COMPROMISE AND ITS REPEAL (1898).

prohibit its expansion into new American states north of Texas.⁹³ However, a subsequent law passed in 1854 allowed slavery in any state that approved it by popular vote, sparking outrage among abolitionists.⁹⁴ Fugitive Slave Acts were enacted to criminalize assistance given to slaves escaping into free states, further enraging abolitionists.⁹⁵ In frustration over these and other conflicts, southern states experimented with acts of nullification—declaring that they would no longer consider themselves bound under the Constitution’s Supremacy Clause to federal laws with which they disagreed.⁹⁶

In 1860 and 1861, the southern states finally decided to withdraw from the United States to form a separate union, the Confederate States of America.⁹⁷ Territorial referenda were taken in Texas, Tennessee, Virginia, and Arkansas, each declaring victory for secession. The balloting in each state suffered from problems of fraud and intimidation that call into question the legitimacy of their results,⁹⁸ but they still may have reflected a majority view among the voting population.

⁹³ Missouri Compromise, ch. 22, 3 Stat. 545, 548 (1820); *see also* DIXON, *supra* note 92, at 54.

⁹⁴ Kansas-Nebraska Act, ch. 59, 10 Stat. 277, 289 (1854). The 1854 Kansas-Nebraska Act admitted Kansas and Nebraska as slave-states notwithstanding the Missouri Compromise, invalidating the earlier law and allowing new states to become slave-holding by popular vote. *Id.*

⁹⁵ *See, e.g.*, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) (“An Act To amend, and supplementary to, the Act entitled An Act respecting Fugitives from Justice, and Persons escaping from the service of their Masters, approved February twelfth, one thousand seven hundred and ninety-three.”).

⁹⁶ *See, e.g.*, *South Carolina Ordinance of Nullification, November 24, 1832*, YALE L. SCH., http://avalon.law.yale.edu/19th_century/ordnull.asp (last visited Oct. 14, 2017) (declaring that certain laws imposing duties on the importation of foreign commodities were constitutionally unauthorized and therefore “null, void, and no law, nor binding upon this State”). Non-slavery related justifications for southern secession (like these) have also been posed, including southern resentment over the 1861 Morrill Tariff, which conferred special protections for infant industries in the North. *See id.* Tariffs provoking southern ire did lead to the nullification crisis of the 1830s, but they are not among the grievances listed in the Confederate States’ declarations of secession, which center squarely on slavery. *See id.* Some scholars suggest that the tariff grievance has been used opportunistically as a post hoc justification for secession, emphasizing that it is not supported by historical evidence. *See, e.g.*, MARC-WILLIAM PALEN, *Debunking the Civil War Tariff Myth*, IMPERIAL & GLOBAL FORUM (Mar. 2, 2015), <http://imperialglobalexeter.com/2015/03/02/debunking-the-civil-war-tariff-myth/>.

⁹⁷ THE UNITED STATES MILITARY ACADEMY, *supra* note 83, at 28–29.

⁹⁸ *See, e.g.*, Walter L. Buenger, *Secession*, TEX. ST. HIST. ASS’N (June 15, 2010), <http://www.tshaonline.org/handbook/online/articles/mgs02> (describing the political and military buildup to the Texas referendum and observing that “[t]he seizure of the San Antonio arsenal, the evacuation of federal troops, and the sending of delegates to Montgomery made the secession referendum appear an insignificant afterthought”).

The Texas case is illustrative. In January 1861, sixty-one representatives from the Texas state legislature convened a state convention on secession, acting without clear legal authority.⁹⁹ Some parts of the state sent elected delegates to the convention, while other parts of the state did not.¹⁰⁰ The delegate elections suffered from serious procedural problems that cast doubt on their fairness, even by nineteenth century standards.¹⁰¹ Many were elected by voice vote at public meetings that unionists were discouraged from attending, or that were ignored by unionists who considered them illegal, so the resulting delegate pool overwhelmingly favored secession.¹⁰² Afterward, the legislature passed an act ratifying these elections, attempting to provide posthoc legal authority for the convention that had been lacking at the outset.¹⁰³

On February 1, 1861, the convention adopted an ordinance of secession that would be put to a popular vote on February 23, 1861.¹⁰⁴ But even before the popular vote was held, Texas sent delegates to participate in the formation of the Confederate States of America.¹⁰⁵ Meanwhile, the convention also empowered a newly formed Committee on Public Safety to seize all federal property in Texas, including the federal arsenal, and ordered the evacuation of three thousand federal troops in Texas.¹⁰⁶ The ordinance of secession ultimately passed by a wide margin in the popular vote,¹⁰⁷ but there was also evidence that voters with unionist sentiments were actively

⁹⁹ *Texas v. White*, 74 U.S. 700, 704 (1868).

¹⁰⁰ *Id.*

¹⁰¹ Walter L. Buenger, *Secession Convention*, TEX. ST. HIST. ASS'N (June 15, 2010), <https://tshaonline.org/handbook/online/articles/mjs01> [hereinafter Buenger, *Secession Convention*].

¹⁰² *Id.*

¹⁰³ *White*, 74 U.S. at 704.

¹⁰⁴ *Id.*

¹⁰⁵ Buenger, *Secession*, *supra* note 98.

¹⁰⁶ *Id.*

¹⁰⁷ *See White*, 74 U.S. at 704 (noting that the ordinance was adopted by a vote of 34,794 to 11,235); RANDOLPH B. CAMPBELL, *AN EMPIRE FOR SLAVERY: THE PECULIAR INSTITUTION IN TEXAS, 1821–1865* 229 (1989) (noting that Texans approved secession by a different margin: 46,129 to 14,697).

intimidated with threats of violence.¹⁰⁸ Variations on this theme later unfolded in Tennessee,¹⁰⁹ Virginia,¹¹⁰ and Arkansas.¹¹¹

Other states joined the Confederacy without pretense of a popular referendum. They claimed the right to secede as an aspect of state sovereignty, severing political and economic ties with the northern states. The rest of the Union did not accept their departure. While the southern states claimed rights of self-determination, the north maintained that secession was beyond state authority. As the Supreme Court would later affirm, the Constitution nowhere considers a right of secession, nor does it provide for territorial referenda on the question.¹¹² The “rebellion” of the southern states, as it was framed in the north, was ultimately quelled by force in a war that claimed over 600,000 lives.¹¹³ After a protracted and devastating conflict, the southern forces were vanquished in 1865, the Constitution was

¹⁰⁸ Buenger, *Secession*, *supra* note 98 (noting evidence of violence and intimidation, and that “[f]ew opponents of secession spoke out on the eve of the secession referendum. Most probably did not vote”).

¹⁰⁹ *E.g.*, NELSON & SHERIFF, *supra* note 20, at 54 (describing procedural irregularities, voter fraud, military intimidation and other problems compromising the Tennessee referendum). Tennessee held a statewide referendum choosing secession on June 8, 1861, but the referendum was subsequent and secondary to the political determination that had already been reached by the state government. *Id.* The legislature had already declared secession, secession troops had already been mobilized, and pro-union meetings were broken up. *Id.*

¹¹⁰ RICHARD ORR CURRY, *A HOUSE DIVIDED: A STUDY OF STATEHOOD POLITICS AND THE COPPERHEAD MOVEMENT IN WEST VIRGINIA* 36–37 (1964) (describing fear and intimidation preceding the Virginia referendum, including coerced oaths of loyalty to the Confederacy even before the ballot was taken). Virginia’s referendum was held after troops had already been marshalled, compromising neutral balloting in some areas of the state. *Id.* Many votes, especially from the Union-leaning western portion of the state, were lost or discarded and therefore never counted. *Ratification of the Ordinance of Secession*, W. VA. ARCHIVES & HIST., <http://www.wvculture.org/history/statehood/statehood06.html> (last visited Oct. 15, 2017). In lieu of these missing ballots, the governor added to the final count his own estimate of what he believed these votes would have been, *Referendum on Secession*, LIBR. VA, http://edu.lva.virginia.gov/online_classroom/union_or_secession/unit/10/referendum_on_secession (last visited Oct. 15, 2017), hastening West Virginia’s secession from Virginia and from the Confederacy a few months later. *West Virginia Statehood*, W. VA. ARCHIVES & HIST., <http://www.wvculture.org/history/archives/statehood.html> (last visited Oct. 15, 2017).

¹¹¹ MICHAEL B. DOUGAN, *CONFEDERATE ARKANSAS: THE PEOPLE AND POLICIES OF A FRONTIER STATE IN WARTIME* 46 (1976) (describing threats and intimidation associated with the Arkansas referendum).

¹¹² *See White*, 74 U.S. at 726.

¹¹³ *Civil War Facts*, CIVIL WAR TRUST, <http://www.civilwar.org/learn/articles/civil-war-facts/> (last visited Oct. 15, 2017).

amended to forbid slavery in all forms, and the nation set to work rebuilding itself for the second half of its existence.¹¹⁴

Yet even after it was clear that the nation would remain intact, serious legal questions confronted the weakened Union. Secession had been militarily blocked, but the question that would then preoccupy the Supreme Court was: what happens now? How should the nation interpret its new relationship with the would-be secessionist states? They had disavowed their position within the Union and then been forced back, but the new question was: were they even still *states*? Or were they something else now? Given that they had returned only by conquest, what did that mean for the apparatus of state governments that were still intact (and which had led the rebellion)? Did they have the same degree of sovereign authority as before the war? Were their representatives eligible to serve in Congress? Would they participate in governance over the rest of the Union? Or were they now just conquered territory, subject to direct federal rule until further dispositions were made?

The U.S. Supreme Court confronted the underlying question—“were the Confederate states still states?”—in *Texas v. White*, an 1868 case addressing the comparatively arcane issue of whether Texas state war bonds would be honored.¹¹⁵ To answer that question, the Court first had to decide whether Texas had even been a state in the immediate aftermath of the Civil War.¹¹⁶ After wrestling with the issue and its implications, the Court ultimately concluded that Texas was indeed a state, and had been for the purpose of resolving the war bonds issue.¹¹⁷ Indeed, all the states that had attempted to secede were still states, and had never stopped being states—because, simply put, the U.S. Constitution does not allow for secession.¹¹⁸ As the Court intoned, there *is* no secession in the United States.¹¹⁹ Therefore,

¹¹⁴ *Id.*

¹¹⁵ *White*, 74 U.S. at 700.

¹¹⁶ *Id.* at 724 (“Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?”).

¹¹⁷ *Id.* at 731 (“It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.”).

¹¹⁸ *Id.* at 726 (“The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.”).

¹¹⁹ *Id.* at 725 (“The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.”).

whatever these states may have claimed, they hadn't actually seceded—they had just very badly misbehaved. More accurately, the individuals involved had misbehaved—because the states themselves had nothing to do with it.¹²⁰

The Court observed that immediately after the war, the president was entitled to establish a provisional government (composed of leaders other than those that had led the rebellion) in order to fulfill his constitutional duty to guarantee republican government throughout the land.¹²¹ Since then, however, elections had been taken, republican representation was in place, and Texas and its sister states could return to normal constitutional status.¹²² Of note, during the period of provisional governance after the war, the sitting legislature took advantage of the temporary southern disenfranchisement in Congress to pass the Fourteenth Amendment to the Constitution,¹²³ which guarantees equal protection of law to all people within its jurisdiction, including former slaves in southern states.¹²⁴ It is a great irony, perhaps, that this critically important part of our Constitution, articulating dearly held American ideals, arose during such circumstances of procedural irregularity—but it is also suggestive of the disorderliness, contingency, and occasionally improvisational quality of governance during times of great historical challenge.¹²⁵

Regardless, *Texas v. White* definitely interpreted the constitutional boundaries of national-level secession, establishing that secession is

¹²⁰ *See id.* at 727.

¹²¹ *Id.* at 729.

¹²² *See id.* at 731.

¹²³ U.S. CONST. amend. XIV.

¹²⁴ *Id.* The period immediately after the war was one of staggering political instability for the United States. Even before the war's end, the President's December 8, 1863, Proclamation to Congress envisioned a forced Union, but one that would invite the southern delegations back to Washington to participate in federal governance. *See* Proclamation No. 11, 13 Stat. 737 (1863). However, procedural irregularities, including the sitting Congress' refusal to seat the southern delegation, enabled Congress to enact (in the absence of that delegation) what would become among the most important pieces of the U.S. Constitution: the Fourteenth Amendment, promising equal protection of the law to all people, including slaves. *See* Dyett v. Turner, 439 P.2d 266, 270–74 (Utah 1968) (providing detailed recitations of the procedural irregularities resulting in this troubled historical moment); Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that it Poses to our Democratic Government*, 11 S.C. L.Q. 484, 487–500 (1959).

¹²⁵ *But see generally* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (defending the origins of the Fourteenth Amendment on grounds that all procedural irregularity has been subsequently legitimized by overwhelming legal, political, and cultural ratification).

unavailable within the U.S. constitutional order, unless the remaining states all consent. Courts continue to heed this precedent today, as did the Alaska Supreme Court in 2010, when it rejected the ballot initiative proposing Alaskan secession.¹²⁶ In that decision, the Alaska justices quoted the memorable words of the U.S. Supreme Court in *White*:

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.¹²⁷

The Union is thus protected against all but consensual departure or revolution—and that revolution, unlike the U.S. Civil War, must succeed in order to accomplish its goals.

II

FEDERALISM IN THE UNITED STATES

In lieu of secession, the United States has developed a very different model for working out regional conflict: the federal system of governance, which divides sovereign power between a central administration and regional subunits.¹²⁸ In the United States, separately sourced authority is vested in the national government and fifty regional states.¹²⁹ The Constitution confers enumerated sovereign powers on the national government, while reserving residual sovereign authority associated with the pre-constitutional police powers of the states.¹³⁰ The states further disseminate their

¹²⁶ *Kohlhaas v. State*, 223 P.3d 105 (Alaska 2010) (discussed *supra* notes 34–37 and accompanying text).

¹²⁷ *Id.* at 110 n.22 (citing *Texas v. White*, 74 U.S. 700, 725–26 (1868)).

¹²⁸ See RYAN, TUG OF WAR, *supra* note 16, at 7–8.

¹²⁹ See *infra* notes 135–46 (describing how authority is allocated among the national and state governments).

¹³⁰ See *infra* notes 135–146; see also *Wyeth v. Levine*, 555 U.S. 555, 564–71 (2009) (discussing the presumption against federal preemption of state authority under their traditional “police powers” to protect the public).

power locally among municipal agencies, and occasionally laterally, in partnerships with other states by constitutionally permissible interstate compacts.¹³¹

The innovation of federalism was first conceived during the debates of the American Constitutional Convention of 1787, about a decade after former colonies separated from Britain during the American Revolution.¹³² The leaders of the newly independent states had been forced to concede the failure of their first attempt at a comparatively decentralized confederation (under the 1777 Articles of Confederation), and they now sought to establish a more enduring union that would better balance the competing objectives of autonomy and interdependence that inform good pluralist governance.¹³³ Today, the dynamics of American federalism provide multiple simultaneous pathways for regional dissent and differentiation, interjurisdictional competition, and collaborative governance.¹³⁴

The availability of multiple sites for political contest and innovation has proven useful for many reasons, but one of them is surely the way that federalism effectively rechannels regional frustration away from calls for secession and into a more cohesive fabric of vibrant multilevel governance. This Part reviews the overall structure of American federalism, the good governance values that undergird it, and the role of federalism theory in navigating inevitable constitutional uncertainty about how to reconcile competing values in different policy contexts.

¹³¹ See generally FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925* (1951).

¹³² See generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* (2007).

¹³³ See RYAN, *TUG OF WAR*, *supra* note 16, at 70–73.

¹³⁴ See, e.g., *id.*; Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) [hereinafter Ryan, *Negotiating Federalism*]; Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007) [hereinafter Ryan, *Seeking Checks and Balance*]; see also Erin Ryan, *Environmental Federalism's Tug of War Within*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 355 (Kalyani Robbins ed., 2015) [hereinafter Ryan, *Environmental Federalism*]; Erin Ryan, *The Once and Future Challenges of American Federalism: The Tug of War Within*, in 1 *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* 267 (Alberto López Basaguren & Leire Escajedo San Epifanio eds., 2013).

A. *The Structure and Function of American Federalism*

American federalism is structured as a system of dual sovereignty, constitutionally conferring certain sovereign powers on the new national government while reserving others to the regional states that predated the Union (and to those that would later follow, on “equal footing” with the original states).¹³⁵ The Constitution confers, or “enumerates,” a list of powers for national governance, including both specific powers (such as those over postal roads, copyrights, and war)¹³⁶ and comparatively open-ended powers (to tax and spend for the public welfare, to regulate interstate commerce, and to regulate as “necessary and proper” for carrying out other enumerated powers).¹³⁷ Where legitimate national governance conflicts with state or local law, the central (or “federal”) law has preemptive force under the Constitution’s Supremacy Clause.¹³⁸ However, the Tenth Amendment clarifies that those powers not delegated to the national government are reserved to the states (or to the people),¹³⁹ indicating that separate sovereign authority is constitutionally intended at both levels simultaneously.¹⁴⁰

The existence of the Supremacy Clause implicitly recognizes that there have always been areas of potential overlap between state and national jurisdiction, and the increasing complexity of national interdependence over time has widened the scope of jurisdictional overlap¹⁴¹ (in addition to further overlap with municipal governance within states, regional partnerships between states, and separately sovereign American Indian tribes).¹⁴² Nevertheless, the structure of dual sovereignty ensures that no level of government has absolute authority, and neither the federal nor state governments can fully displace the other. In congruence with the principle of subsidiarity, regulatory matters are generally governed at the most local level with

¹³⁵ See *Coyle v. Smith*, 221 U.S. 559, 566 (1911) (interpreting the equal footing doctrine); RYAN, TUG OF WAR, *supra* note 16, at 7–8.

¹³⁶ U.S. CONST. art. I, § 8, cls. 7, 8, 11.

¹³⁷ *Id.* cls. 1, 3, 18.

¹³⁸ *Id.* art. VI, cl. 2.

¹³⁹ *Id.* amend. X.

¹⁴⁰ See RYAN, TUG OF WAR, *supra* note 16, at 8–10.

¹⁴¹ *Id.* at 146–47.

¹⁴² See Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 34–44 (2010) [hereinafter Gerken, *Federalism All the Way Down*] (discussing the dynamics of jurisdictional overlap at multiple levels).

capacity to resolve them.¹⁴³ The constitutional enumeration of powers tracks those regulatory arenas in which central governance is presumed necessary, and leaves other matters to the competence of state or local regulation.¹⁴⁴ As such, the multiple American sovereigns deal separately with those issues that fall within their exclusive regulatory purviews, and they engage in ways ranging from collaboration to competition to cope with issues that straddle jurisdictional boundaries.¹⁴⁵

While federalism diffuses authority vertically between the national and state levels of government, related separation-of-powers doctrines diffuse authority horizontally among the three branches of American government¹⁴⁶ (which are then replicated vertically downward within each of the fifty states). As a result, the American system is easily critiqued as confusing, prone to jurisdictional conflict, and needlessly inefficient.¹⁴⁷ Yet Americans generally tolerate these problems in light of the benefits federalism has conferred in balancing our competing political demands for local autonomy and national interdependence. Demands for local autonomy, which predominate in claims for secession, are addressed by the increased political agency and independence available within state and local governance in the federal system. These demands are moderated by the recognition of national interdependence on matters that include national security, commercial productivity, environmental protection, and the normative commitments of constitutional law.

Ideally, federalism strengthens local autonomy and meaningful self-determination by preserving state regulatory authority over matters where state or local government have superior governing capacity. For example, in the United States, traditional areas of state and local competence include zoning, land use regulation, local policing, and elections.¹⁴⁸ Yet while federalism protects these zones

¹⁴³ RYAN, TUG OF WAR, *supra* note 16, at 59–60.

¹⁴⁴ *Id.* at 61–63.

¹⁴⁵ *See id.* at 265–70 (discussing various ways that state and federal actors cope with jurisdictional overlap).

¹⁴⁶ Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4, 5 (2015) [hereinafter Ryan, *Negotiating Federalism and the Structural Constitution*].

¹⁴⁷ *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906–07 (1994). *See also* MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008) (following up the earlier work).

¹⁴⁸ RYAN, TUG OF WAR, *supra* note 16, at xii.

of local autonomy, it does so within the bounds of strong central authority for coping with the kinds of collective action problems that can undermine atomistic local regulation—such as those that would hamper the management of interstate commerce, boundary-crossing environmental harms, or national defense.¹⁴⁹ Local autonomy is also constrained within the ambit of strong central authority for vindicating national consensus on core constitutional rights, such as freedom of expression and equal protection of the laws. American federalism relies on national power to ensure that these rights are upheld, even when enforcing them requires overriding local autonomy in a given circumstance.¹⁵⁰ For example, even if you live in a region of the country where the majority of citizens wish you and your political party would stop speaking, your rights to engage in political speech will be protected, even against contrary state or local laws.¹⁵¹

B. Federalism as a Strategy for Good Governance

In pursuit of this elusive balance, federalism in the United States and elsewhere is thus designed to cultivate the “sweet spot” between fully local and fully centralized governance, encouraging regulatory systems in which decisions are made at the level where they make the most sense. Importantly, however, and often overlooked in the older literature, federalism’s “sweet spot” is dynamic and subject to renegotiation over time, through the processes of competition and collaboration that are facilitated by healthy multilevel governance.¹⁵² While American federalism is often characterized as a naked contest between state and federal power, it is better understood as a site of negotiation in which political actors at various levels of government

¹⁴⁹ See Ryan, *Environmental Federalism*, *supra* note 134, at 362–66 (discussing the role of American federalism in policing collective action problems and enforcing core constitutional promises).

¹⁵⁰ U.S. CONST. amends. I, XIV.

¹⁵¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (invalidating state laws criminalizing desecration of the American flag for violating the First Amendment’s protection of symbolic speech).

¹⁵² See RYAN, *TUG OF WAR*, *supra* note 16, at 266–67 (discussing negotiated federal governance); Ryan, *Environmental Federalism*, *supra* note 134, at 412–13 (drawing examples of negotiated governance from environmental law); see also Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1784–85 (2005) [hereinafter Gerken, *Dissenting by Deciding*]; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–60 (2009) [hereinafter *Uncooperative Federalism*]; Ryan, *Negotiating Federalism*, *supra* note 134, at 4–5.

to work out a continually shifting balance between competing good governance values.¹⁵³ Indeed, the best way to understand federalism in general, and perhaps American federalism in particular, is in terms of these underlying values.

Federalism is, at its heart, a strategy for good governance—based on a set of clear values that we hope federalism will help us accomplish.¹⁵⁴ In a previous book, *Federalism and the Tug of War Within*, and other work, I extrapolate five foundational values that American federalism is designed to advance, based on analysis of the legislative history of the Constitutional Convention, later Supreme Court interpretations, congressional and executive pronouncements, and the academic literature.¹⁵⁵ These emphasize the maintenance of (1) checks and balances between opposing centers of power that protect individuals, (2) governmental accountability and transparency that enhance democratic participation, (3) local autonomy that enables interjurisdictional innovation and competition, (4) centralized authority to manage collective action problems and vindicate core constitutional promises, and finally (5) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone.¹⁵⁶

As I have described in this previous work, governance in pursuit of these values advances individual dignity within healthy

¹⁵³ See RYAN, TUG OF WAR, *supra* note 16, at xi–xii.

¹⁵⁴ *Id.* at xiv.

¹⁵⁵ *Id.* at 34–67. In the original book and Article, I discuss the four federalism values most directly voiced in American federalism jurisprudence: checks and balances, transparency and accountability, localism values, and the problem-solving value implied by subsidiarity. The values of centralized authority are implied by the value of intergovernmental problem-solving synergy, but in later exploration of the material, I added more overt discussion of how centralized power counterbalances localism values within federalism. See Ryan, *Environmental Federalism*, *supra* note 134, at 362–64. Because they are implicit in the creation of an overall nation-state, the values of central administration are debated less directly in the many cases that presume centralized national authority but debate its appropriate relationship with subnational authority. However, as the discourse has progressed, I believe it is worth highlighting it more explicitly as the fifth in the series.

¹⁵⁶ See RYAN, TUG OF WAR, *supra* note 16, at xiv, 34–67 (specifically detailing the values of checks, transparency, localism, and synergy and dealing more holistically with the nationalism values necessarily implied by a federal system); Ryan, *Environmental Federalism*, *supra* note 134, at 362–64 (summarizing these and explicitly adding centralized authority).

communities.¹⁵⁷ It enhances democratic governance principles of self-determination while recognizing the responsibilities that group members hold toward one another. It creates a laboratory for innovations in governance from multiple possible sources¹⁵⁸ and facilitates multiple planes of negotiation among competing interests and interest groups.¹⁵⁹ It appropriately honors both sides of the subsidiarity principle—the directive to solve problems at the most local level possible¹⁶⁰—which notably couples its preference for local autonomy in governance with the expectation of effective regulatory problem-solving (and by implication, at whatever level will achieve it).¹⁶¹ Good federalism-sensitive governance is especially powerful at diffusing the kinds of regional tension that could foment secession under other circumstances.

Nevertheless, identifying what federalism is designed to accomplish is only the first part of the puzzle. The harder task is figuring out how these goals fit together. The core federalism values are doubtlessly all good things in and of themselves, and American governance has long aspired to realize each of them independently. Yet our success has been complicated by the fact that each individual value is suspended in a web of tensions with the others. No matter how we may try, the hard truth is that they all cannot always be satisfied simultaneously in any given context. The regulatory choices we make inevitably involve tradeoffs, in which one value may

¹⁵⁷ The following description of the original work in RYAN, TUG OF WAR, *supra* note 16, at 34–67, closely tracks my description of it in a later work, Ryan, *Environmental Federalism*, *supra* note 134, at 362–64.

¹⁵⁸ For the most famous statement of this principle, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (comparing the states to laboratories in which to “try novel social and economic experiments”).

¹⁵⁹ See RYAN, TUG OF WAR, *supra* note 16, at 265–367 (discussing negotiated federalism among the various levels and branches of government). See generally Ryan, *Negotiating Federalism*, *supra* note 134 (introducing the analysis that evolved into this final part of the book).

¹⁶⁰ See, e.g., Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001). For various accounts of the subsidiarity principle, see David P. Currie, *Subsidiarity*, 1 GREEN BAG 2d 359 (1998); James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KAN. L. REV. 1377 (2004); John F. Stinneford, *Subsidiarity, Federalism, and Federal Prosecution of Street Crime*, 2 J. CATH. SOC. THOUGHT 495 (2005); W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT’L L. 61 (1995); Jared Bayer, Comment, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U.L. REV. 1421 (2004).

¹⁶¹ See RYAN, TUG OF WAR, *supra* note 16, at 59–66.

partially eclipse another.¹⁶² Conflicts between localism and nationalism are obvious, but the network of tension runs much deeper and among all the various values.

For example, consider the tension between the values of (1) checks on sovereign authority and (2) transparent and accountable government. Federalism promotes a balanced system of checks on sovereign authority at both the state and federal level,¹⁶³ enabling the useful tool of governance that I have previously called “regulatory backstop,” which protects individuals against government excess or abdication by either side.¹⁶⁴ When sovereign authority at one level fails to protect the vulnerable, regulatory backstop ensures that it remains available to do so at a different level.

The history of American civil rights law reveals especially famous examples, including periods in which the federal government protected the rights of African Americans forsaken by state law¹⁶⁵ and more modern examples in which states have acted first to protect rights unrecognized by federal law, including those of LGBT citizens¹⁶⁶ and the owners of property subject to eminent domain.¹⁶⁷ Environmental law showcases equally compelling examples of dual sovereignty at its best,¹⁶⁸ including the 1970s era in which the federal government acted to prevent excessive air and water pollution when most states had failed to do so,¹⁶⁹ and the current era in which many

¹⁶² See *id.* at 38–39 (and more generally at 34–67).

¹⁶³ *Id.* at 39–44 (discussing checks and balances).

¹⁶⁴ *Id.* at 42–43 (discussing regulatory backstop).

¹⁶⁵ See, e.g., Marilyn K. Howard, *Discrimination*, in 1 THE JIM CROW ENCYCLOPEDIA 222, 226–27 (Nikki L.M. Brown & Barry M. Stentiford eds., 2008).

¹⁶⁶ See, e.g., COLO. REV. STAT. §§ 24-34-401 to -402 (2007) (barring discrimination in hiring based on sexual orientation); VT. STAT. ANN. tit. 15, § 8 (2009) (amending marriage definition from union between a man and woman to a union between two people); see *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (asserting that the Massachusetts constitution is more protective of civil rights than the federal Constitution in invalidating a state statutory ban on same-sex marriages). More recently, the Supreme Court removed an important federal obstacle to state efforts to legalize gay marriage. See *United States v. Windsor*, 133 S. Ct. 2675 (U.S. 2013) (invalidating parts of the federal Defense of Marriage Act); *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015) (establishing a federal constitutional right to same-sex marriage); cf. Gerken, *Dissenting by Deciding*, *supra* note 152 (discussing San Francisco’s decision to issue gay marriage licenses despite contrary state law).

¹⁶⁷ See, e.g., Tim Hoover, *Eminent Domain Reform Signed*, KAN. CITY STAR, July 14, 2006, at B2 (reporting on new state law property rights).

¹⁶⁸ See RYAN, TUG OF WAR, *supra* note 16, at xxvii–xxix.

¹⁶⁹ See Clean Water Act, 33 U.S.C. § 1251 (2006); Clean Air Act, 42 U.S.C. § 7401 (2006).

states are moving to address the causes and effects of climate change at a time when the national government has not succeeded.¹⁷⁰

The availability of regulatory backstop, however, exacts a price. The very maintenance of checks and balances between state and national actors itself frustrates the independent value of transparency, making it harder for the average citizen to navigate the lines of governmental accountability (and know whom to blame for bad policy choices).¹⁷¹ This is especially problematic in realms of extreme jurisdictional overlap, such as environmental or criminal law, where legitimate state and federal governance takes place simultaneously.¹⁷²

As I describe in *Federalism and the Tug of War Within*, if all we cared about were the good governance values of transparency and accountability, the best alternative would be a unitary system of government, such as that used in China.¹⁷³ Alternatively, if checks and balances were the primary governance ideal, then we should do away with the Constitution's Supremacy Clause,¹⁷⁴ which gives the national government a powerful edge in many state-federal conflicts.¹⁷⁵ If localism values were primary, then our best course of action would be a confederal system among powerful states and a weak center, lacking federal constitutional supremacy (not unlike the nation's first experiment with the Articles of Confederation).¹⁷⁶

Instead, Americans tolerate the open tension between checks and transparency, and the obvious conflicts between localism and strong national power, and all the other tradeoffs that palpably manifest among the five values—precisely to reap the federalism-facilitated benefits of local autonomy when desirable, national uniformity when preferable, regulatory backstop when necessary, and

¹⁷⁰ See, e.g., Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 PUBLIUS 432 (2009); Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006).

¹⁷¹ See RYAN, TUG OF WAR, *supra* note 16, at 43–50.

¹⁷² See *id.* at 145–80.

¹⁷³ *Id.* at 48.

¹⁷⁴ U.S. CONST. art. VI, cl. 2.

¹⁷⁵ See RYAN, TUG OF WAR, *supra* note 16, at 43–44.

¹⁷⁶ See *id.* Notably, this unsuccessful experiment was rejected in favor of true federalism. See *id.*

interjurisdictional problem-solving when inevitable.¹⁷⁷ Strong local authority expands opportunities for democratic participation, encourages well-tailored governance, facilitates diversity, inspires innovation, and encourages interjurisdictional competition.¹⁷⁸ Strong national power resolves collective action problems, facilitates markets, manages border-crossing harms and large-scale public commons, speaks to the world with a unitary voice, and vindicates nonnegotiable constitutional promises.¹⁷⁹ Ideally, coupling healthy local authority with strong national power facilitates the kind of dynamic interjurisdictional synergy in governance that makes for the most effective regulatory response—drawing on the distinctive forms of governance capacity that develop respectively at the local and national level to solve pressing interjurisdictional problems that require both.¹⁸⁰

C. *Constitutional Indeterminacy and Federalism Theory*

With values-based competition implicit in all federalism quandaries, each dilemma demands that decision-makers choose, consciously or otherwise, how to prioritize among these conflicting federalism values. Navigating that tension toward resolution usually provides good direction on the associated issue of where to assign regulatory responsibility along the continuum from local to national governance, but it is not always conclusive.¹⁸¹ Allocating authority and reconciling these competing values are daunting tasks, and ongoing federalism controversies in such realms as environmental law, health care law, immigration, marriage rights, and religious expression highlight the deep interpretive tensions involved in navigating American federalism.¹⁸²

Indeed, these controversies underscore the fundamental problem for managing federalism in the United States, which is that of

¹⁷⁷ See *id.* at 34–67.

¹⁷⁸ See *id.* at 50–59.

¹⁷⁹ See, e.g., EDWARD MILLICAN, *ONE UNITED PEOPLE: THE FEDERALIST PAPERS AND THE NATIONAL IDEA* (1990).

¹⁸⁰ See RYAN, *TUG OF WAR*, *supra* note 16, at 59–66, 145–80, 265–367. See generally Ryan, *Negotiating Federalism*, *supra* note 134 (exploring intergovernmental bargaining as a means of harnessing interjurisdictional synergy).

¹⁸¹ See RYAN, *TUG OF WAR*, *supra* note 16, at 8–17, 145–80 (discussing inherent indeterminacy in the Constitution's federalism directives and the resulting interjurisdictional gray area in federalism sensitive governance).

¹⁸² See Ryan, *Environmental Federalism*, *supra* note 134, at 2–3 and accompanying notes (listing ongoing federalism controversies in American governance).

constitutional indeterminacy. The American Constitution mandates—but incompletely describes—the system of dual sovereignty implied by the various federalism directives scattered throughout its text.¹⁸³ Applying these directives in the absence of clearer constraints necessarily requires interpreters to rely, consciously or otherwise, on some exogenous theory of federalism for help—to fill in the constitutional blanks that inevitably arise when these relatively vague federalism directives are applied to specific cases and controversies.¹⁸⁴ The theoretical tools employed must be consistent with constitutional mandates, but they cannot be found entirely within the document itself. Those tasked with policymaking and adjudication need some kind of operating theory to interpret it.

As a result, American federalism jurisprudence has vacillated substantially over time, as the Supreme Court, Congress, and other interpreters have experimented with different theoretical models to fill in these blanks.¹⁸⁵ At various points in American history, including the early years of the republic and during the Supreme Court’s “New Federalism revival” of the 1990s, the Court grounded its federalism adjudication in an idealized model of “dual federalism.”¹⁸⁶ Dual federalism privileges the check-and-balance value in idealizing a system of mutually exclusive state and federal jurisdictional spheres—notwithstanding the marked departure of this ideal from the reality of an American system suffused with jurisdictional overlap.¹⁸⁷

By contrast, the preferred model of federalism during the New Deal era of the 1940s and the Great Society era of the 1960s

¹⁸³ See RYAN, TUG OF WAR, *supra* note 16, at xiv. These directives include powers enumerated to the different branches of government in various articles and amendments (for example, those delegated to Congress under Article I, Section 8 or Section 5 of the Fourteenth Amendment), the recognition of ongoing state authority in various articles and amendments (for example, the responsibilities for national elections conferred in Article I, Section 2, and Article II, Section 1), and the relationship between them suggested by the Tenth Amendment. *See id.* at 8–9.

¹⁸⁴ *See id.* at 7–33 (discussing the possibility of multiple models of American federalism, all consistent with constitutional directives).

¹⁸⁵ *See id.* at 68–104 (analyzing the different theoretical models of federalism in use over the history of American governance and jurisprudence).

¹⁸⁶ *See id.* at 98–104, 109–44 (reviewing dual federalism and analyzing the Rehnquist Court’s New Federalism revival).

¹⁸⁷ See MORTON GRODZINS, THE AMERICAN SYSTEM 8, 60–153 (Daniel J. Elazar ed., 2d ed. 1984); RYAN, TUG OF WAR, *supra* note 16, at 145–80 (reviewing the interjurisdictional challenge to dual federalism). In fact, jurisdictional overlap is so prevalent in American governance that it has been famously compared to “marble cake,” with entangled swirls of interlocking local and national law. *See id.* at xii.

privileged nationalism in service to the problem-solving value—elevating the need for strong federal power to solve critical societal problems after the Great Depression and during the Civil Rights Movement—but with less regard for the values of checks, localism, or accountability (and arguably fomenting the social frustration that would later lead to the modern New Federalism and Tea Party Movements).¹⁸⁸ The federalism discourse is only just beginning to appreciate how this unresolved “tug of war” for privilege among competing federalism values has led to the Supreme Court’s notoriously fluctuating federalism jurisprudence.¹⁸⁹

Notwithstanding the dual federalism model that continues to influence the Supreme Court’s jurisprudence, the model of cooperative federalism predominates in the actual practice of federalism-sensitive governance.¹⁹⁰ Cooperative federalism acknowledges the reality of jurisdictional overlap between legitimate state and federal interests, and it allows for regulatory partnerships in which state and federal actors take responsibility for interlocking parts of a larger regulatory whole.¹⁹¹ This model seeks a middle ground between the excessive jurisdictional separation of pure dual federalism and the fear that New Deal federalism would obliterate dual sovereignty. Nevertheless, the critics of cooperative federalism

¹⁸⁸ See RYAN, TUG OF WAR, *supra* note 16, at 84–88, 98–104 (reviewing New Deal Federalism and the rise of New Federalism and the Tea Party).

¹⁸⁹ The literature on American federalism has exploded in recent years with interesting new perspectives on dynamic and innovative federalism theory. While all sources are too numerous to list, a worthy tour would include: ERWIN CHEREMINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING (2009); Rubin & Feeley, *supra* note 147; RYAN, TUG OF WAR, *supra* note 16; ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); *Uncooperative Federalism*, *supra* note 152; William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Gerken, *Federalism All the Way Down*, *supra* note 142; Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014). More traditional and historical perspectives are also an important part of the recent federalism discourse: *see, e.g.*, JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN (2009); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012); LACROIX, *supra* note 132; PURCELL, *supra* note 132.

¹⁹⁰ See RYAN, TUG OF WAR, *supra* note 16, at 89–98 (reviewing cooperative federalism).

¹⁹¹ *Id.* at 94–95.

variously assail the model as overly ad hoc, undertheorized, and coercive.¹⁹²

In response to shortcomings in these paradigmatic models, a host of new scholarship is developing newer theoretical conceptions of American federalism,¹⁹³ including the Balanced Federalism model that I proposed in *Federalism and the Tug of War Within*.¹⁹⁴ Balanced Federalism emphasizes dynamic interaction among the various levels of government and shared interpretive responsibility among the three branches of government, with the overall goal of achieving a balance among the competing federalism values that is both dynamic and adaptive over time.¹⁹⁵ The full elaboration in the book helps provide the missing theoretical justification for the tools of cooperative federalism that predominate in modern American governance, as well as support for future moves by environmental governance toward even greater dynamic engagement.¹⁹⁶ It emphasizes the skillful deployment of legislative, executive, and judicial capacity at each level of federalism-sensitive governance, allocating authority based on the specific forms of decision-making in which they excel.¹⁹⁷

These newer theoretical models demonstrate how well-crafted multi-scalar governance deflates the more traditional presumption of

¹⁹² See *id.* at 96–98 (discussing frustration with cooperative federalism), 273–76 (discussing the federalism safeguards debate); see also GREVE, *supra* note 189 (assailing cooperative federalism as coercive and collusive).

¹⁹³ See, e.g., CHERMERINSKY, *supra* note 189; GREVE, *supra* note 189; SCHAPIRO, *supra* note 189.

¹⁹⁴ See generally RYAN, *TUG OF WAR*, *supra* note 16.

¹⁹⁵ See *id.* at 181–214, 265–70, 339–670 (discussing what the Balanced Federalism model involves).

[A] series of innovations to bring judicial, legislative, and executive efforts to manage [the tug of war] into more fully theorized focus. [Balanced Federalism] mediates the tensions within federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of the three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing. [This initial foray] imagines three successive means of coping with the values tug of war within federalism, each experimenting with different degrees of judicial and political leadership at different levels of government. Along the way, the analysis provides clearer theoretical justification for the ways in which the tug of war is already legitimately mediated through various forms of balancing, compromise, and negotiation.

Id. at xi–xii.

¹⁹⁶ See generally *id.*

¹⁹⁷ See *id.*; RYAN, *Negotiating Federalism and the Structural Constitution*, *supra* note 146.

“zero-sum federalism,” a misunderstanding of state-federal relations with roots in dual federalism that continues to haunt the American discourse.¹⁹⁸ Zero-sum conceptualizations of federalism assume that the state and federal governments are locked in an antagonistic, winner-takes-all competition for power, in which every victory by one side constitutes a loss for the other.¹⁹⁹ While this is sometimes true,²⁰⁰ closer examination of federalism-sensitive governance reveals that the line between state and federal power is just as often a project of negotiation, through ongoing processes of consultation and coordination that can afford advantages to both sides.²⁰¹ Understanding federalism as a project of continual negotiation among all levels of government—preserving both regional preferences and national commitments—is a critical feature of healthy multilevel governance, and one that has helped strengthen the American Union against the forces of fragmentation.²⁰²

III

NATIONHOOD AMID FORCES OF POLITICAL ENTROPY AND GRAVITY

American federalism has surely helped galvanize the United States against further efforts to disassociate,²⁰³ but it is also important to recognize the limitations of American federalism, and perhaps federalism in general, when the pressures toward secession are most manifest. Federalism is a useful strategy for good governance in many pluralist societies, and an alternative favored over secession by

¹⁹⁸ Ryan, *Negotiating Federalism and the Structural Constitution*, *supra* note 146, at 25; *see also* Ryan, *Negotiating Federalism*, *supra* note 134, at 4–5.

¹⁹⁹ Ryan, *Negotiating Federalism and the Structural Constitution*, *supra* note 146, at 25; *see also* Ryan, *Negotiating Federalism*, *supra* note 134, at 4–5.

²⁰⁰ *See, e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012) (holding most of a state immigration statute preempted by federal law).

²⁰¹ *See* Ryan, *Negotiating Federalism and the Structural Constitution*, *supra* note 146, at 25; *see also* Ryan, *Negotiating Federalism*, *supra* note 134, at 4–5.

²⁰² *See* Alice Kaswan, *Cooperative Federalism and Adaptation*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 188 (Kalyani Robbins ed., 2015); Hannah J. Wiseman, *Evolving Energy Federalism: Current Allocations of Authority and the Need for Inclusive Governance*, in *LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 114 (Kalyani Robbins ed., 2015).

²⁰³ *See, e.g.*, Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 657 (1991) (“Any society that constitutes its government through a federal system—one that embodies a decision to allow for movement among states and to limit the scope of national law—necessarily creates a built-in safeguard against political or economic oppression,” and accordingly, Sunstein argues, secession.).

generally accepted principles of international law²⁰⁴—but it cannot solve all problems, nor can it overcome all obstacles. Nor is the American model appropriate in all political contexts. Drawing from the U.S. example and that of other federal nations, this Part offers observations about the core dynamics with which federal systems must contend in any context, and that exert pressure on federal unions toward the extremes of further fragmentation or further centralization.

A. The U.S. Model and the Alternatives

First, it is important to acknowledge the critical differences between federalism in the United States and elsewhere that may limit the transferability of lessons from the American experience at all. Federalism operates very differently between the United States and, say, Europe—because there are very different demands on the institution in each place, relating to the substantially greater regional diversity that exists in Europe for reasons of history, culture, and geography. While there is significant cultural, ethnic, and ideological diversity within the United States, it is far less regionally specific than it is among the nation states of Europe (and even within some of them, such as Belgium, Switzerland, or Spain), where distinct regional groups maintain separate languages, religions, and other social organizing principles.²⁰⁵

In the United States, cultural and political diversity within individual states can be even greater than it is between separate states, so state-based diversity is less likely to cleave along uniform racial, ethnic, or linguistic lines.²⁰⁶ In the European Union, and within federal European nation-states with regionally distinctive ethnic or language subcultures, federalism operates more directly as a vindicator of local autonomy among cultural groups that may not otherwise be willing to cooperate.²⁰⁷ In facilitating shared governance

²⁰⁴ See *In re Secession of Québec*, [1998] 2 S.C.R. 217, 222, 292 (Can.).

²⁰⁵ Cf. Rubin & Feeley, *supra* note 147; SCHAPIRO, *supra* note 189 (noting that substantial U.S. cultural diversity is much more diffuse than regionally concentrated).

²⁰⁶ See Rubin & Feeley, *supra* note 147; see also SCHAPIRO, *supra* note 189.

²⁰⁷ See, e.g., Vernon Bogdanor, *Forms of Autonomy and the Protection of Minorities*, 126 DAEDALUS 65 (1997) (discussing the persistence of regionally based religious conflict in Switzerland until constitutional federalism was used to reconcile differences between Protestant and Catholic cantons). Federalism has also been suggested as a means for governing Iraq. Renad Mansour, *Rethinking Recognition: The Case of Iraqi Kurdistan*, 3 CAMBRIDGE J. INT'L & COMP. L. 1182 (2014). In fact, the Iraqi Kurds have declared a “federal region” in the northern third of the country to protect their autonomy. Matt

by historically independent populations, federalism does a wholly different job in Europe—and even in Canada—than it does in the United States, where the differences between the original thirteen British colonies were far less meaningful.

For this reason, observations about American federalism may be appropriately limited to its context, and a fuller inquiry would more deeply engage other models of devolution in constitutional design. These might include models of “asymmetrical federalism,” in which different subnational constituents with similar constitutional status are granted different powers and degrees of autonomy,²⁰⁸ in contrast to the U.S. model of symmetrical federalism, in which all states possess equivalent authority in an identical relationship to the national government.²⁰⁹ Canada,²¹⁰ India,²¹¹ Russia,²¹² and several other nations with formal federal systems use different varieties of asymmetrical federalism, and several unitary nations without formal federalism use related systems of devolution, including the United Kingdom,²¹³ Spain,²¹⁴ and Indonesia.²¹⁵ Importantly, the literature on

Bradley et al., *Kurds Declare ‘Federal Region’ in Syria, Says Official*, WALL ST. J. (Mar. 24, 2016, 12:41 PM), <http://www.wsj.com/articles/kurds-declare-federal-region-in-syria-says-official-1458216404>. However, some suggest that dissolution into regional subunits may be preferable. See Tim Arango, *Reviving an Old Idea for Iraq Still in Turmoil: Splitting it Up*, N.Y. TIMES, Apr. 29, 2016, at A6.

²⁰⁸ See, e.g., ALIXANDRA FUNK, *ASYMMETRICAL FEDERALISM IN THE MULTINATIONAL FEDERATION: A COMPARATIVE STUDY OF ASYMMETRICAL FEDERALISM IN CANADA AND SPAIN* (2010); Alain-G. Gagnon, *Taking Stock of Asymmetrical Federalism in an Era of Exacerbated Centralization*, in *CONTEMPORARY CANADIAN FEDERALISM: FOUNDATIONS, TRADITIONS, INSTITUTIONS* (Alain-G. Gagnon ed., 2006); R. Michael Stevens, *Asymmetrical Federalism: The Federal Principle and the Survival of the Small Republic*, 7 *PUBLIUS* 177 (1977).

²⁰⁹ See Alfred C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 *J. DEMOCRACY* 19 (1999).

²¹⁰ See Gagnon, *supra* note 208.

²¹¹ See M. Govinda Rao & Nirvikar Singh, *Asymmetric Federalism in India* (U.C. Santa Cruz, Working Paper No. 04–08, 2004), <http://www.escholarship.org/uc/item/0v59942g.pdf;origin=repeccitec>.

²¹² See Jorge Martinez-Vazquez, *Asymmetric Federalism in Russia: Cure or Poison?*, in *FISCAL FRAGMENTATION IN DECENTRALIZED COUNTRIES: SUBSIDIARITY, SOLIDARITY AND ASYMMETRY* 227 (Richard M. Byrd & Robert D. Ebel eds., 2007).

²¹³ See ANDREW BLICK & GEORGE JONES, *A FEDERAL FUTURE FOR THE UK: THE OPTIONS* 7 (2010), <http://www.lse.ac.uk/government/Publications/A-Federal-Future-for-the-UK.pdf>.

²¹⁴ See Joan Marc Simon, *Federalism and the Future of Spain*, *FED. UNION* (Oct. 5, 2011), <http://www.federalunion.org.uk/federalism-and-the-future-of-spain/>.

²¹⁵ See Jacques Bertrand, *Indonesia’s Quasi-Federalist Approach: Accommodation Amid Strong Integrationist Tendencies*, 5 *INT’L J. CONST. L.* 576 (2007).

constitutional design in ethnically divided societies would also be of great service to this larger project.²¹⁶

Even so, some commonalities can be found among pluralist societies coping with regional tension, about which the U.S. experience remains informative.

B. The Forces of Fragmentation and Centralization

Most patent are the forces of fragmentation and centralization that are ever-present in pluralist societies, in the United States and beyond. When political conflicts become severe, fragmentation can foment violent movements for secession, as the United States experienced during its Civil War,²¹⁷ although it can also lead to consensual disassociation, as between Norway and Sweden,²¹⁸ the Czech Republic and Slovakia,²¹⁹ and as may be happening today in Belgium.²²⁰ At the same time, the counterbalancing forces of political interdependence can help hold a union together, or (as some critics argue has occurred in the United States) overly consolidate central power.²²¹ In each case, federalism must contend with the opposing political forces of entropy and gravity.

²¹⁶ See, e.g., CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? (Sujit Choudhry ed., 2008); Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 15 (Andrew Reynolds ed., 2002); Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, 42 NOMOS 253 (2000).

²¹⁷ See *supra* Part I.B.

²¹⁸ Margaret Moore, *On National Self-Determination*, 45 POL. STUD. 900, 910 (1997) (discussing the 1905 secession of Norway from Sweden); Øyvind Østerud, *Introduction: The Peculiarities of Norway*, 28 W. EUR. POL. 705, 706 (2005). But see Glen M.E. Duerr, *Peaceful and Mutual Parliamentary Dissolution: Dissolved Unions in Sweden-Norway (1905) and Czechoslovakia (1993) and Their Lessons for Europe*, 35 SPRAWY NARODOWOSCIOWE 29, 38 (2009) (noting that Norway's unilateral declaration of independence surprised Sweden, and that "[s]ome Swedish ministers advocated war to retain Norway").

²¹⁹ Duerr, *supra* note 218, at 39 (noting that Czechoslovakia's disassociation truly was a peaceful "[v]elvet [d]ivorce").

²²⁰ *Id.* at 32 (discussing the potential disassociation of Belgium); Bogdanor, *supra* note 207, at 65 (discussing the potential failure of Belgian federalism to reconcile the competing interests of distinct linguistic communities).

²²¹ See *infra* note 236 (discussing the Tea Party, Tenthers, and New Federalism movements).

1. *Political Entropy: Toward Disassociation*

With regard to those forces that operate to pull polities apart, federal unions must endure considerable pressures toward disassociation.²²² Federalism may strive for that “sweet spot” between local autonomy and national interdependence, but it only works when there is broad enough agreement on an overarching national purpose. In the United States and elsewhere, successful federalism hinges on there being enough shared values to support the national consensus that a central government is empowered to protect against competing local impulses. When the national consensus breaks down, so does the legitimacy of enabling centralized government to trump local autonomy.

Drawing from the example of the American Civil War, regional conflict culminated into full-blown rebellion when the consensus between northern and southern states broke down over conflicting constitutional provisions regarding human rights and slavery. Setting aside pressing questions about the morality of the southern position, the loss of sufficient national consensus weakened the perceived legitimacy of national power among southern secessionists. After all, from their perspective, what legitimizes the exercise of national power against local autonomy if there is no longer a national consensus for it to enforce? For this reason, federal unions must work hard against the forces of political entropy that can draw distinctive regional subcultures farther and farther apart, pushing for regulatory decision-making at the more local or regional level.

²²² While the legal literature focuses on whether there are international or domestic rights to secession as a legal matter, the political science and moral philosophy literature is rich with compelling discussion on whether there are moral rights to secession that flow from legitimate political claims for self-determination. *See, e.g.*, CHRISTOPHER WELLMAN, *A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION* (2005); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990) (setting forth moral justification for a conditional right to self-determination by members of an encompassing group); Christopher H. Wellman, *A Defense of Secession and Political Self-Determination*, 24 PHIL. & PUB. AFF. 142 (1995) (arguing for a hybrid model of political justification for a limited right secession, when its proponents have a legitimate claim for self-determination and the resulting new state is able to perform the rights-protective functions of government without too much externalized harm); Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1997) (arguing in favor of remedial rights-based justifications for secession over ascriptive or associative group rights-based justifications); David Copp, *International Law and Morality in the Theory of Secession*, 2 J. ETHICS 219 (1998) (arguing for a broad right of secession among territorial and political societies). *But see* Sunstein, *supra* note 203 (arguing against formalizing rights of secession within constitutional systems).

In extreme cases, however, where regionally-related conflict has fractured a nation beyond repair, separation may be the only effective remedy—or at least a remedy that seems morally justified.²²³ As the author of one International Court of Justice opinion acknowledged in assessing Kosovo’s bid for independence from Serbia, claims for secession are especially persuasive in circumstances showing extreme oppression, disenfranchisement, or marginalization of a regional group within the overall nation.²²⁴

For example, the United States and other world leaders supported the secession of South Sudan from the Republic of Sudan in 2011, after fifty years of post-colonial civil war and entrenched regional conflict over ethnic and religious violence, access to valuable natural resources, and political marginalization.²²⁵ Tragically, further fragmentation along tribal lines continues to fray the new nation even after independence, as local militias that formed during the civil wars engage in violent competition over political power and oil revenues.²²⁶ Although oppression by the north was alleviated by its secession, South Sudan’s ongoing struggles with poverty and corruption are increasingly exacerbated by more local ethnic rivalries

²²³ See also Buchanan, *supra* note 222, at 34–38 (arguing that remedial rights-based claims for secession are most justifiable, because, consistent with Lockean theory of revolution, “[w]hen the people suffer prolonged and serious injustices, the people will rise”). Writing in 1997, Professor Buchanan referenced genocidal policies against the Kurds in northern Iraq to demonstrate the basis for a remedial right of secession—an especially poignant example given failed Kurdish independence referendum that would follow twenty years later in 2017. See *infra* text accompanying notes 239–43 (discussing the contemporary secession movement in Iraqi Kurdistan).

²²⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 166–68, 176, 205–08, 217 (July 22) (separate opinion by Trindade, J.) (summarizing recent atrocities in Kosovo, arguing that self-determination becomes a right of severely subjugated peoples, and concluding that international respect for territorial integrity is waived by states that practice ethnic cleansing). See also Joel Day, Research Paper, *The Remedial Right to Succession*, POTENTIA 19, 20 (2012) (arguing that ICJ precedent understands self-determination as the externally recognized self-governance of an “insular, often oppressed, minority” within a state and that “the crux of the matter is whether possessing a state is a universal right or if groups may only secede in response to human rights violations”).

²²⁵ See Jeffrey Gettleman, *Struggle Over, Independent South Sudan Rejoices*, N.Y. TIMES, July 10, 2011, at A6 (discussing the secession of South Sudan).

²²⁶ See Max Fisher, *9 Questions About South Sudan You Were Too Embarrassed to Ask*, WASH. POST (Dec. 30, 2013), <https://www.washingtonpost.com/news/worldviews/wp/2013/12/30/9-questions-about-south-sudan-you-were-too-embarrassed-to-ask/> (discussing ongoing ethnic strife in South Sudan).

within the new nation²²⁷—perhaps lending sad credence to concerns that secession can sometimes exacerbate the ethnic conflicts that give rise to secession in the first place.²²⁸ Governing South Sudan amid such extreme fragmentation—or at least protecting its most vulnerable people in the meanwhile—remains an urgent international challenge.²²⁹

2. *Political Gravity: Toward Interconnection*

The forces of political entropy are thus formidable, but opposing forces of political gravity operate simultaneously to pull federal participants closer and closer together, especially in the present day.

Federalism nurtures the “sweet spot” between autonomy and interdependence, but the forces of interdependence have been gathering strength over time.²³⁰ Few communities exist in full isolation of others now, if they ever did. People migrate, intermarry, and interact across cultural and geographical boundaries. Activities within one community can cause changes within others. Disparate polities help and harm one another by the choices they make, purposefully or otherwise. Within federalism, the principle of subsidiarity directs that regulatory decisions be taken at the most local level possible, but the same rationale preempts fully local management of regulatory problems with boundary-crossing or “spillover” impacts to neighboring communities, where other local governments lack the legal or practical capacity to respond.²³¹ Indeed, the list of regulatory issues threatening spillover impacts grows larger as the global village grows seemingly smaller. Climate change, refugee crises, regional political instability, international markets, the

²²⁷ See Jeffrey Gettleman, *City of Hope in South Sudan is Now One of Fear*, N.Y. TIMES, Mar. 11, 2016, at A1 (describing local rivalries).

²²⁸ See, e.g., Buchanan, *supra* note 222, at 45 (noting that secession can exacerbate the ethnic conflicts that led to the secession because when one ethnic minority secedes, that often creates new ethnic minorities with new grievances, or reverses prior patterns of grievances); Sunstein, *supra* note 203, at 634 (arguing that recognizing rights of secession “would increase the risks of ethnic and factional struggle”).

²²⁹ Rick Gladstone, *U.N. Peacekeeping Chief Issues Warning on South Sudan*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/world/africa/south-sudan-war.html?_r=0 (“The leader of United Nations’ peacekeeping operations offered a dire appraisal of South Sudan on Tuesday, saying the world’s youngest nation is sliding further into mayhem with no sign that its antagonists want peace.”).

²³⁰ See RYAN, TUG OF WAR, *supra* note 16, at 145–80; see also Ryan, *Seeking Checks and Balance*, *supra* note 134, at 567–95.

²³¹ See RYAN, TUG OF WAR, *supra* note 16, at 59–66.

Internet, and diseases like Ebola, Zika, and measles all exemplify the ways in which we are ever more interconnected.

The complexity of the modern world—in which we are bound together along planes of international public health, multinational commercial enterprise, global environmental systems, and international corridors of travel and migration—means that there are fewer and fewer truly local decisions that can be made without boundary-crossing consequences.²³² Regional subdivisions within a state, let alone nation-states themselves, can hardly make policy in these arenas without accounting for the decisions of others, or the impacts of their own decisions on others. But if one group's decisions will have meaningful consequences beyond its jurisdictional boundaries, what justifies that group's authority to make decisions for others?

The legitimacy of strong local authority to contradict national policy is weakened when the decisions locals wish to make have consequences beyond their own jurisdictional boundaries.²³³ This intuition underlies many modern assertions of national authority in unions like the United States, where increasing commercial, environmental, and health-related sources of national interdependence have justified new regulatory reach from the center.²³⁴

C. Suspended Between Autonomy and Interdependence

The forces of political gravity, pushing for regulatory decision making at the central level, can thus mitigate claims for regional autonomy at the very same time that the forces of political entropy strain against claims for national authority.

In a healthy federal system—one that has maintained the “sweet spot” over time—these forces will operate in opposition, fortifying the union against challenges from both extremes. The durability of the American union suggests a solid balance—although critics from both sides alternatively complain that the American federation either

²³² See sources cited *supra* note 230.

²³³ See sources cited *supra* note 230.

²³⁴ See, e.g., RYAN, TUG OF WAR, *supra* note 16, at 145–80; Ryan, *Environmental Federalism*, *supra* note 134.

devolves too much authority for efficient national governance²³⁵ or has centralized beyond acceptable boundaries for local autonomy.²³⁶

Yet even mature unions face threatening disturbances in the federal equilibrium, let alone those newly formed. Recent examples in Canada, Iraq, Spain, and the United Kingdom demonstrate the challenges of maintaining healthy unions amidst these competing forces. While federalism has held some nations together against regional cleavage, it can act as a double-edged sword in others, with the potential to either relieve or exacerbate fragmentation.

1. Regional Marginalization in Québec and Kurdistan

The Canadian experience reveals how even an established federal union is vulnerable to the forces of fragmentation. There, the narrow failure of a popular referendum for secession in Québec—driven in part by allegations of linguistic and cultural marginalization—prompted the Canadian Supreme Court to analyze the secession issue in light of the four implicit principles of the Canadian Constitution: democracy, federalism, the rule of law, and the protection of minorities.²³⁷

In a 1998 case frequently cited by constitutional scholars worldwide, the Court held that according to these principles, a territorial referendum could not allow unilateral secession without constitutional amendment²³⁸—but that a successful referendum

²³⁵ See, e.g., sources cited *supra* note 147.

²³⁶ See, e.g., GREVE, *supra* note 189; see also RYAN, TUG OF WAR, *supra* note 16, at xviii–xxiii, 89–104 (discussing the contemporary Tea Party and Tenthers movements, which critique the over-centralization of American governance and these movements within the overall context of the New Federalism revival).

²³⁷ *In re Secession of Québec*, [1998] 2 S.C.R. 217, 292 (Can.).

[T]he Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Québecers votes on a clear question in favour of secession.

Id.

²³⁸ *Id.* at 265.

The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Québec of their will to

would obligate the rest of Canada to engage with the dissenting province to negotiate consensual solutions to the sources of dissatisfaction.²³⁹ The decision left the nuances of such a process for political actors to settle.²⁴⁰ Yet in recognizing the need for genuine, interjurisdictional negotiation to address the concerns driving separatism, the decision represents a sage approach to mediating the competing themes of autonomy and interdependence on which strong federalism is founded. The failure of the Québec secession movement pleased some and disappointed others, but federalism has continued to hold strong in Canada since the Supreme Court's decision, in which all sides found respect for their positions.

It is difficult to predict the course of another combustible secession movement that continues to unfold in the semiautonomous Kurdistan region of Iraq. There, the vast majority of voters recently endorsed the creation of an independent Kurdish state, in a 2017 referendum sponsored by the regional Kurdish government.²⁴¹ In Iraq, the creation of semiautonomous regional federalism has not quelled the

secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession.

Id.

²³⁹ *Id.* at 266.

The clear repudiation by the people of Québec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

Id.

²⁴⁰ *Id.* at 221–22.

[I]n the event of demonstrated majority support for Québec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations.

Id.

²⁴¹ See Martin Chulov, *More than 92% of Voters in Iraqi Kurdistan Back Independence*, GUARDIAN (Sept. 28, 2017, 7:05 PM), <https://www.theguardian.com/world/2017/sep/27/over-92-of-iraqs-kurds-vote-for-independence>; Bethan McKernan, *Kurdistan Referendum Results: 93% of Iraqi Kurds Vote for Independence, Say Reports*, INDEPENDENT (Sept. 27 2017, 5:33 PM), <http://www.independent.co.uk/news/world/middle-east/kurdistan-referendum-results-vote-yes-iraqi-kurds-independence-iran-syria-a-7970241.html>. Approximately seventy-two percent of 4.5 million registered voters turned out for the referendum, held on September 25, 2017, and ninety-two percent voted “yes” in answer to the question “Do you want the Kurdistan region and the Kurdistan areas outside the administration of the Region to become an independent state?” McKernan, *supra*.

impulse toward sovereign independence among its Kurdish population. This may be because the Kurdish ethnic region extends beyond the political borders of Iraq and into neighboring nations, such as Turkey, but it may also reflect fresh memory of the genocidal oppression of Iraqi Kurds under the Saddam Hussein regime.²⁴²

The independence vote in Iraqi Kurdistan prompted vehement condemnation from the Iraqi central government,²⁴³ which later sent military reinforcement into Kirkuk,²⁴⁴ and it was later rejected as unconstitutional by the Iraqi Supreme Federal Court.²⁴⁵ The referendum was also condemned by the Turkish government, which feared that a Kurdish independence movement would exacerbate Kurdish unrest within its own borders.²⁴⁶

Thus, while federalism can help assuage the forces of political entropy, as it appears to have done in Canada, the Kurdish example indicates that it may not always defeat them.

2. *Devolution in the United Kingdom and Spain*

Moreover, while federalism provides useful tools for mediating these concerns, it may not be effective, or even appropriate, in every historical context—especially those giving rise to deep national anxiety over regional cohesiveness.

²⁴² See MOHAMMED IHSAN, *NATION BUILDING IN KURDISTAN: MEMORY, GENOCIDE, AND HUMAN RIGHTS* (2016) (analyzing the Kurdish independence movement in light of the history of human rights atrocities against Kurds in Iraq).

²⁴³ McKernan, *supra* note 241; David Zucchini & Margaret Coker, *Iraq Escalates Dispute with Kurds After a Vote for Independence*, N.Y. TIMES, Sept. 28, 2017, at A13.

²⁴⁴ Saeed Kamali Dehghan et al., *Iraqi Forces Claim Rapid Progress in Operation to 'Impose Security' on Kirkuk*, GUARDIAN (Oct. 16, 2017, 9:43 AM), <https://www.theguardian.com/world/2017/oct/16/iraqi-army-advances-kirkuk-kurds>; David Zucchini, *Iraqis Capture Key Kurdish City with Little Fight*, N.Y. TIMES, Oct. 17, 2017, at A1. A month after the referendum, the Iraqi central government ordered the army into Kirkuk to “impose security.” Dehghan et al., *supra*.

²⁴⁵ On November 6, 2017, Iraq’s Supreme Federal Court ruled that no region or province can secede from the country. *Iraq Court Rules No Region Can Secede After Kurdish Independence Bid*, N.Y. TIMES (Nov. 6, 2017, 6:03 AM), <https://www.nytimes.com/reuters/2017/11/06/world/middleeast/06reuters-mideast-crisis-iraq-kurds.html>. After the failed referendum, the Kurdish regional president resigned his post. Margaret Coker, *Fallout in Kurds' Independence Vote Claims Longtime President of Region*, N.Y. TIMES, Oct. 30, 2017, at A8.

²⁴⁶ Maher Chmaytelli & Ece Toksabay, *Turkey Raises Oil Threat After Iraqi Kurds Back Independence*, REUTERS (Sept. 28, 2017, 6:06 AM), <https://www.reuters.com/article/us-mideast-crisis-kurds-referendum/turkey-raises-oil-threat-after-iraqi-kurds-back-independence-idUSKCN1C31U8>.

It is here important to acknowledge the double-edged sword that federalism implies under such circumstances. Federalism may provide a safety valve that prevents regional tension from overcoming national unity, but concern that full-blown federalism could dangerously exacerbate fragmentation has led some nations to experiment with less formal systems of pseudo-federal devolution. For example, Great Britain and Spain, two longstanding European nations, are both characterized by strong traditions of regional governance without constitutionally formalized dual sovereignty.²⁴⁷ With only a single source of sovereign authority, these systems are not technically federalism, but they represent another approach to decentralizing regulatory decision-making in order to balance local and national governance in a pluralist society. Scholars have noted that decentralized governance offers many of the benefits claimed by formal federalism,²⁴⁸ and it may be preferable to fully unitary or disaggregated governance where full federalism is a poor fit.

Perhaps attesting to this, Great Britain allowed the possibility of Scottish secession by popular referendum in 2014, but a majority of Scottish voters preferred to remain a semiautonomous region within the overall British union.²⁴⁹ Of note, the possibility of Scottish independence induced the leaders of all three major parties at Westminster to promise, ahead of the referendum, to devolve additional authority to the Scottish Parliament, signaling the salience of the local autonomy issue.²⁵⁰ Exactly which powers will be devolved, and whether other British subdivisions should also have more say over local laws, are both issues that remain undecided.²⁵¹

²⁴⁷ Cf. Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation State*, 54 INT'L & COMP. L.Q. 161, 169 (2005) ("Sub-state forces, including sub-state national societies within plurinational states, have in certain cases been able to negotiate degrees of autonomy within the State. The existence of federal states is an obvious example of this process; but even in unitary States it has been possible for sub-state national societies to secure levels of autonomy, even though in unitary States, such as the U.K. and Spain, these measures of self-rule may not have been formally entrenched in the State's constitution.").

²⁴⁸ See Rubin & Feeley, *supra* note 147.

²⁴⁹ *Scottish Referendum: Scotland Votes 'No' to Independence*, BBC NEWS (Sept. 19, 2014), <http://www.bbc.com/news/uk-scotland-29270441>. The vote was 2,001,926 to 1,617,989 against Scottish secession, or 55.3% "No" to 44.7% "Yes." *Id.*

²⁵⁰ *Scottish Independence: Cameron, Miliband and Clegg sign 'No' Vote Pledge*, BBC NEWS (Sept. 16, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-29213418>.

²⁵¹ *Devolution: After the Scottish Referendum*, UK PARLIAMENT, <http://www.parliament.uk/business/publications/research/scotland-the-referendum-and-independence/devol>

Complicating matters, however, the British vote to exit the European Union has reignited calls for Scottish independence²⁵²—and potentially even Northern Irish secession from the United Kingdom²⁵³—as distinctive regional groups navigate how their own interests, economies, and identities align with the rest of Europe versus the rest of Britain.

The British example shows that devolution can advance the federalism value of enhancing local autonomy without requiring formal federalism. Still, mere decentralization cannot protect the check-and-balance values associated with local autonomy to the same extent as constitutional federalism, with corresponding losses to the availability of strong interjurisdictional competition, regulatory backstop, and other related benefits of federalism.²⁵⁴ Some pseudo-federal subdivisions have chafed against these limitations, urging even greater powers of self-determination.

For example, ferocious political conflict has erupted between the Spanish central government and regional separatists in the autonomous community of Catalonia, whose quest for greater fiscal and political autonomy intensified in 2013.²⁵⁵ The Spanish Constitutional Court firmly rejected Catalonia's bid for sovereign autonomy in 2014, holding that sovereign authority rests only within the central Spanish government,²⁵⁶ and that unilateral secession by

ution-after-the-scottish-referendum/ (last visited Oct. 15, 2017); *see also* *England-Only Votes: What Are the Options?* BBC NEWS (Feb. 3, 2015), <http://www.bbc.com/news/uk-politics-29292721> (discussing possibilities for more local autonomy for England and other regions within the U.K.).

²⁵² Katrin Bennhold, *Amid Divisions in U.K. over 'Brexit,' Nicola Sturgeon Calls for New Referendum on Scottish Independence*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/world/europe/scotland-referendum-independence.html>. *But see* Severin Carrell, *Sturgeon Urged to Delay Scottish Independence Vote Until 2020s*, GUARDIAN (Oct. 7, 2017, 2:00 AM), <https://www.theguardian.com/politics/2017/oct/07/sturgeon-urged-to-delay-scottish-independence-vote-until-2020s>.

²⁵³ *Sinn Fein Wants Vote on Northern Ireland Leaving UK 'as Soon as Possible'*, REUTERS (Mar. 13, 2017, 10:29 AM), <https://www.reuters.com/article/us-britain-eu-nireland/sinn-fein-wants-vote-on-northern-ireland-leaving-uk-as-soon-as-possible-idUSKBN16K28M>.

²⁵⁴ *See supra* notes 164–170 and accompanying text (discussing the benefits of regulatory backstop between opposing centers of sovereign power).

²⁵⁵ DECLARACIÓ DE SOBIRANIA I DEL DRET A DECIDIR DEL POBLE DE CATALUNYANA (Jan. 23, 2013), http://premsa.gencat.cat/pres_fsvp/docs/2013/01/23/20/58/033ae0d1-338c-45d0-badf-dfdbe4b0ede.pdf (last visited Mar. 21, 2016). In 2013, the Catalanian *Generalitat* adopted the Declaration of Sovereignty and Right to Decide of the People of Catalonia. *Id.*

²⁵⁶ S.T.C., Mar. 25, 2014, (BOE-A-2014-3885, No. 042/2014) (Spain), <http://hj.tribunalconstitucional.es/en/Resolucion/Show/23861> (“Article 1(2) of the Spanish Constitution proclaims that ‘national sovereignty belongs to the Spanish people, from whom all State

Catalonia would be unconstitutional.²⁵⁷ Catalonia nevertheless held a popular referendum later that year, with over eighty percent voting for secession—although the low voter turnout of only forty percent clouded the significance of the outcome.²⁵⁸ In 2017, a second referendum prompted violent clashes between Spanish police and Catalanian voters attempting to cast ballots for independence.²⁵⁹ Of six million eligible voters, only 2.26 million participated (a voter turnout that remained near forty-two percent), but the Catalanian government reported that ninety percent voted for secession.²⁶⁰

The ballot triggered a standoff between the central government in Madrid and regional Catalanian leaders that drew worldwide attention. When Catalanian governor Charles Puigdemont waffled between calls from his political base to formally declare independence from Spain and calls from Madrid to affirm the Spanish union, the Spanish government took steps to constitutionally revoke the autonomous status of Catalonia.²⁶¹ In late October, Madrid invoked Article 155 of the Spanish Constitution and announced plans to remove the Catalanian premier, his deputy, and other pro-secessionist members of the Catalanian parliament from their

powers emanate' . . . [a]s in the current constitutional order only the Spanish People are sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power.”).

²⁵⁷ *Id.* Because the Spanish Constitution declares that the unity of the regions under it is indissoluble, unilateral secession by the people of Catalonia was impossible. *Id.* (“It may therefore be inferred that in the constitutional order an Autonomous Community may not unilaterally hold a referendum of self-determination in order to decide on its integration in Spain.”).

²⁵⁸ Patrick Jackson, *Catalonia Vote: No Smiles for Spain*, BBC NEWS: INSIDE EUROPE BLOG (Nov. 10, 2014), <http://www.bbc.com/news/blogs-eu-29994633> (reporting on the outcome of the referendum).

²⁵⁹ Raphael Minder & Ellen Barry, *Catalonia’s Independence Vote Descends into Chaos*, N.Y. TIMES, Oct. 2, 2017, at A1.

²⁶⁰ Jon Sharman et al., *Catalan Independence Referendum: Massive Majority Votes ‘Yes’, Regional Government Says*, INDEPENDENT (Sept. 30, 2017, 4:01 PM), <http://www.independent.co.uk/news/world/europe/catalan-referendum-live-updates-results-polls-spain-catalonia-independence-votes-a7975901.html>.

²⁶¹ See Giles Tremlett, *Puigdemont Speech Gives No Clarity on Catalan Independence*, GUARDIAN (Oct. 10, 2017, 4:58 PM), <https://www.theguardian.com/world/2017/oct/10/puigdemonts-speech-provides-no-clarity-on-catalan-independence>; Ivanna Vallespin, *Puigdemont Letter Fails to Provide Clear Answer on Independence Declaration*, EL PAÍS (Oct. 16, 2017, 12:17 PM), https://elpais.com/elpais/2017/10/16/inenglish/1508138246_000760.html.

posts.²⁶² Meanwhile, hundreds of thousands of unionists took to the streets of Barcelona to protest the Catalan independence movement and pledge their allegiance to a united Spain.²⁶³ Puigdemont fled to Belgium, while the Spanish central government sought his extradition to stand trial for rebellion²⁶⁴ and scheduled new Catalan elections for December.²⁶⁵ As this article goes to press, Spain is in turmoil, and the future resolution remains unclear.

D. Secession and the Morality of Inclusion

The movements for Catalan and Kurdish independence are ongoing, and while it seems unlikely that either will succeed in the near term, it seems equally unlikely that either will be fully extinguished any time soon. Unfolding simultaneously, the two movements have revived international debate over the extent to which secession should be an available remedy for resolving regional conflict. Moreover, they provide a provocative contrast for assessing the legitimacy of differing impetus for secession.

In both contexts, proponents argue that secession is justified by cultural marginalization within the larger nation. Like the Kurds, who suffered atrocities during the regime of Saddam Hussein from the 1980s into the early 2000s, Catalan culture was repressed during the Franco Regime that extended from the late 1930s to the mid 1970s.²⁶⁶ While the Kurds remain relatively isolated within Iraq, however, the opponents of Catalan secession argue that formerly legitimate complaints cultural marginalization under Franco no longer

²⁶² Anabel Diez & Juan José Mateo, *Spanish PM Activates Article 155, Stripping Powers of Catalan Government*, EL PAÍS (Oct. 21, 2017, 3:44 PM), https://elpais.com/elpais/2017/10/21/inenglish/1508587023_487115.html.

²⁶³ Tim Lister, Vasco Cotovio, & Angela Dewan, *300,000 Rally Against Catalan Independence as Autonomy Stripped*, CNN (Oct. 29, 2017, 1:14 PM), <http://www.cnn.com/2017/10/29/europe/catalonia-independence-spain/index.html>.

²⁶⁴ James Badcock & James Crisp, *Deposed Catalan Leader Carles Puigdemont Released by Belgian Judge Pending Extradition Decision*, Telegraph (Nov. 5, 2017, 11:42 PM), <http://www.telegraph.co.uk/news/2017/11/05/deposed-catalan-leader-carles-puigdemont-turns-police/>.

²⁶⁵ Sam Edwards, *Spanish PM, in Catalonia, Calls for Big Turnout at December Election*, REUTERS (Nov. 12, 2017, 6:25 AM), <http://www.reuters.com/article/us-spain-politics-catalonia-rajoy/spanish-pm-in-catalonia-calls-for-big-turnout-at-december-election-idUSKBN1DC0ND>.

²⁶⁶ See *supra* note 242 (discussing Kurdish oppression under Saddam Hussein); Omar G. Encarnacion, *The Ghost of Franco Still Haunts Catalonia*, FOREIGN POLICY (Oct. 5, 2017, 10:13 AM), <http://foreignpolicy.com/2017/10/05/the-ghost-of-franco-still-haunts-catalonia/>.

apply, and that the modern secession movement is primarily an effort to free wealthy Catalonia from financial obligations to the economically struggling parts of Spain.²⁶⁷ They argue that in the near half-century since Franco's death in 1975, the Catalan language and culture has flourished, and economic ties have deepened.²⁶⁸ Spanish unionists insist that Catalonia remain part of a national community bound together by ties of cultural, political, and economic interdependence.

If accurate, these calls for national interdependence to override Catalonian autonomy situates the Spanish conflict within a larger international discourse about the responsibilities of those with means towards those with less, especially under conditions of widening wealth inequality.²⁶⁹ Similar themes are likely to animate future contests between claims for autonomy and interdependence within federal unions. They certainly operated in the British "Brexit" decision to leave the European Union,²⁷⁰ and may in other unfolding conflicts within the European Union and in other European nations.²⁷¹ As the Catalonian conflict exploded in 2017, northern Italians in Lombardi and Veneto, Italy's wealthiest regions, began calling for their own independence as well, forthrightly over their

²⁶⁷ See, e.g., Gaspar Pericay Coll, *The Reasons Behind Barcelona's Massive Demonstration for Catalonia's Independence*, CATALAN NEWS (Sept. 11, 2012, 6:29 PM), <http://www.catalannews.com/politics/item/the-reasons-behind-barcelonas-massive-demonstration-for-catalonias-independence>.

²⁶⁸ *Id.*

²⁶⁹ See, e.g., *A Tale of Two Economies*, ECONOMIST (May 16, 2015), <http://www.economist.com/news/finance-and-economics/21651261-north-limbs-ahead-south-swoons-tale-two-economies> (discussing similar sentiments among northern Italians to "dump" the southern part of the country, seen by some as a corrupt drain on the resources of the wealthier northern region); Celestine Bohlen, *North-South Divide in Italy: A Problem for Europe, Too*, N.Y. TIMES (Nov. 15, 1996), <http://www.nytimes.com/1996/11/15/world/north-south-divide-in-italy-a-problem-for-europe-too.html?mcubz=3>.

²⁷⁰ See, e.g., Erlanger, *supra* note 1 (discussing motivating factors including British nationalism, cultural independence, and anti-immigration sentiments); *Q&A: What Britain Wants From Europe*, BBC NEWS (Feb. 17 2016), <http://www.bbc.com/news/uk-politics-32695399> (discussing the possibility of British withdrawal from the E.U. over, in part, reluctance to contribute to "Eurozone bailouts").

²⁷¹ See, e.g., Steven Erlanger, *Dutch Referendum on Pact with Ukraine Could Cause Trouble for E.U.*, N.Y. TIMES, Apr. 6, 2016, at A6 (discussing political tensions that could lead the Netherlands to exit the E.U.); Bruno Waterfield, *Dutch Would be 'Better Off' if They Left the Euro*, TELEGRAPH (Feb. 6, 2014, 11:05 AM), <http://www.telegraph.co.uk/finance/economics/10621264/Dutch-would-be-better-off-if-they-left-the-euro.html> (discussing economic benefits to the Dutch of leaving the E.U.).

frustration at providing economic support to less prosperous regions in southern Italy.²⁷²

These examples raise normative questions about the extent that secession should be available as a remedy for regional division, especially in the absence of extreme marginalization or abuses. Scholars have long argued that economic self-interest alone provides a weak claim for secession at best, and a morally dubious one at worst. For example, Cass Sunstein has argued that “[s]elf-interest is usually a controversial grounds for political action at the individual level, unless translated into terms that invoke reasons other than self-interest alone,” adding that “it is all the more difficult to support secession of subunits on this ground.”²⁷³

Similarly, Allen Buchanan urges that appeals to both secession and federalism can represent a moral regression, rather than moral progress, if we fail to acknowledge our reciprocal obligations under what he calls “the morality of inclusion.”²⁷⁴ He tempers his enthusiasm for federalism as both an alternative to secession and a framework for organizing sovereign authority if we fail to recognize “that we have substantial obligations not to exclude others from membership in political associations simply because doing so would best further our own interests.”²⁷⁵ To preserve worthy federal systems and pluralist societies threatened by these factors, the approach taken by the Canadian Supreme Court—requiring interjurisdictional negotiation to meaningfully address shared grievances²⁷⁶—is, at the very least, a wise place to begin.

CONCLUSION: FEDERALISM AS A SWORD AND A SHIELD

Among comparative constitutional theorists, there are few more incendiary topics than the debate over whether secession should be more or less readily available. The question of how to govern pluralist societies amidst the opposing forces of fragmentation and

²⁷² Elisabetta Povoledo, *Italian Regions of Lombardy and Veneto Vote for More Autonomy*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/world/europe/lombardy-veneto-referendums.html>.

²⁷³ Sunstein, *supra* note 203, at 659 (critiquing claims for secession on grounds of economic self-interest).

²⁷⁴ Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995).

²⁷⁵ *Id.*

²⁷⁶ See *supra* notes 237–238 (discussing *In re Secession of Québec*, [1998] 2 S.C.R. 217, 232 (Can.)).

centralization is equally compelling. Unfolding turmoil in nations as disparate as Spain, Iraq, and the United Kingdom, let alone the uncertainties facing the European Union, all prompt questions about when subcommunities should be forced to stay part of a union they wish to leave²⁷⁷—and perhaps even when subcommunities should be able to remain part of a union that wishes to relinquish them.²⁷⁸ This critical discourse should inspire all of us to think as carefully as possible about how best to reconcile the claims for self-determination that underlie secession movements with the competing claims for regional interdependence that support national unity.

Claims for secession are especially persuasive in circumstances of last resort, where extreme oppression, disenfranchisement, or marginalization of a regional group within the overall nation has all but extinguished the possibilities for negotiated resolution. Claims for preserving national unity are also compelling, especially in circumstances where regional departures portend other human rights abuses, pose significant spillover effects, or where the proponents of secession have benefited economically from a national partnership from which the rest of the polity has yet to reap its reward. But when secession cannot be justified or is otherwise politically unavailable, federalism and other frameworks for decentralization provide important tools for managing regional conflict within a pluralist society.

As echoed by the Canadian Supreme Court's *Québec* decision, the dominant position in international law prefers federalism to secession as a means of managing regional conflict (perhaps excepting circumstances in which the principles of self-determination are grossly violated by colonial exploitation, alien subjugation, or severe repression).²⁷⁹ Ideally, federalism provides a means of enhancing self-determination and resolving the impulses toward fragmentation and political entropy that can pull states apart. Yet in some circumstances, federalism poses a paradoxical risk. By providing

²⁷⁷ See, e.g., Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5, 14 (2003) (arguing secession will not reduce conflict, violence, or minority oppression as proponents hope, and generally dampens needed efforts toward peaceful coexistence in inherently heterogeneous polities).

²⁷⁸ See Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROBS. 215, 219–20 (2017) (discussing whether the same principles of self-determination that justify secession would enable one part of a larger union—for example, a former colony—to remain part of the union even when the rest of the polity would have them go).

²⁷⁹ *In re Secession of Québec*, [1998] 2 S.C.R. 217, 232 (Can.).

formal political autonomy to constituent groups that enhance their identity as a distinct political community, federalism threatens to act as a double-edged sword, creating a conduit toward the very claims for secession it is designed to prevent.

In other words, federalism can be both a driver of claims to secession as well as a safety valve against them. Had American federalism not already identified the southern states as separate political communities with a degree of sovereign authority, it would likely have been more difficult for them to organize around the target of secession during the U.S. Civil War. Federalism preserves, encourages, and foments distinctive regional identity—in ways that may seem threatening to nations in which regional tension is already formidable. It is for this very reason that nations already worried about regional conflict, such as the United Kingdom and Spain, have been hesitant to adopt fully formalized federal arrangements. Yet the Spanish example shows that even non-federal devolution can pose similar risks.

Acknowledging that federalism can operate as both a sword that instigates secession conflict and a shield against claims for secession raises important questions for the architects of good governance moving forward. Under what circumstances will it operate as more a sword and more a shield? To be sure, the “sweet spot” that federalism enables between claims for autonomy and claims for interdependence will be different in each circumstance, hinging on the distinct history, geography, culture, and demographics that distinguishes every nation on earth—but for the sake of improved governance in the future, can lessons of general applicability be coaxed from our present experience?

To this end, future research should continue to query why different models of devolved governance—and even different models of formal federalism—work best in different contexts. Should the United Kingdom retain its informal arrangement of asymmetrical devolution, or should it move to a more formal symmetrical or even asymmetrical form of federalism? Is there something distinctive about the U.S. and Canadian experiences that justifies the different approaches the two judicial systems have taken toward secession, in which the U.S. courts have foreclosed the option, while the Canadian courts have left it a comparatively (if weakly) open possibility? Is one approach likely to produce better results over time, or does it hinge entirely on the differences between these sibling nations, as closely related as they are?

Finally, this analysis forces us to confront the meta-level puzzle about the degree to which the same pressures that make subnational states inadequate units of governance for managing transboundary problems *also* make larger nation-states inadequate governance units for yet larger transboundary problems. Wicked conundrums like climate change, international refugee crises, and international criminal enterprises raise questions about when international cooperation is required to deal with large-scale cross-jurisdictional problems,²⁸⁰ and how these networks may further undermine national power.

Indeed, many of the same factors that weaken subnational efforts to govern transboundary problems render national efforts equally weak at governing even bigger transboundary problems, at least when the most important issue at hand is the transboundary-ness of the problem.²⁸¹ Transnational treaties, tribunals, trade compacts, and other institutions have been created to deal with various economic, environmental, public health, immigration, and terrorism-related challenges in response to the failure of the old Westphalian order²⁸²—and many of these have come under criticism for further threatening the Westphalian order of distinctive nation-state identity and self-determination as a means of achieving lasting peace and stability.²⁸³

This dilemma is perhaps best exemplified by the widespread grievances underlying the British vote to withdraw from the European Union²⁸⁴—in which countless average Britons expressed dismay at decisions affecting their daily lives being made by bureaucrats on the mainland, for whom they had not voted, and whom they felt did not

²⁸⁰ Cf. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009).

²⁸¹ See SIMONA ȚUȚUIANU, TOWARDS GLOBAL JUSTICE: SOVEREIGNTY IN AN INTERDEPENDENT WORLD 43–94 (2013) (discussing the shift toward multilateral and international responses to transboundary problems formerly handled exclusively by nation states).

²⁸² See *List of International Institutions*, GLOBAL INVENTORY OF STATISTICAL STANDARDS, <https://unstats.un.org/unsd/iiss/List-of-International-Organizations.ashx> (last visited Oct. 15, 2017), for a list of contemporary international institutions. See also John J. Mersheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, 5 (1995), <https://mearsheimer.uchicago.edu/pdfs/A0021.pdf> (discussing various such institutions).

²⁸³ See, e.g., Mersheimer, *supra* note 282 (critiquing international institutions at failing to promote the objective of a peaceful international order).

²⁸⁴ See Erlanger, *supra* note 1 and accompanying text (discussing the Brexit vote).

represent them or their interests.²⁸⁵ Even so, countervailing concerns press on for more local governance—for example, the Brexit vote led to renewed calls for Scottish independence²⁸⁶ and even the possibility of Northern Irish secession from Britain—but in reunification with the Irish Republic²⁸⁷—and so the dialectic continues to spin.

In the meanwhile, the American example and others throughout the world continue to highlight the role of meaningful multilevel governance in mediating these conflicts, even as we work out the finer details of the analysis (if for no other reason than lack of a better alternative). Effective systems of federalism, and other systems that devolve authority to the level with appropriate capacity, cultivate a healthfully dynamic regulatory regime in which local, regional, and national perspectives are channeled toward decision-making realms in which each best contributes to the overall goals of good governance. The developed, modern framework offers useful tools for understanding earlier chapters in American history, including the American Revolution and Civil War, as well as ongoing federalism controversies today. Meanwhile, our continual negotiation and renegotiation of American federalism forces us to reckon with the “morality of inclusion” on an ongoing basis.

The processes of competition, collaboration, and negotiation by which American federalism diffuses regional tension today are among its most important features, and they have surely helped galvanize the Union against further efforts to disassociate its many moving parts. To the extent that other nations face similar challenges, the ongoing

²⁸⁵ See, e.g., Carmen Fishwick, *Meet 10 Britons who Voted to Leave the EU*, *GUARDIAN* (June 25, 2016, 9:45 AM), <https://www.theguardian.com/politics/2016/jun/25/meet-10-britons-who-voted-to-leave-the-eu> (“For me it was all about sovereignty, the ability to make our own decisions and not be ruled by the faceless, non-elected bureaucrats in Brussels; not to be frogmarched into ever greater political union and the creation of a European superstate which no one ever sought my opinion over. It was about regaining control over our own borders and regaining a say into our own destiny.”); Daniel Hannan, *The Case Against Europe: One MEP Reveals the Disturbing Contempt for Democracy at the Heart of the EU*, *DAILYMAIL* (Aug. 14, 2012, 6:04 PM), <http://www.dailymail.co.uk/news/article-2188453/The-case-Europe-MEP-Daniel-Hannan-reveals-disturbing-contempt-democracy-heart-EU.html> (presaging the later Brexit vote in arguing that “the EU is contemptuous of public opinion — not by some oversight, but as an inevitable consequence of its supra-national nature”).

²⁸⁶ See, e.g., Lyndsie Bourgon, *Brexit Has Brought the Idea of Scottish Independence Back from the Dead*, *ATLANTIC* (Apr. 20, 2017), <https://www.theatlantic.com/international/archive/2017/04/scotland-sturgeon-may-brexit-britain-independence/523623/>.

²⁸⁷ See, e.g., Vicent Boland, *Brexit Brings Irish Reunification Back into the Spotlight*, *FIN. TIMES* (Mar. 31, 2017), <https://www.ft.com/content/7a48e040-0d67-11e7-b030-768954394623>.

American experiment still holds instructional value. And just as surely, Americans will continue to learn from the experience of other pluralist societies as we continue to seek the evolving and dynamic “sweet spot” between meaningful autonomy and healthful interdependence.

