

THE UTILIZATION OF CONSTITUTIONAL SPACE
TO MAXIMIZE SUB-NATIONAL AUTONOMY IN FEDERATIONS

By

Mark E. Oppe

RECOMMENDED:

A. Lovecraft

Mary F. Eshlander

Jerry Kubiak
Advisory Committee Chair

Mary F. Eshlander
Director, Northern Studies Program

APPROVED:

Ronald Davis
Dean, College of Liberal Arts

Laverne K. Suffy
Dean of the Graduate School

Date

Apr 15, 2009

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Mark E. Oppe, B.A.

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Abstract

The comparative study of federal systems has most often focused on the view of federation “from the top down.” This is particularly true of the study of constitutionalism in federations, in which federal constitutions have received significantly more attention than sub-national constitutions. An emerging concept in the understanding of federal systems from the sub-national perspective is the idea of constitutional space, which is defined as “the range of discretion available to the component units in a federal system in designing their constitutional arrangements.” Some scholars have suggested that the full utilization of constitutional space can effectively increase the autonomy of sub-national units within a federation. This thesis explores the potential for increased sub-national autonomy through the utilization of constitutional space in a comparative analysis of state and provincial actions in the United States and Canada with regard to same-sex marriage and resource management, and concludes that due to the influence of additional factors in the federal relationship, the utilization of constitutional space by itself is insufficient to increase sub-national autonomy.

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Chapter 1: Introduction and Overview of U.S. and Canadian Federalism

Introduction

The study of federal systems is chiefly inspired by a desire to understand and explain the distribution of power between national and sub-national units of government and to evaluate the intrinsic value of federation as opposed to other systems of government. Scholars have attempted to define and describe federalism through an examination of power-sharing arrangements, fiscal interdependence, degrees of national sovereignty and sub-national autonomy, representation, the extent (or existence) of minority group rights, and the role of the judiciary in upholding constitutional supremacy. The growing body of literature dedicated to comparative federalism addresses all of these points, but tends, more often than not, to focus on federation and its benefits either “from the top down” or in relation to the special circumstances of national minorities. This is particularly true of the study of constitutionalism in federations, in which federal constitutions have been the focus of most scholarly interest.¹ Receiving less attention is an analysis of federation from the perspective of sub-national units wishing to maintain or increase their autonomy within a federal system.

¹ G. Alan Tarr and Robert F. Williams of Rutgers-Camden University have suggested that this leads to a misleading view of federalism as a “top-down or center-periphery arrangement rather than as one based on differing spheres of governmental authority.”

G. Alan Tarr, Robert F. Williams, and Josef Marko, eds. *Federalism, Subnational Constitutions, and Minority Rights*, (Westport, Connecticut: Praeger, 2004), 5.

The issue of sub-national autonomy is not new. In the United States, it has been exhaustively debated in relation to the nineteenth century conflicts over states' rights. In Canada, it has contributed to a relatively large body of literature related to the nature of the Canadian Confederation² and Quebec's place within it. Nevertheless, in studies of comparative federalism, sub-national autonomy is addressed primarily as something which is necessary for the maintenance and survival of the federal system and the good of the whole federation rather than as something which is intrinsically valuable and important to an individual sub-national unit.

The latter perspective has not been completely neglected, however. It has at least been hinted at, if not fully explored, by a few scholars. It is universally accepted that federations must be based on written constitutions which provide a basic framework for the relationship between the national and sub-national governments. Indeed, a criticism of federations has been that they tend to be overly legalistic in nature, relying on the courts and legal interpretations of constitutional arrangements in order to function. Perhaps this criticism, and a conscious effort by scholars to escape the narrow analysis of legal/constitutional characteristics of federalism and federation has resulted in the current trend away from examining such arrangements and broadening the scope of comparative federalism studies to include not only constitutional and legal factors, but also social, economic, cultural, philosophical, and ideological perspectives. Federalism, therefore, is

² As will be discussed later, Canada best fits the modern definition of a federation, but is commonly referred to as "the Canadian Confederation." Some scholars have suggested that this practice may be related to the process of bringing together the provinces into a federation rather than to the actual structure of the Canadian system of government. However, as will be discussed later in this thesis, the term appears to have its origins in the quasi-federal arrangement which existed within the province of Canada following the Act of Union of 1841.

Ronald Watts, *Comparing Federal Systems*, 2nd ed. (Montreal: Queen's University, 1999), 23.

now perceived by most scholars to “span the whole gamut of human experience,”³ and lacks vigorous categories of analysis.

While a more comprehensive view of federalism is certainly valuable, it does not diminish the need for an understanding of the constitutional and legal facets of federation which are relevant to the question of how to protect and enhance sub-national autonomy. The role and function of specific constitutional arrangements in a given federation necessarily both reflect the underlying values of the federal society and determine the extent to which additional factors will be allowed to influence the process of federation and the evolution of federalism. To put it another way: Because federations are based on written constitutions, it is imperative to understand the constitutional limits placed on both the national and sub-national governments in order to understand the precise nature of the federal relationship. A useful concept in reaching this understanding is the idea of sub-national “constitutional space.”

Constitutional Space Defined

Constitutional space has been defined as “the range of discretion (space) available to the component units in a federal system in designing their constitutional arrangements.”⁴ This definition implies two conditions. First, that the national constitution, through either enumeration of sub-national competencies or limitations on national authority, and the disposition of any residual powers, leaves a sphere of authority

³ Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), 1.

⁴ Tarr and Williams, 5.

in the hands of the sub-national units. Second, that the sub-national units have the ability, not always fully utilized, to expand their own constitutional authority within the limits of their spheres. For the purposes of this thesis, the concept of constitutional space is therefore useful in a comparative analysis of U.S. and Canadian federalism with regard to the ability of states and provinces to maintain and enhance their individual autonomy. Additionally, Robert F. Williams and G. Alan Tarr of Rutgers-Camden have suggested that the exploitation of constitutional space might be productive in the areas of rights protection and self-determination for national minorities.⁵ This is a topic which, although it may not be applicable to American style federalism and is outside the scope of this paper, seems to warrant further investigation, particularly as it pertains to detached or peripheral sub-national units.

Overview of U.S. and Canadian Federalism

While the United States and Canada share many similarities, having both evolved from the British colonial tradition and having somewhat similar frontier and expansion experiences, they also exhibit significant differences in their federal structure. The United States can be characterized as a symmetric coming-together federation (to use terminology suggested by Alfred Stepan of Columbia University, which will be discussed in the next chapter), while Canada, at least with respect to Quebec, has a greater degree of constitutional asymmetry and could be considered a holding-together federation. The United States pioneered the separation of powers form of federal government, while

⁵ Ibid., 15.

Canada chose the British-model parliamentary system. Nevertheless, for all the differences between the United States and Canada, the cultural, social, and economic ties they share make day-to-day life in the Canadian provinces and American states similar enough to justify a comparative analysis of how each benefits from its respective federal system and to draw useful conclusions about how aspects of one might be applied to the other if found to be advantageous to the goal of increasing sub-national autonomy.

Origins of U.S. and Canadian Federalism

In the United States, the origins of federation extend back to the establishment of the earliest British colonies under royal charters which functioned as proto-constitutions.⁶ In recognition of the fact that distance and the difficulty of travel and communication in the seventeenth century made direct rule by the British government impractical, the Crown granted its colonies a degree of autonomy and self-determination which would not have been possible in England. Thus, long before independence, the American colonies were part of a relationship which has been described as “federal in operation, although not federal by design.”⁷

By the mid-eighteenth century, the colonies had evolved from tenuous and distant settlements into rapidly maturing political societies. They would soon embark upon an

⁶ Typical of the proto-constitutional nature of early colonial charters were the Virginia Charter of 1612, the Massachusetts Charter of 1629, and the Maryland Charter of 1632. These charters each established colonial governments with their own competencies and guarantees of rights such as the right to try criminals in colonial courts, the right of freemen to vote, and the right to establish colonial laws. Furthermore, prior to the Pennsylvania Charter of 1681, colonial charters did not clearly place the colonies under the authority of Parliament, leaving them subject only to the king.

⁷ Donald S. Lutz, “The Articles of Confederation as the Background to the Federal Republic,” *Publius: The Journal of Federalism* 20, no. 1 (Winter 1990), 57.

extraordinary period of constitution-making culminating in the Philadelphia Convention of 1787. The colonies were, at this time, distinct polities which, although united in their resistance to British rule, jealously guarded their own identities and independence. Their reluctance to surrender any portion of their newly asserted sovereignty led to difficulties with financing and fighting the Revolution and to governing the confederation which was the original United States of America.

By 1787 it had become clear, to some at least, that the Articles of Confederation were inadequate and that a major reform of the Union was necessary. In order to accomplish this reform, delegates were sent to Philadelphia not as at-large representatives of an as yet imaginary American people, but as representatives of the twelve states (Rhode Island did not participate). The collected American experiences of the previous 175 years (going back to the Virginia Charter of 1612) dictated that the only option open to the convention delegates would be to establish some type of federal system.

In Canada, the origins of federation lie not in the early colonial period, but in an effort by the British government to preserve and consolidate its remaining interests in North America in the face of the United States' rapid expansion. The Constitutional Act of 1791 reformed the old province of Quebec into the new provinces of predominantly Anglophone Upper Canada, and the predominantly Francophone Lower Canada. In 1841, following armed rebellions against the colonial political elite, the Act of Union recombined Upper and Lower Canada into the united province of Canada. Upper Canada became known as Canada West, while Lower Canada became known as Canada East. Each was equally represented in the provincial government. The union of Upper and

Lower Canada within a single province gave rise to the practice of referring to the “Canadian Confederation,” which survives to this day. The British North America Act of 1867 (BNA) joined Canada West and Canada East (henceforth known as Ontario and Quebec, respectively), New Brunswick, and Nova Scotia, all of which retained their local governments, under a new federal government. Contrary to the United States, in which nominally independent states came together to form a federal government, in Canada the provinces were never independent and simply had a new layer of government placed between them and the British Parliament.⁸

The need for a federal form of government in Canada was a result not only of the desire to maintain the regional identities and local governments of the original four provinces, but also because federalism seemed to offer the best protection for the Francophone minority in Quebec. The BNA provided explicit guarantees regarding the preservation of the French language and culture, which could most easily be accommodated in a federal system. The necessity of a government which could accommodate cultural and regional differences was reinforced by the addition of the western provinces (Manitoba, Saskatchewan, Alberta, and British Columbia), which were not bound by the BNA’s provisions requiring protection of the French language and culture. Federalism, and particularly a degree of asymmetry with regard to the French-speaking minority, became necessary to hold together the multi-cultural and region-centric Canadian union.

⁸ This was a conscious act by the Canadian founders, who intended to subordinate the provinces to the federal government in part because of their understanding of the American federal system and the belief that the residual sovereignty of the states had been a major contributing factor to the Civil War. Jennifer Smith, “Canadian Confederation and the Influence of American Federalism,” *Canadian Journal of Political Science/Revue canadienne de science politique* 21, no. 3 (September 1998), 452.

Formation of the U.S. and Canadian Federations

The organization and structure of the American and Canadian federal governments, along with significant constitutional developments which have resulted in major alterations to them, will be considered in our discussion of the formation of both federations. As Michael Burgess, of the University of Kent, has noted, the formation of federations must be considered separately from their origins in order to facilitate comparative analysis.⁹ However, it should be clear that each federation's origins have important implications for its formation. In the case of the United States and Canada, the different points of origin have clearly led to fundamental differences in formation.

One of the most significant and readily apparent differences between American and Canadian federalism lies in their opposite disposition of residual powers. In the United States, the federal government is one of enumerated, delegated powers. Those powers not given to the federal government are, as the Tenth Amendment reassured those who feared the power of the new government, retained by the states or the people.¹⁰ While the clear intent of the Framers was to limit the federal government by enumerating its powers and leaving the residual powers to the states, interpretation of the Constitution over time has led to an inexorable broadening of federal authority through the Necessary and Proper Clause, the Commerce Clause, and the implied powers.

⁹ Burgess, 98-99.

¹⁰ The Supreme Court has declared that the Tenth Amendment did not, in fact, alter anything in the original Constitution, but merely stated "a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Sprague*, 282 U.S. 716 (1931)

In Canada, the BNA enumerated the powers of the provinces, while giving the remainder to the new federal government. The logic behind this can be found in the origins of Canadian federalism. Because the provinces had a federal government imposed upon them by the British Parliament, instead of creating it themselves (as in the case of the American states), it would seem to follow naturally that Parliament intended for the center to be its proxy and to allow the provinces to control purely local and internal affairs.

In reality, although the American system would seem to have been set up to preserve the maximum possible amount of autonomy for the states, while the Canadian system left the provinces with relatively little autonomy, subsequent developments have resulted in the consolidation of power in the American federal government and increased autonomy for the provinces. Each system seems to have drifted in the opposite direction from that which was intended by its creators. In the United States, for example, broad interpretation of the Commerce Clause, dating back to the founding generation,¹¹ has enabled Congress to regulate everything from intrastate rail fares¹² to wheat production for on-farm consumption.¹³ Meanwhile, in Canada, the enumerated provincial powers have also been broadly interpreted, most notably in the area of natural resource ownership, management, and development, from which the federal government is

¹¹ John Marshall's opinion in *Gibbons v. Ogden* (1824) stated that Congress had plenary power over interstate commerce, including regulations by which commerce could be carried out. This interpretation set the stage for future decisions granting the federal government power over a variety of activities related to interstate commerce; often at the expense of state power.

¹² *Houston E. & W. Railroad Co. v. United States*, 234 U.S. 342 (1914)

¹³ *Wickard v. Filburn*, 317 U.S. 111 (1942)

virtually excluded.¹⁴ Additionally, in Canada federal treaties which affect provincial jurisdictions are subject to provincial implementing legislation, providing a further check on federal power which the Supremacy Clause of the U.S. Constitution denies to the states.

The experience of both the Canadian and American federal systems seems to suggest that the enumeration of powers, whether at the federal or the sub-national level, although intended as a limitation, in fact tends to result in a broad interpretation of the scope of the enumerated powers, leaving little room for the other level of government to act in the affected areas of competence. This is an important point to remember in an analysis of sub-national constitutional space. It implies that the Canadian provinces have an inherent advantage over the American states when attempting to preserve or enhance their individual autonomy.¹⁵

While the disposition of residual powers (with the federal government in Canada and with the states in the United States) demonstrates a fundamental difference in the formation of Canadian and American federalism, the continuing evolution of both federal systems must also be considered. Significant developments in both countries have contributed to the evolution of each federation. These developments suggest that the formation of federations is a continuing and evolutionary process.

¹⁴ The Canada Act of 1982 amended the British North America Act of 1867 to specifically add to the enumerated powers of the provincial governments the power to make all laws regulating non-renewable resources, forestry, and electrical power within their respective provinces.

¹⁵ The expansive interpretation of the enumerated powers of Canadian provinces is perhaps even more extraordinary because not only was the enumeration of provincial powers meant to limit provincial autonomy, but also because most provincial and all federal judges in Canada are appointed by the federal government. This means that the majority of provincial judges in Canada may not have the vested interest in defending sub-national autonomy that state judges do in the United States.

Evolution of the U.S. and Canadian Federations

In the United States, the most significant alteration to the federal system occurred as a result of our greatest constitutional crisis, the Civil War. The Fourteenth Amendment has been characterized by some scholars as such a radical alteration of the American government as to transform it from a federal to a quasi-unitary system.¹⁶ It extended the protections of federal citizenship to the citizens of each state, and, in effect, severely limited the amount of constitutional space available to the states by essentially establishing federal “minimums” for the protection of individual rights. This in turn has led to the “New Judicial Federalism,” a development in state constitutional law which has seen state courts becoming increasingly protective of individual rights. In many cases, this has resulted in state courts interpreting their own constitutions to require more extensive protections than those required by the federal Constitution.¹⁷ In the evolution of the American federation, therefore, the Fourteenth Amendment’s alteration of the federal arrangement has ultimately resulted in an additional alteration in the role of state courts in protecting individual rights and civil liberties under state constitutions.

In Canada, the patriation of the Constitution and ongoing questions over the role of Quebec within the Confederation have contributed to significant developments in the evolution of Canada’s federal system. In 1982, the Trudeau government undertook a fundamental alteration of the Canadian Constitution in which Canada gained, for the first time, the ability to amend the Constitution without the consent of the British Parliament.

¹⁶ Andrea R. C. Helms and Gerald McBeath, *A Cross National Study of Statehood in Federal Systems*, a report for the Alaska Statehood Commission, June 1981, 16.

¹⁷ Robert F. Williams, “American State Constitutional Law” (paper presented at the conference “Federalism and Sub-national Constitutions: Design and Reform,” Bellagio, Italy, March 22-26, 2004).

Although parliamentary consent had long been regarded as a mere formality, the Constitution Act of 1982 dispensed with this archaic necessity altogether.¹⁸

In looking at the formation of Canada's federal system, two changes resulted from the adoption of the Constitution Act of 1982. First, a precedent was established allowing for amendment of the Constitution without Quebec's approval. Under the new amendment process, changes to the Constitution must win the support of at least seven provinces, with a population totaling at least half the total population of all of the provinces. Table 1 shows the most recent census figures for Canada (May 2006), from which we can make some general observations about the relative power of individual provinces in the amending process.

Table 1. Population of Canada (2006 Census)¹⁹

Region	Population	Pop. %
Newfoundland and Labrador	505,469	1.6
Prince Edward Island	135,851	0.4
Nova Scotia	913,462	2.9
New Brunswick	729,997	2.3
Quebec	7,546,131	23.9
Ontario	12,160,282	38.5
Manitoba	1,148,401	3.6
Saskatchewan	968,157	3.1
Alberta	3,290,350	10.4
British Columbia	4,113,487	13.0
Yukon Territory	30,372	0.1
Northwest Territories	41,464	0.1
Nunavut	29,474	0.1
Canada	31,612,897	100.0

¹⁸ However, for the final time, the Canadian government followed the colonial procedure of submitting the Constitution Act to Parliament for approval. This was given in the Canada Act of 1982.

¹⁹ Population figures taken from Statistics Canada.

"Population and dwelling counts for Canada, provinces, and territories, 2006 and 2001 censuses – 100% data," Statistics Canada, <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-550/Index.cfm?TPL=P1C&Page=RETR&LANG=Eng&T=101> (accessed February 11, 2009).

Although the asymmetries of the Canadian federal system will be discussed in greater depth in a later chapter, the population figures in table 1 highlight Quebec's concerns. According to the most recent census data, any combination of seven provinces which includes Ontario is enough to pass an amendment. Quebec, however, must have the support of at least one of the other large provinces (Ontario, British Columbia, Alberta) in order to block an amendment, and, without the support of Ontario, needs both British Columbia and Alberta to be among the six other provinces necessary to gain passage of an amendment. Given Quebec's distinct culture and interests, this new provision leaves Quebec in a clearly disadvantageous position in defending its interests against the Anglophone majority in Canada. Recognition of this reality led to widespread dissatisfaction with the Constitution Act of 1982 within Quebec.²⁰

A second significant result of the Constitution Act of 1982 was the enumeration, in the Act's Charter of Rights and Freedoms, of federally guaranteed individual rights, including linguistic and educational rights. Similarly to the Fourteenth Amendment's impact in American constitutionalism, the Canadian Charter of Rights and Freedoms provides for federal protection of individual rights from both the federal and provincial governments. It has been suggested that this development in Canadian constitutionalism will inevitably force the federal court system, and, ultimately, the Supreme Court of Canada, to intrude increasingly upon what had previously been provincial decisions about education, what constitutes a "sufficient number" or "significant demand" for instruction

²⁰ Gil Remillard, "The Constitution Act, 1982: An Unfinished Compromise," *The American Journal of Comparative Law* 32, no. 2 (Spring 1984): 271.

in a second language (English, French, or aboriginal), and constantly to evaluate the balance between individual and collective rights.²¹

Undoubtedly, the most significant recent development in the formation of Canadian federalism has been the ruling by the Supreme Court of Canada regarding secession. In 1998, the Court issued a referential ruling on the question of whether or not Quebec has a unilateral right to secede. Canada, like almost every federation in history, does not provide an explicit constitutional right to secession. The Supreme Court of Canada, however, found that such a right is implicit but that an actual secession must be the result of bi-lateral negotiation between the province in question and the rest of Canada.²² The decision was initially greeted favorably by both the Canadian federal government and Quebec secessionists, but has since been criticized as an exercise in judicial activism by those who believe that it was necessary only for the Court to deny a right to unilateral secession, and not to “[answer] a question it was not asked and need not have answered” by going on to identify a constitutional method for secession.²³

In response to the Court’s ruling, the Canadian Parliament passed the “Clarity Bill” in 2000. The bill required that the results of any future referendum on secession pose an unambiguous question regarding Quebec’s future (or that of any other province) within Canada and pass by more than a bare majority (with the question of what constitutes an acceptable majority being left unclear). Unlike the Court’s decision, the Clarity Bill was met with considerably less approval by those on both sides of the

²¹ *Ibid.*, 280.

²² *Reference re Secession of Quebec*, (1998) 2 S.C.R. 217.

²³ Hilliard Aronovitch, “Seceding the Canadian Way,” *Publius: The Journal of Federalism* 36, no. 4 (Fall 2006), 541-543.

secession issue. In Quebec, the provincial government responded by passing “An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State,” declaring that Quebec reserves the right to determine the question to be posed in a referendum and that a 51 percent majority shall be sufficient to determine the province’s course.

Conclusions on the Origins, Formation, and Evolution of the U.S. and Canadian Federal Systems

The preceding discussion of the origins, formation, and evolution of the American and Canadian federations allows us to draw two general conclusions about the nature of each. First, it is clear from their differing points of origin that the U.S. and Canadian federal systems were intended to serve different purposes. In the case of the United States, federation was seen first as a means of preserving the maximum possible amount of sovereignty for each of the states while providing for strength and unity in foreign affairs (under the Articles of Confederation), and then (under the Constitution) as a way to create a “more perfect” Union of the states in which the federal government had sufficient power to address the shortcomings of confederation that had become apparent under the previous form of government. In Canada, federation was the result of imperial devolution and the need to integrate distinct cultures and regions under a single government. The different manifestations of federalism seen in the United States and Canada today can therefore be traced back to their very inception.

Secondly, we may infer that the evolution of each of these federations, while dependent upon their origins, has led each to develop in ways which could not have been anticipated by their founders. In the United States, the adoption of the Fourteenth Amendment resulted in increasing political homogenization and centralization along with the emergence of state court systems as the primary guarantors of individual rights going above and beyond the federal “baseline.” In Canada, a broad interpretation of the enumerated powers of the provinces, provincial ownership of natural resources, the adoption of a new procedure for amending the Constitution, the federalization of individual rights’ protection, and more recent developments regarding the possibility of a constitutional means of secession, have resulted in both greater than intended provincial autonomy and the need for a more cooperative and negotiated form of federalism than the centralist system originally envisioned by the British North America Act of 1867.

The preceding discussion of the origins, formation, and evolution of the Canadian and U.S. federations leads us to the question of whether it is possible to enhance sub-national autonomy in a federation through the utilization of constitutional space. This is the question this thesis will attempt to answer through a comparative analysis of the utilization of constitutional space in relation to same-sex marriage and resource management in the United States and Canada. Through an analysis of state and provincial uses of constitutional space in these two areas, it will be demonstrated that the utilization of constitutional space is, in fact, insufficient for the preservation or enhancement of sub-national autonomy due to additional factors in the federal relationship.

However, prior to embarking on a more in-depth analysis of the role of constitutional space in the U.S. and Canadian federal systems, it is necessary to place this concept within the context of the historical and contemporary study of comparative federalism. This will allow for a greater appreciation of the somewhat unconventional view of federalism and federation from the sub-national, rather than the national, perspective. It will also help us to recognize the roots of this perspective in historical discussions of federalism and federal systems.

Chapter 2: Comparative Federalism Literature Review

Defining Federalism/Federation

Many scholars have concluded that modern theories of federalism begin with the formation of the new American federation under the Constitution of 1787, the oldest surviving written federal constitution. This created a previously unknown distinction between the terms “federation” and “confederation,” and shaped future perceptions of what a federal system ought to look like. Although it is debatable how accurate these perceptions are, or how relevant they are to newer federal systems in the twenty-first century, the importance of American federal philosophy in the study of comparative federalism is undeniable. Equally undeniable is the centrality of *The Federalist* to an understanding of American federalism.

The relationship between the American colonies and Great Britain has been described as “federal in operation, although not federal by design.”²⁴ In looking at the origins of the American federal system, therefore, it is necessary to remember that the colonists had long-standing experience with the concept of dual sovereignty. By the time of the Philadelphia Convention, Americans had long been accustomed to living under two layers of government. The relationship between the colonies and the British government was replaced by the relationship between the states and the Continental

²⁴ Lutz, 57.

Congress. During this relatively short period of time, their status was somewhat ambiguous, being more akin to an alliance of independent states than any type of federation. Indeed, the Continental Congress has been described as “a coordinating and advisory body” formed to “protect American interests”²⁵ rather than a true governing body. The Articles of Confederation, when they were finally ratified in 1781, merely codified the “informal rules and practices” that “the exigencies of war and common concerns among the states”²⁶ had given Congress the political power to exercise. Support for this view can be found in the text of the Articles, which states that the document created a “league of friendship.” When it became apparent (to some, at least) that the Articles of Confederation were in need of reform, the question for the Convention delegates who met in Philadelphia during the summer of 1787 was not whether to devise a new federal relationship, but how to define federalism in such a way that it would permit the new government to assume the powers necessary to avoid the failings of the Confederation.

The new model of federalism created by the Constitution differed from the model under the Articles of Confederation in that it clearly created a strong central government which was able to act directly on individuals, rather than solely on the states. This contradicted the previous understanding of federalism as a system in which each of the states had complete sovereignty over its own citizens while “some of the general

²⁵ Herman Belz, *Living Constitution or Fundamental Law: American Constitutionalism in Historical Perspective* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 1998), 23.

²⁶ *Ibid.*

concerns”²⁷ were delegated to the central government (in this case, Congress). However, the new conception of federalism also gave rise to some of the most vocal opposition to the new plan of government.²⁸ In order to counter this opposition, Alexander Hamilton, James Madison, and John Jay wrote what became the recognized authority on the proposed new federal system, *The Federalist*.

Federal vs. National Governments

In *Federalist No. 39*, James Madison redefined the characteristics of a federal government in order to convince doubters that the Constitution did not abandon federal principles in order to create a unitary, or national, government. *Federalist No. 39* is significant to a study of comparative federalism because it establishes the parameters of what is now commonly accepted as “federal,” and, in so doing, distinguishes modern federalism from confederalism, a distinction which did not exist prior to that time.²⁹

According to Madison, the nature of a government may be determined by an examination of “the foundation on which it is to be established; . . . the sources from which its ordinary powers are to be drawn; . . . the operation of those powers; . . . the extent of them; and . . . the authority by which future changes in the government are to be

²⁷ Agrippa to The People, Massachusetts, 25 December 1787, in *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. Herbert J. Storing, sel. Murray Dry from *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1985), 243.

²⁸ This criticism of the proposed new system was repeated by many of the most prominent Anti-Federalists, including Melancton Smith, one of the most formidable opponents of the Constitution, in the New York ratifying convention.

Speeches by Melancton Smith, 20 June 1788, *Ibid.*, 334.

²⁹ Helms and McBeath, 65.

introduced.”³⁰ Each of these five points identifies characteristics which help to measure the degree to which a given governmental system is either federal (under the new post-Philadelphia definition of federalism) or national (Madison’s term for what is today referred to as a unitary government). With respect to the government established by the Constitution, Madison wrote that its federal features (those depending on the states to exercise some degree of authority or autonomy in order for the central government to exist and function) at least balanced, and perhaps outnumbered, its national ones. The new government depended on the ratification of the states for its existence, the participation of the states in the Senate, separate spheres of sovereignty with respect to the powers of government, and consent of a super-majority of the states in the amendment process. Madison characterized this as a “mixed” government, with the clear implication that its federal characteristics predominated and were essential to its operation. America’s federal structure became the new standard against which to measure the “federalness” of a government, and continues to greatly influence the study of federal systems today.

Distinguishing Between Federation and Confederation

Prior to the establishment of the new American federation under the Constitution, the terms “federal” and “confederal” or “federation” and “confederation” were used interchangeably. Early writings on federalism did not make the distinction between

³⁰ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (1787; repr. New York: Bantam Dell, 2003), 230.

federations and confederations which is common today.³¹ The modern differentiation between a confederation, acting on its constituent states, and a federation, acting both on the constituent states and on individual citizens, was a result of the creation of the American “mixed Constitution,” and of the need to discredit the prior form of government while preserving the idea of a federal republic.³²

German philosopher Samuel Pufendorf’s 1672 description of differing forms of government provides a good example of the pre-1787 understanding of federalism. Although Pufendorf did not use the terms “federation” or “confederation,” he wrote about what he referred to as “systems of states.”³³ A “system of states,” according to Pufendorf, could take on either of two forms. It could consist of two or more states under the same ruler, or it could be “two or more states . . . joined by a pact into one body.”³⁴ The first type of system might come into being through either democratic or non-democratic means, but could be dissolved upon the death of the monarch if the member states had different rules of succession. The second type would generally be created through some type of compact, and might be dissolved by any of the parties to the compact for any violation of its terms.³⁵ In either of these cases, the “system of states” would appear, from the outside, to function as a single “regular” state, while, in reality,

³¹ See note 2.

³² *The Federalist Papers*, 234.

³³ Samuel Pufendorf. 1672. *Theories of Federalism: A Reader*, eds. Dimitrios Karmis and Wayne Norman (New York: Palgrave Macmillan, 2005), 40.

³⁴ *Ibid.*, 41.

³⁵ This type of arrangement would be considered a confederation today. In the antebellum debates over the nature of the American Union, southerners such as John C. Calhoun took this position. They claimed support for their argument from the Framers, and particularly from the Virginia and Kentucky Resolutions written by Thomas Jefferson and James Madison.

each of the members “retain[ed] supreme sovereignty over its own affairs.”³⁶ The “systems” Pufendorf described are clearly federal in nature; with a limited central government of presumably enumerated delegated powers and member states retaining complete sovereignty over all remaining non-delegated powers.

In Pufendorf’s time the study of federalism had not yet advanced to the point of considering differing degrees of federation which might lead to the distinction between confederation and federation. In his writing, Pufendorf seems only to have considered “systems of states” which would interact with each other as partners in a league or under the leadership of a common monarch. Either way, there is no explicit discussion of the central government acting only on the member states or on the individuals within the states. The closest Pufendorf appears to have come to this question was his consideration of the circumstances under which one state in a system might enforce its laws upon a citizen of another state. His conclusion was only that it might be desirable to appoint a “common council” which would then determine how a punishment might be carried out.³⁷ This would seem to imply that Pufendorf did not foresee a “system of states” in which a central authority would have the power to intervene in the lives of individual citizens. This therefore suggests that, in Pufendorf’s opinion, a “system of states” would be confederal in nature.

The further development of federal thought can be seen in Montesquieu’s writings. In 1748, Montesquieu explored the advantages of what he referred to as a “confederate republic.” His ideas were to have a major impact on the American Framers,

³⁶ Pufendorf, *Theories of Federalism*, 40.

³⁷ *Ibid.*, 45.

and are referred to repeatedly in *The Federalist*. Montesquieu identified the two types of government as monarchical and republican. Montesquieu was not interested in federalism for its own sake, but rather as a means of remedying the defects inherent in a republican system, which he identified as weakness (in a small republic) and “internal imperfection” (in a large one). His writing therefore focused on confederation as the solution to the problem of size in a republic. As James Madison would argue during the ratification debates in the United States, Montesquieu believed that small republics were under the perpetual threat of conquest by a foreign power, while large ones are threatened by corruption from within. Confederation, however, seemed to solve both of these problems by preserving the “internal advantages of a republican, with the external force of a monarchical, government.”³⁸

Like Pufendorf, Montesquieu did not directly address the question of whether a confederation should act only on the member states or on individuals within the states. However, his argument for the advantages of confederate republics seems to suggest that he viewed the purposes of confederation to be directed outward, rather than internally upon the citizens of the sovereign states composing the confederation. This interpretation of his work is consistent with the idea that the “mixed Constitution” concept advocated by *The Federalist* represented something new in federal theory and necessitated the distinction between federations and confederations.

As previously mentioned, *Federalist No. 39* began to articulate the new idea of federalism as something different from confederalism. Madison’s “mixed Constitution”

³⁸ Charles-Louis de Secondat, Baron Montesquieu. 1748. *Theories of Federalism*, 55.

sought not only to combine the advantages of small and large states, but also of federal and “national” (unitary) forms of government. Madison’s idea went beyond anything that Montesquieu suggested, and beyond the eighteenth century understanding of federalism. From this time forward, beginning in the United States, the term confederation, inextricably tied, as it was, to the deficiencies of the Articles of Confederation, would begin to take on a negative connotation, suggesting a form of government that was inherently weak and unable to achieve the goals which led to the formation of a union in the first place.³⁹

Michael Burgess, Professor of Federal Studies and Director of the Centre for Federal Studies at the University of Kent, provides an explanation of the unforeseen and long-reaching impact the Federalists’ attacks on the Articles of Confederation had on the concept of confederation itself. He argues that it was essential to the Federalist argument not only to denigrate the principles underlying the Articles (which had previously been understood to be the true principles of federalism), but also to cast themselves as the “real” federalists while tarring their opponents with the name “Anti-Federalist.”⁴⁰ The result of this was the adoption (or co-option) of the term “federal” to describe what was, in reality, a blending of federal, republican, and national ideas. The great success of *The Federalist*, according to Burgess, is that the new understanding of federalism has come to be seen as the model for federations around the world, while it has been necessary to label what was once universally recognized as “federal” with the new name “confederation” in order to distinguish between national governments acting only on their

³⁹ Burgess, 57-59.

⁴⁰ *Ibid.*, 59-66.

constituent sub-national units and those acting on both the sub-national units and directly on the citizens of the federation. Additionally, in discrediting the concept of confederation so thoroughly, the Federalists unintentionally shut the door on the possibility of new confederal systems evolving not only in the United States, but around the world. The enduring influence of *The Federalist* essentially assured that nations experimenting with new forms of government would overlook confederation as a viable alternative. It is only since World War II, with the emergence of the European Union, that a potential new model for confederation has begun to gain acceptance. The continued evolution of the European Union will undoubtedly provide scholars with an abundance of opportunities for re-examining confederation.

Origins of Federations

Motivations for Forming Federal Systems

There is a large body of literature written on the motivations for forming federal systems of government. Reasons may include, but are not limited to: mutual defense; potential economic benefits proceeding from a common market; a long-term process of democratization culminating in some sort of federal arrangement; the protection of ethnic, linguistic, or religious minorities within a pluralistic society (as in Switzerland, Belgium, Canada, and India); pragmatic political compromise (as in the case of the United States with the shift from confederation to federation); an unwillingness to completely surrender local or regional customs and autonomy; the devolution of imperial

power (evident in the cases of Canada, Australia, and India); and decentralization in formerly unitary states (such as Spain).

Within the field of comparative federalism, William Riker has had tremendous influence over the understanding of how and why federations are formed. In the 1960s and 1970s, Riker posited two conditions for the formation of federations, which he argued were necessary and omnipresent in all federal systems: the military condition and the expansion condition.⁴¹ In short, Riker's hypothesis was that the formation of all federal systems could be explained by the presence of an external military threat or an internal desire for territorial expansion. Although viewed today as somewhat simplistic, Riker's theory played a major role in framing the debate over causes and motivations for the formation of federal systems.

While acknowledging the significance of Riker's work in comparative federalism, Michael Burgess has faulted him for promoting a framework for understanding the formation of federations which is "at best exaggerated and at worst erroneous."⁴² Burgess instead offers what he refers to as a "theory of circumstantial causation." This provides a framework for understanding the creation of federal states which is based on four assumptions. First, federations are "founded upon the notion of a liberal democratic state." Second, the origins of federation (that is, the preconditions which lead to the decision to federate) must be distinguished from the formation of federation (the actual process of creating a federal state) in order to facilitate comparative analysis. Third, the

⁴¹ William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, & Company, 1964), 19.

⁴² Burgess, 97.

origins and formation of federations come from different historical “points of departure” which may be characterized as aggregation/disaggregation and devolution/decentralization. Fourth, the “democratic credentials” of federal founding movements differ in different historical eras from the eighteenth to twentieth centuries.⁴³

The essential point Burgess attempts to make with his theory of circumstantial causation is that the process of federation is far more complex and historically contextual than the model offered by Riker. While Riker’s conditions may hold true in some cases, they are by no means satisfactory in explaining the motivations for federation in all federal states. Burgess argues that his theory is wide enough in scope and flexible enough to provide a useful framework for the study of all federations, while avoiding the over-simplification of Riker’s two-condition model. He does not suggest that Riker’s military and expansion conditions should be completely disregarded, but rather that they should be evaluated in the context of other pertinent historical, social, and political factors. In some federations, Riker’s conditions may be sufficient to explain their formation; in others they will be subordinated to different, more relevant causes.

To date, Burgess has provided us with what is perhaps the single most complete framework for understanding federation yet offered. However, it seems to be lacking one essential element, which was added to the discussion of the U.S. and Canadian federal systems in the previous chapter. The lacking element is evolution. While there is no

⁴³ This description paraphrases the explanation Burgess provides for his theory of circumstantial causation in federations. This theory is useful in advancing the study of federalism because it may be the single most comprehensive theoretical framework yet developed for analyzing the origins and formation of federations. Burgess stresses the need to move beyond attempts to develop an all-encompassing theory and instead create a “hierarchy of causes” which is flexible enough to facilitate the study of any given federal system. *Ibid.*, 98-99.

doubt that Burgess is correct in emphasizing the origins and formation of federations, federal systems are not static. Analysis of the origins and formation of federal systems leaves us with an incomplete perception of federation which can be more adequately understood when the evolution of federal relationships is considered. Evolutionary developments may well represent changing motivations for continuing federation, which Burgess does not acknowledge in his theory of circumstantial causation.

Another useful framework for understanding the motivation for federation has been proposed by Alfred Stepan of Columbia University. Like Burgess, Stepan criticizes Riker for “concept-stretching” in his attempt to find a one size fits all model of federalism.⁴⁴ Stepan proposes a simpler way to understand the motivation for federation than the theory of circumstantial causation suggested by Burgess. He characterizes democratic federations as the result of either “holding-together federalism” or “coming-together federalism.”⁴⁵

Holding-together federalism can best be described as a process by which political leaders come to the realization that the only way to hold their countries together democratically is through the devolution of power and the transformation from unitary to federal states. This is most common in multicultural polities where different ethnic, religious, or linguistic groups may feel threatened by the central authority. Typically, a holding-together federation, according to Stepan, is created by a “constituent assembly,” rather than delegates of sovereign states. This means that this type of federal system

⁴⁴ Alfred Stepan. 1999. *Theories of Federalism*, 257.

⁴⁵ Stepan also briefly mentions a third type of federalism in non-democratic federations, which he calls “putting-together” federalism. He offers the USSR as an example in which federation is the result of coercive and non-democratic centralization. *Ibid.*, 257-258.

starts out with a completely different understanding of the purpose of federation. Instead of delegating certain powers to the central government, the central government confers some degree of autonomy (which may vary from case to case) on its constituent units. The purpose of holding-together federalism is simply to give to each sub-national unit the amount of autonomy necessary to ensure that it derives enough benefit from federation to remain within the system.

Coming-together federalism, on the other hand, is virtually the exact opposite. Sovereign states agree to cede certain powers to the central government, while retaining the balance of their sovereignty, in order to reap the benefits of federation. These benefits differ from case to case, and may be more perceived than real. This potential disparity between the perceived and actual benefits of federation raises additional questions, which the literature on comparative federalism has attempted to address.

Regardless of what other questions Stepan's conceptual framework may raise, his basic hypothesis seems to effectively address the shortcomings in Riker's theory owing to its more general and flexible nature. Stepan does not attempt to make all federations fit into a single model, and gives allowances for individual variations and contextual differences influencing federal systems created either through a holding-together or coming-together process. Stepan's effort to explain the motivations leading to federation, however, seems less complete (although not incompatible with) the theory of circumstantial causation suggested by Burgess.

Why Federalism?

There appears to be some ambivalence on the part of modern scholars of comparative federalism over the intrinsic value of federalism and federation. While Montesquieu believed that federalism held the promise of solving the problem of size in republics, and Madison saw federalism, along with the separation of powers, as a safeguard of individual liberty, modern writing on federalism tends to suggest that its primary value lies in its ability to gain the acceptance of the people and constituent sub-national units. In fact, it may be that the decisive factor in the success of federations, as in any constitutional arrangement, is simply the commitment to making them work, rather than any advantages inherent to federal systems of government.⁴⁶ Thus, Burgess' emphasis on the origins of federation may be sound, since in many cases it may be impossible to get the necessary commitment from the sub-national units without some type of federal arrangement.

There is some question over the value of federalism as compared to simple devolution of a unitary system of government. Indeed, it is not clear at what point a devolved system becomes a de facto federation, or vice versa, nor does there seem to be a widely accepted definition of what constitutes a federal vs. a devolved unitary system. The only meaningful distinction between the two may be found in their origins, formation, and evolution rather than in any quantifiable or observable differences in how they function. It is also possible that a federal system could be regarded as more permanent, while devolution, by definition, is a transitory state, presumably meant to

⁴⁶ Cheryl Saunders, "Constitutional Arrangements of Federal Systems," *Publius: The Journal of Federalism* 25, no. 2 (Spring 1995), 78.

accomplish specific ends. Ronald Watts, however, has identified several generally accepted common characteristics of modern federations that may be useful here. Among these, he lists: two levels of government which act directly on the citizens; constitutionally mandated separation of legislative and executive powers; a formal method for allocating revenues between the two levels of government; provisions for regional representation; a written constitution requiring a super-majority for amendment; a system for adjudicating disputes between governments; and processes for facilitating intergovernmental collaboration in areas of mutual interest or responsibility.⁴⁷

If we are to accept the criteria established by Watts, Spain is hardly less federal than the United States. The two systems differ only in the degree to which their respective states and regions enjoy constitutionally protected autonomy. Burgess characterizes the process by which this has occurred as one of “adaptation and adjustment between distinctive communities.” He further suggests that the advantage of federations lies in their ability to “accommodate and reconcile different forms of unity with different forms of diversity.”⁴⁸ However, little distinction is made within the literature between the successes of federal or devolved systems in achieving these goals of accommodation and reconciliation of diversity. In fact, it appears that Spain has been quite successful at achieving the end desired by a federal arrangement by means of a devolutionary, rather than federalizing, process. This suggests that federalism, as we now understand the term, may not have any particular inherent advantages over devolutionary processes which will eventually arrive at the same, or virtually identical, outcomes. This is an area which

⁴⁷ Watts, *Comparing Federal Systems*, 7.

⁴⁸ Burgess, 156.

seems to warrant further investigation, with Spain, Italy, and the United Kingdom providing current examples of devolutionary processes which might be used in an analytical comparison against a variety of federal systems. Additionally, Northern Ireland may also provide useful insight into the phenomenon of devolution and the potential for a re-assumption of power by the devolving authority.

Characteristics of Federal Systems

The previous two sections have reviewed the definition of federalism/federation and the origins of federation in the literature of comparative federalism. It is crucial to establish a common understanding of these concepts prior to examining the characteristics of federal systems. Although each federation is unique, by definition they share certain common traits. Among the most significant and extensively treated in the literature are: the relationship between federalism, ethnic nationalism, and minority rights; symmetry vs. asymmetry; the distribution of power; representation; and constitutional supremacy. This is by no means an exhaustive list of topics covered in the literature on comparative federalism, but it includes those characteristics of federations which the literature suggests are among the most important.

Federalism, Ethnic Nationalism, and Minority Rights

The relationship between federalism and nationalism is complex and has been treated in two ways. Federalism has been suggested as a means of protecting national

minorities. Conversely, ethnic nationalism has been seen as a threat to federation. To some extent, the relationship must depend on the strength of national identity and the size of a national group. Small groups with a strong national identity may desire autonomy and the protection of their culture, but be unable to preserve either outside of a federal system. On the other hand, larger national groups, such as the Quebecois, may come to the conclusion that their interests are better served by independence and that continued membership in a federation in which they form a minority threatens their national identity. How to address the potentially conflicting values of federalism and nationalism has been a question which political scientists have attempted to answer.

There is a common distinction between national minorities which are dispersed throughout a federation or make up a very small proportion of the population at both the federal and sub-national levels, and those which form a majority within a sub-national unit. Scholars have noted important differences in how national minorities are, or should be, treated in these different circumstances. This distinction does not apply to federations, such as the United States, which do not recognize national minorities or grant group rights (with the exception of the special relationship between American Indians and Alaska Natives and the federal government).

One of the potential problems with minority nationalism in federal systems is that national minorities, if they are granted group rights, may be able to exercise disproportionate influence within sub-national units. It has been suggested that according minorities disproportionate influence may result in weakened loyalty toward the federation on the part of the sub-national majority. This effect may be more pronounced

when the sub-national majority is itself a minority at the national level.⁴⁹ The validity of this concern is demonstrated in an article by Hilliard Aronovitch which discusses the Supreme Court of Canada's decision on the constitutionality of secession. Aronovitch points out that if Quebec were to secede, this would raise serious questions regarding the territorial integrity of the province. While the Canadian federal government has a fundamental responsibility to protect the rights of minorities and recognizes the rights of First Nations peoples, the Cree and other aboriginal groups in Quebec would be unlikely to enjoy the same degree of protection of their group rights in an independent Quebec.⁵⁰ First Nations' reluctance to secede with Quebec demonstrates the difficulty of conflicting national identities in federal systems and particularly within a sub-national unit.⁵¹ Although the Quebecois form a local majority, they are themselves a national minority sharing their province with other national minorities which have federally guaranteed group rights.

There are countless other national minorities in federal systems. The literature on comparative federalism suggests that this dilemma of how best to protect minority rights within a federal system is a delicate area which contains numerous potential pit-falls. It has been suggested that the American model of federalism provides no guidance for dealing with the question of national minorities or nationalism because it is a "territorial"

⁴⁹ Nicole Töpperwien. *Federalism, Subnational Constitutions, and Minority Rights*, eds. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport, Connecticut: Praeger, 2004), 47.

⁵⁰ It would not be surprising to find that Alaska Natives may have reservations similar to those of the Cree at the prospect of any change in the relationship between Alaska and the United States. Given the state's position in the subsistence debate, it seems apparent that Native groups enjoy greater protection from the federal government than they would from the state.

⁵¹ Hilliard Aronovitch, "Seceding the Canadian Way," *Publius: The Journal of Federalism* 36, no. 4 (2006), 48.

rather than “multinational” federation. Canadian political philosopher Will Kymlicka states that territorial federations may actually be detrimental to the rights of national minorities because they are intended to “protect the equal rights of individuals within a common national community, not to recognize the rights of national minorities to self-government.”⁵²

Alfred Stepan has also addressed the inadequacy of American-style federalism for protecting minority rights. Stepan characterizes the U.S. federal system as *demos*-constraining, meaning that it limits the influence of the people through the institution of the Senate and the reserved powers of the states. This gives the states a greater voice in the federal government than the people, and makes it unlikely that any sub-national group can win significant rights or protections.⁵³ He argues that the concept of group rights is incompatible with the value placed on individual rights in American-style federalism.

Somewhat contrary to what has been written by Kymlicka, Stepan, and others, Michael Burgess has argued that while federations and federal institutions do not perfectly protect the rights of national minorities, some degree of accommodation through “federal arrangements” is necessary in multinational states. Burgess does not advocate full-blown federalism in every case. He uses Spain and the United Kingdom as examples in which devolution, varying degrees of political autonomy, and consociational techniques have enabled states which are not officially federations to achieve many of the goals of accommodating national minority nationalism and protection of minority rights.

⁵² Will Kymlicka. 2004. *Theories of Federalism*, 274.

⁵³We will return to the concept of American federalism as *demos*-constraining when we examine the constitutional space available to states and provinces in relation to issues concerning the protection of rights.

Stepan. *Theories of Federalism*, 266-267.

Burgess does not use the *demos*-constraining/*demos*-enabling structure proposed by Stepan, and specifically rejects Kymlicka's definition of a multinational federation.⁵⁴

There appears, then, to be some disagreement within the literature over the degree to which federalism can or does protect minority rights and how federalism and nationalism relate to each other. Although there is broad general agreement over the potential for tension between national minorities and majorities, it is unclear to what extent federations can diffuse this tension more effectively than unitary states which are committed to multiculturalism and the protection of minorities. The lack of scholarly consensus in this area suggests the need for development of an accepted paradigm in order to facilitate a common point of origin for further investigation of the degree to which federal arrangements can offer protection to national and sub-national minority groups.

Symmetry vs. Asymmetry in Federations

Although much has been written about symmetry vs. asymmetry in federations, the reality is that all federations are asymmetrical to some extent. While the United States is considered to be one of the most symmetrical federations, with the equality of the states officially enshrined in the Constitution, it also contains certain asymmetrical features. In particular, the allocation of seats in Congress and electoral votes in

⁵⁴Burgess suggests that while Canada may be a multinational society, it is not a multinational federation. It was not created with the specific purpose of accommodating ethnocultural groups, and, despite subsequent developments, continues to foster a predominantly Anglophone national identity. His position is debatable, however, given the protections afforded to the Francophone minority in the British North America Act of 1867.

Burgess, 130-31.

presidential elections gives the individual citizens of smaller states a greater voice in the federal government than those in more populous states. At the same time, proportional representation in the House of Representatives guarantees the largest states great power over national decision making. The states in the middle, however, are neither disproportionately represented nor populous enough to greatly influence congressional policy. As one of the least populous states, this asymmetry is particularly relevant to Alaska because it gives Alaskans a greater voice in the federal government than their population would seem to deserve.

The literature suggests several factors which may help to determine the necessary degree of asymmetry in each federation. Here again, the theory of circumstantial causation put forth by Burgess is useful in explaining why some federations display greater degrees of asymmetry than others.⁵⁵ For example, the emergence of a relatively symmetrical style of federalism in the United States, as a coming-together federation, is of little practical use in understanding Indian federalism. According to Burgess, a variety of factors render American-style federalism unsuitable for India. Asymmetry is the product of each federation's unique history and circumstances, and, in his view, cannot be explained through simple generalizations.⁵⁶

⁵⁵ *Ibid.*, 98.

⁵⁶ Although Burgess is hesitant to acknowledge any possible explanatory hypothesis regarding the need for varying degrees of asymmetry in federations, other scholars have not been. In particular, Stepan, as we will see below, suggests that asymmetry may be a necessary condition for federation under certain conditions.

Burgess identifies several preconditions for asymmetry in federations,⁵⁷ as well as several examples of both de facto⁵⁸ and de jure asymmetries.⁵⁹ He concludes that the concept of asymmetry is useful in understanding the ways in which federations seek political stability and as a manifestation of the values, beliefs, and interests within each federation.

Ronald Watts does not disagree with Burgess, but instead of distinguishing between de facto and de jure asymmetry uses the terms “political asymmetry” and “constitutional asymmetry.” He points out that every federation has some degree of political asymmetry resulting from a variety of social, economic, cultural, and political conditions which affect the relationship among various sub-national units and between sub-national units and the federal government. Political asymmetry corresponds to Burgess’ de facto asymmetry, and arises from differences in representation resulting from population disparities among sub-national units. Watts defines constitutional asymmetry, which corresponds to Burgess’s de jure asymmetry, as “the degree to which powers assigned to regional units by the constitution of the federation are not uniform.”⁶⁰ Constitutional asymmetry may take the form of provisions allowing one or more sub-

⁵⁷ These preconditions include local political cultures and traditions, social cleavages, territoriality, socio-economic factors, and demographic patterns.

Burgess, 215-216.

⁵⁸ De facto asymmetries may include variations in the territorial and population size of sub-national units, fiscal power and autonomy, representation, and the role and nature of political parties. Ibid., 219-220.

⁵⁹ De jure asymmetries include constitutional and legal provisions for differential treatment. Ibid., 220-221.

⁶⁰ Watts’ terminology is more self-explanatory than Burgess’, and will be used throughout the remainder of this chapter’s discussion of asymmetry. Watts, *Comparing Federal Systems*, 63.

national units to collect their own income taxes (a power given to Quebec, but not to other Canadian provinces).

In reviewing the literature on comparative federalism, there is an obvious correlation between constitutional asymmetry and holding-together federalism. Stepan identifies India, Belgium, and Spain as holding-together federations.⁶¹ Each of these federations has characteristics which are different from American-style coming-together federations. In each case, a major manifestation of difference is the asymmetrical relationships that the regions, communities, or states have with each other and with the federal government. The correlation between constitutional asymmetry and holding-together federalism is so strong that it could be argued that constitutional asymmetry is the *principal characteristic* of holding-together federations. Although Stepan does not specifically say this, he does point out that, with the exception of Switzerland, all of the constitutionally symmetrical federations are mononational, while all of the multinational federations are constitutionally asymmetrical.⁶²

A common question in constitutionally asymmetrical federations is the degree to which sub-national units enjoying greater autonomy should be allowed to participate in federal policy making decisions related to issues which fall under federal jurisdiction in most of the federation, but under local jurisdiction in the more autonomous unit. This has been particularly relevant to discussion of the relationship between Quebec and Canada. Canadian political philosopher Will Kymlicka has argued that greater autonomy must result in correspondingly lesser representation since “[a]n asymmetry in powers entails an

⁶¹Stepan. *Theories of Federalism*, 258.

⁶²Ibid., 264-266.

asymmetry in representation.”⁶³ However, fellow Canadian Ronald Watts suggests that while it may seem reasonable to restrict sub-national units from participating in some federal legislating on issues which do not concern them individually, it is in fact impractical to selectively exclude members of the federation from participation.⁶⁴ No federation has yet taken steps to do so.

There is broad agreement among scholars that asymmetry “is rooted in respect for, and toleration of, difference.”⁶⁵ It is therefore logical that the literature on comparative federalism would focus on asymmetrical relationships in multinational, multicultural, and linguistically diverse federations. Federations primarily composed of a homogeneous population, or where minorities are widely dispersed, are less likely to require the accommodation of group rights that asymmetry reflects. Likewise, it is somewhat intuitive that most discussion of asymmetry relates to holding-together federations, where accommodations for diverse populations are necessary for the preservation of the whole.

Distribution of Power in Federal Systems

The distribution of power in federal systems can refer to either the structure of the federal government or to the balance of power between the federal and sub-national governments. When referring to the structure of the federal government, scholars generally recognize two basic variations. The first is the separation of powers system,

⁶³ Kymlicka, *Theories of Federalism*, 282.

⁶⁴ Watts, *Comparing Federal Systems*, 68.

⁶⁵ Burgess, 222.

which is sometimes called the republican-presidential model. The separation of powers system is most closely identified with the United States. The second variation is the parliamentary system, which is also known as the Westminster model. Canada is an example of a federation which has a parliamentary system. Some scholars have also identified a third method of power distribution which combines elements of the first two. Michael Burgess refers to Germany, Austria, and Switzerland as examples of this hybrid structure known as the “quasi-presidential system.”⁶⁶ Although there is some question about the true structure of the current Russian Federation’s government, and the role of the president vis-a-vis the prime minister in particular, it also appears to fall into this third category of power distribution.

In reality, the specific structure of the federal government seems to be less relevant to the de facto distribution of power in federations than the interpretation and evolution of the constitutional division of competencies between federal and sub-national levels of government. This is particularly evident in the case of India, where the emergency provisions permit the transformation of the Constitution from a federal to a unitary form.⁶⁷ India, however, is an example of an unusual distribution of powers which is not typical of most other federations.⁶⁸ In general, there are a few principles regarding

⁶⁶ Ibid., 136.

⁶⁷ Indian Const. part XVII, art. 352-360.

⁶⁸ Scholars have referred to India’s system as “flexible federalism.” In addition to the greater autonomy granted to Jammu and Kashmir, sub-national control over issues ranging from language to immigration, varying degrees of traditional legal, social, and religious practices, and the creation of new states and autonomous regions have all contributed to a large degree of asymmetry in India. The federal government has also adjusted internal boundaries along traditional ethno-linguistic lines and increasingly relied on executive federalism for the formulation and furtherance of national policy.

the distribution of powers in federal systems which seem to be commonly accepted in the literature.

By definition, all federal systems must have at least two levels of government. The division of powers between the national and sub-national governments is formally outlined in a written constitution which is subject to amendment and judicial review. A system of government which does not meet these basic conditions may not be considered truly federal. The variation in the distribution of power between federations has been classified in two significant ways. First, there is the enumeration of executive and legislative powers. Second, there is the question of which level of government will possess the residual powers which are neither specifically assigned to the national or sub-national governments nor denied to either one.

According to Watts, federations in the Anglo-Saxon tradition (essentially those which grew out of the British colonial system and the New World federations based on the American model) tend to assign each level of government executive authority over the same areas in which it has legislative authority. In the United States, the general police power of the states provides an example of this type of arrangement, in which the states are responsible for both legislation and enforcement/administration. Federations in the continental European tradition are more likely to give extensive executive authority over federal legislation to the sub-national units.⁶⁹ The result of this practice can be seen in the German practice of enacting federal “framework” legislation which is then

⁶⁹ Watts, *Comparing Federal Systems*, 36-37.

implemented by the *Länder*.⁷⁰ There are exceptions to each of these general rules, but analysis by several scholars has more or less demonstrated the usefulness of Watts' conceptual framework in looking at the division of powers in federations.⁷¹

There has been much written about the consequences of these differences in the division of powers. In particular, the evolution of federalism in Spain and Belgium has tested the validity of Watts' generalization. In the case of Spain, there appears to be a combination of what Watts has called the Anglo-Saxon tradition and the continental European tradition. While in most cases the Autonomous Communities and national government each has executive and legislative authorities which complement each other, there are several areas in which the continental practice of framework legislation at the national level requires local legislation and executive action for implementation. The broad grant of executive and legislative powers to the Autonomous Communities has led some scholars to believe that Spain has become a federation in all but name,⁷² while others suggest that serious obstacles, such as conflict over the degree of asymmetry between the Basque regions and the remainder of the country, remain to the creation of a true federal system.⁷³

The evolution of federalism in Belgium has also tested Watts' generalization about the division of powers due to the unique nature of Belgian federalism. Because

⁷⁰ Such legislation might, for example, mandate universal health care, but allow the sub-national governments to implement their own health care plans in accordance with their own unique needs and conditions.

⁷¹ For example, Burgess cites Watts in his discussion of the division of powers, and merely notes that, as Watts admits, this is a generalization which does not completely apply to every federation. Burgess, 136-137.

⁷² Watts, 30.

⁷³ Eduardo J. Ruiz Vieytez. *Federalism, Subnational Constitutions, and Minority Rights*, 149-150.

autonomy in Belgium is divided between regions and communities, the federal relationship is somewhat more complicated. In many ways, it seems to function similarly to the “system of states” described by Pufendorf in which states are united under a common monarch, but retain most aspects of their individual sovereignty.⁷⁴ Unlike either the Anglo-Saxon or continental European models, Belgium has evolved into a bi-polar federation in which there is no overriding federal legislative authority over the communities.⁷⁵ Additionally, the regions have their competencies, which are, at least in theory, separate and distinct from those of the communities. This has been characterized as a “multi-layered” federal system, which is unique to Belgium in Europe.⁷⁶ In practice, Wouter Pas, of the Belgian Council of State and Catholic University of Leuven, has argued that the Belgian federal system is more of a confederal compact between linguistic/ethnic communities that does not appear to fit either of the general structures for the distribution of powers in federations suggested by Watts.⁷⁷

On the question of which level of government should possess the residual powers not assigned by the federal constitution, there has been considerable scholarly interest. Canada and the United States have been used as examples in which the former leaves all residual powers in the hands of the federal government, while the latter, under the Ninth and Tenth Amendments, gives them to the states or to the people. There has been some discussion of the implications for sub-national autonomy under either method. Watts suggests that while the American model was intended to preserve the maximum possible

⁷⁴ Pufendorf. *Theories of Federalism*, 41.

⁷⁵ Wouter Pas. *Federalism, Subnational Constitutions, and Minority Rights*, 161.

⁷⁶ *Ibid.*, 163.

⁷⁷ *Ibid.*, 166.

amount of autonomy for the states, it has, in fact, resulted in a progressive centralization of power as the implied powers of the federal government have been liberally interpreted. Conversely, the practice of enumerating sub-national powers, with all residual powers belonging to the central government seems to have resulted in expansive interpretations of the enumerated powers and relatively greater autonomy in the Canadian provinces.⁷⁸ The question of the disposition of residual powers and its effect on sub-national autonomy will be addressed in greater depth in the following chapters.

Representation in Federal Systems

Michael Burgess has suggested that the relationship between federalism and representation has been seriously neglected, and is deserving of much more attention from scholars of comparative federalism.⁷⁹ If one of the primary purposes of federation is to gain the advantages of security and national unity while preserving sub-national diversity,⁸⁰ then it is clearly necessary for federal governments to represent the sub-national units of which they are comprised. However, democratic principles seem to require that the citizens of the federation must also be represented at the federal level. Adequate representation has frequently been achieved through bicameral arrangements similar to the American model in which the states (or other sub-national units) are represented in one house, and the people in the other. However, the method of election

⁷⁸ Watts, *Comparing Federal Systems*, 39.

⁷⁹ Burgess, 207.

⁸⁰ Helms and McBeath, 74.

or appointment to the so-called upper house varies from federation to federation and raises the question of who (or whose interests) is truly being represented.

According to Burgess, the conceptual shift from confederation to federation in the modern sense in 1787 led to the evolution of dual representation within federations through which citizens are represented both in their individual capacities and through the representation of their sub-national units within the federal government.⁸¹ The result of this fundamental change in the answer to the question of who should be represented was the creation of a more firmly consolidated union of both states and citizens. The question of who shall be represented, therefore, is critical to understanding the nature of modern federalism. Citizens of federations today may be acted upon directly by the federal government because they are directly represented in it. This was a notion which was unknown under the Articles of Confederation, and has only begun to be explored by the confederal European Union over the past half century.⁸²

The primary role of the second legislative chambers (those in which the sub-national units are represented) in federations has been “reviewing federal legislation with a view to bringing to bear upon it regional and minority interests and concerns.”⁸³ Watts suggests, and other scholars have agreed, that the credibility of these second chambers as

⁸¹ Burgess, 194-195.

⁸² Although the European Parliament represents the people of the member states and has been elected by them since 1979, its inability to initiate legislation raises questions about the degree to which citizens of the EU are truly represented in the legislating process. Recent reforms and developments, including the pending Treaty of Lisbon, suggest that the legislative powers will be housed more completely in Parliament and that the citizens of the EU will be more closely connected to the legislative process from initiation at the Union level to implementation at the national level.

⁸³ Watts, *Comparing Federal Systems*, 97.

representative bodies depends greatly on their method of election or appointment.⁸⁴ In federations such as the United States and Australia, where senators are elected directly by the citizens of their states, the second chamber is likely to be representative of the respective electorates.⁸⁵ At the other end of the spectrum, the federally appointed Canadian Senate appears to have the least credibility as a representative body, which has prompted calls for its reform.⁸⁶

The problem with dual representation is that it appears to be inherently undemocratic. While the second legislative chamber is generally viewed as a necessity in a federal system, it can also lead to situations in which the vote of a citizen in a less populous region is, in effect, worth more than the vote of a citizen in a more populous one. This clearly violates the principle of “one man, one vote,” yet it is a characteristic of federalism which does not seem to generate as much discussion as one might expect in the literature. Michael Burgess concludes that, along with the fact that there are no serious proposals for the reform of second legislative chambers of federations in which they are popularly elected, the relative lack of scholarly debate surrounding representation in upper houses suggests that “the democratic foundations” of federalism are sufficiently accepted and stable for this undemocratic aspect to be less problematic than might be assumed.⁸⁷

⁸⁴ *Ibid.*, 95.

⁸⁵ In the United States, the adoption of the Seventeenth Amendment in 1913 was a fundamental alteration of the federal system in which the states as political entities essentially lost their representation in the federal government. Although outside the scope of this paper, an examination of the Seventeenth Amendment’s impact on American federalism might attempt to quantify the impact of the Amendment on state autonomy, if such an impact were found to exist.

⁸⁶ *Ibid.*, 97.

⁸⁷ Burgess, 206.

There is another problem related to representation in federal systems, which was recognized shortly after the development of modern federalism and which has still not been resolved. This is the problem of majoritarianism. If we accept that one of the purposes of federation is to protect diversity, a scheme of representation which makes a sub-national unit subject to a national majority regarding internal policies or issues of concern is problematic. In the United States, one of the most vocal anti-majoritarians was John C. Calhoun. Although Calhoun was primarily concerned with preserving the institution of slavery, the concerns he raised appear to have been well founded.

Calhoun advocated the now-discredited position that the federal government of the United States was a creation of the states and was a result of, rather than a party to, the constitutional compact. The federal government was not, outside the bounds of the powers delegated to it, sovereign over the states, and could not, through Congress, impose its will upon the states with regard to their internal concerns. To give the federal government such authority, according to Calhoun, would amount to a surrender of state sovereignty to the will of an irrelevant and unconstitutional majority.⁸⁸

In the United States, scholars have suggested that the problem of majoritarianism was effectively addressed through the adoption of the Fourteenth Amendment, which has been described as transforming the government from a federal to a unitary or quasi-unitary form.⁸⁹ In other federations, this problem has been resolved in different ways. For example, the German *Bundesrat* has an absolute veto over federal legislation requiring *Land* administration. However, there seems to be little consensus within the

⁸⁸ Calhoun. *Theories of Federalism*, 144.

⁸⁹ Helms and McBeath, 16.

literature on the proper way to address the potential problem of majoritarianism in federations. Perhaps the continuing evolution of the European Union will provide the opportunity to examine this issue more closely as member states and potential members are required to conform to EU standards related to human rights, environmental, and economic policies.

Constitutional Supremacy in Federations

One of the conditions of federation that is universally accepted is the existence of a written constitution which formally establishes the distribution of powers between the levels of government. Typically, changes to the constitution require the consent of a super-majority of the sub-national units and must be enacted through a pre-determined process specified in the constitution. Furthermore, the constitution is most often considered to be superior to mere statutory law or normal legislation. Watts states that constitutional supremacy is necessary in order to prevent one order of government from subordinating the other and consequently undermining the constitutional balance required for the maintenance of the federation.⁹⁰

To maintain the constitutional order, it is necessary to subject governmental claims of authority to judicial review. The legitimacy of judicial review further requires a respect for constitutionality⁹¹ and faith in the independence and impartiality of judicial

⁹⁰ Watts, *Comparing Federal Systems*, 99.

⁹¹ *Ibid.*

interpretation.⁹² Some scholars have suggested, however, that judicial review has the potential to undermine federalism owing to the lack of general awareness of judicial processes compared to the debates generated over formal constitutional amendments. The danger to federations is that judicial activism, combined with a respect for the rule of law that results in compliance with court decisions, can present a threat to the balance of power that is essential to maintaining a federal system. Burgess suggests that this is a valid concern and that the result of judicial review is quite often nationalizing and hierarchical, to the detriment of federalism.⁹³ Others have suggested that federalism may, in practice, simply be “rule by judges.” However, Watts has pointed out that the extent to which judicial review influences the balance of power in federations depends on the efficacy of alternative means of conflict resolution, such as intergovernmental agreements, the electoral process, formal amendments, and mediation.⁹⁴ Nevertheless, other scholars have noted that the nature of federations, based on powers assigned through a written constitution, may “invite litigation,” causing frequent resort to the courts.⁹⁵

What is clear from the scholarly discussion of constitutional supremacy in federal systems is that in bona fide democratic federations, the constitutional document and respect for constitutionalism play a major role in the success or failure of federalism. In any conflict between the levels of government, both sides must rely on a favorable interpretation of the constitution to validate their positions. Additionally, only when both

⁹² Burgess, 158.

⁹³ *Ibid.*, 159.

⁹⁴ Watts, *Comparing Federal Systems*, 101.

⁹⁵ Helms and McBeath, E-2.

sides willingly accept the constitutional determinations made through judicial review can the federation continue to function.

The Question of Secession

While there may be little in the way of scholarly consensus on the intrinsic value of federation or even of the chief motivating factors for adopting a federal form of government, there is a general recognition that federalism is, at its core, a unifying force. Seen in this light, it is not surprising that the vast majority of federations have not made constitutional provisions for secession.⁹⁶ Secession can be seen as the antithesis of federation, and attempts to secede are most likely to lead to the complete dissolution of the federation (as in the case of Yugoslavia) or the forcible imposition of continued federation (as in the case of the United States). Historically, both options have resulted in war. The only case of a modern independent (as opposed to colonial) federation undergoing peaceful separation occurred in Czechoslovakia in 1993. Several possible reasons for the peaceful nature of this dissolution have been offered, including questions of the legitimacy of the Czechoslovak federation, but it remains clear that the Czechoslovak experience is an aberration in the history of federations.

Watts has identified three reasons why federations have refused to provide a constitutional path to unilateral secession. First, there is a fear that such a right would weaken the federation by making it subject to coercion by the sub-national governments.

⁹⁶ In fact, the Ethiopian and Soviet constitutions are the only federal constitutions ever to include a unilateral right to secede. The Supreme Court of Canada ruled in 1998 that Quebec has a right to secede, but not unilaterally. See Chapter 1 for a brief discussion of this decision.

Second, the uncertainty over the future and stability of the federation introduced by a right of secession would undermine economic development and unity. Third, the right to secede would fundamentally alter the federal principle of divided sovereignty by subordinating the national government to the will of the seceding sub-national government.⁹⁷

Michael Burgess, while acknowledging the work of Watts and others on the question of secession, has pointed out that, in keeping with his theory of circumstantial causation, there may be a moral case for secession in a federation when it evolves in such a way as to become “less federal” than it was upon its formation. For this reason, he argues that it is necessary constantly to return to an examination of the origins and formation of a federation to determine, through the historical record, what the founding purposes and values of the federation were.⁹⁸ Thus he suggests that a federation which strays, in its operation, from the original meaning of federation as understood by the sub-national units has subjected itself to the possibility of a morally acceptable, if not constitutional, secession.

James Buchanan, of George Mason University, has taken a different approach to the question of secession. Buchanan has suggested that federations, ideally, should function similarly to economic markets and that such “competitive federalism” will maximize individual liberty.⁹⁹ In a competitive federal system, the national government would be restricted to a strictly limited domain and essentially empowered merely to

⁹⁷ Watts, *Comparing Federal Systems*, 107.

⁹⁸ Burgess, 280-281.

⁹⁹ James M. Buchanan, “Federalism as an Ideal Political Order and an Objective for Constitutional Reform,” *Publius: The Journal of Federalism* 25, no. 2 (Spring 1995), 21.

ensure free trade among the sub-national units. In order to keep the national government from overstepping its legitimate bounds, he argues for a constitutional provision for secession. Buchanan argues that such an arrangement would cause a federal system to act similarly to an economic market in which competition for the loyalty of the citizens and the ability to choose or reject continued membership in the federation would result in a truly federal government that would be more responsive to the will of the people and less likely to infringe upon individual liberty.

Suggestions for Further Research

This brief overview of historical and contemporary comparative federalism literature leaves us with several possible areas in which further research might be beneficial to an understanding of the interaction between federal and sub-national governments and the maximization of sub-national autonomy. First, the continuing evolution of the European Union gives us the opportunity to re-examine the suitability of confederation, as opposed to federation, for the modern world. Although *The Federalist* has served as the most influential source of federal thought for over 200 years, it may be time to re-evaluate its assumptions that confederation is inherently flawed and incapable of producing a government vigorous enough to achieve the ends for which union was originally sought.

The devolutionary processes currently at work in Spain, the United Kingdom, and Italy also seem to warrant further investigation. An examination of each of these countries would be useful in a comparative analysis of the value of federation vs. that of

devolution. The process of devolution in Spain, in particular, seems to suggest that the supposed benefits of federation may be just as easily achieved through devolution in formerly unitary systems. Such a study may further call into question the intrinsic value of federation, which has been questioned by several scholars.

There appears to be little consensus within the literature on the question of whether federal or unitary states are better suited to diffuse the potential tensions between ethnic minorities and national majorities. This question has particular relevance to Russia, given the ongoing tensions and recurring conflicts within the federation as various ethnic/national minorities press for greater autonomy or outright independence. A comparative analysis of how such issues have been addressed in a variety of federal and unitary states might provide insight into how best to accommodate ethnic minorities and whether federalism offers advantages over a unitary system.

As Michael Burgess has suggested, the question of who is represented in federal systems is deserving of further attention. With respect to the United States, such a study might attempt to quantify the impact of the Seventeenth Amendment and the direct election of senators on state autonomy and influence in Congress. Can the states as political entities still be said to have representation in Congress? Did the Seventeenth Amendment fundamentally alter American federalism? If so, precisely what have the effects been? All of these questions warrant further investigation.

Finally, there is the question we will begin to explore in the remainder of this thesis. Can sub-national units utilize constitutional space to maintain or increase their autonomy? In particular, how have Canadian provinces and American states used the

constitutional space available to them, and do these experiences have implications for the potential to increase Alaska's autonomy? The following chapters will attempt to provide some answers to these questions through an examination of asymmetries which may result from varying degrees of exploitation of constitutional space and an analysis of the roles of state and provincial constitutions as they relate to state and provincial actions with regard to same-sex marriage and resource management.

Chapter 3: Same-Sex Marriage and Constitutional Space

The previous two chapters have laid the groundwork for an examination of the real-world potential for the utilization of constitutional space as a means of preserving and enhancing state and provincial autonomy in the United States and Canada. Recall that in the previous chapters we have defined constitutional space as “the range of discretion available to the component units in a federal system in designing their constitutional arrangements.” In this chapter, we will focus specifically on the issue of same-sex marriage and the potential for states and provinces to utilize constitutional space in order to respond to pressures to either redefine marriage or to provide benefits for relationships that have traditionally not enjoyed official recognition or legal status.

In examining this issue, it will be helpful to recall the differing origins, formation, and evolution of the American and Canadian federal systems. In particular, their contrasting disposition of residual powers has had a major impact on the resolution of social problems in each federation and may limit the amount of constitutional space available to the states and provinces in relation to specific social issues which may or may not be explicitly enumerated in each country’s constitution. It is also important to note that divergent interpretations of basic human rights which are guaranteed and protected by each federal government under the Fourteenth Amendment and the Charter

of Rights and Freedoms have led to different paradigms with respect to certain social issues in Canada and the United States.¹⁰⁰

Same-Sex Marriage in Canada

In July 2005, Canada became the fourth country in the world to legalize same-sex marriage nationwide through the federal Civil Marriage Act. The Act followed decisions in eight of the provinces and the Yukon Territory to legalize such unions within their own jurisdictions, which will be addressed below. Table 2 shows the dates of legalization throughout Canada.

Table 2. Dates of Same-Sex Marriage Legalization in Canada.¹⁰¹

Province/Territory	Date
Ontario	June 2003
British Columbia	July 2003
Quebec	March 2004
Yukon Territory	July 2004
Manitoba	September 2004
Nova Scotia	September 2004
Saskatchewan	November 2004
Newfoundland and Labrador	December 2004
New Brunswick	June 2005
Canada (Civil Marriage Act)	July 2005

If we are concerned with the relationship between sub-national constitutional space and the legal status of same-sex marriage, the Civil Marriage Act itself is of only

¹⁰⁰ It has been suggested that the long history of anti-sodomy laws in the United States, only recently found to be unconstitutional, has led homosexuality to be treated as a matter of criminal law. In Canada, where such laws were repealed in the 1960s, the predominant view is that homosexuality should be viewed as a human rights issue. This is but one example of different paradigms resulting in different policy outcomes. Miriam Smith, "The Politics of Same-Sex Marriage in Canada and the United States," *PS: Political Science and Politics* 38, no. 2 (April 2005), 226.

¹⁰¹ Compiled by author.

secondary interest. What is more relevant to our discussion is the ways in which the provinces addressed this issue prior to the Civil Marriage Act and how those provinces which had not yet acted on their own to legalize same-sex marriage reacted to it. However, prior to examining provincial responses to this issue, it is necessary to understand the general constitutional status of marriage in Canada.

Constitutional Authority over Marriage in Canada

The British North America Act of 1867 (BNA) gave the Canadian Parliament the authority to define and legislate on matters related to marriage. Unlike the United States Constitution, which does not mention marriage and therefore leaves its definition completely to the states, the BNA allowed for a single federal definition of marriage and federal control over legislation related to marriage.¹⁰² Left to the provinces, however, was the solemnization of marriage (that is, the legal processes related to the actual performance of marriages). The Constitution Act, 1982 recognized the BNA (re-named the Constitution Act, 1867 in Canada, but still known as the British North America Act in the United Kingdom) as part of the Canadian Constitution, maintaining federal control over legislation relating to marriage and divorce.

Due to the specific provisions of the BNA regarding marriage, there is very little constitutional space remaining for the provinces on the issue of same-sex marriage. No province may define marriage (as the states may do), and while they may regulate the

¹⁰² Section 91(26) of the BNA gives Parliament “exclusive Legislative Authority” over “all Matters” related to marriage and divorce.

procedures for solemnization, they may not exclude persons or groups whom the federal government recognizes as eligible to marry. In addition, Section 15 of the Charter of Rights and Freedoms (which may be considered analogous to the Fourteenth Amendment's Equal Protection Clause) has been cited by Canadian courts (both provincial and federal) as requiring the legalization of same-sex marriage under its guarantee of "equality rights."¹⁰³ Section 15 has been more broadly interpreted with respect to gay rights than the Fourteenth Amendment has been in the United States, leaving the provinces with few alternatives but to comply with court rulings legalizing same-sex marriage. Additionally, the initiative, which has been used extensively in the United States to define marriage and limit anti-discrimination measures based on sexual orientation, is not available to Canadian voters.

All of the above factors combine to severely limit provincial constitutional space with regard to the issue of same-sex marriage, and have effectively prevented any province from successfully challenging court rulings and federal legislation recognizing same-sex unions. There is, however, a unique Canadian constitutional provision which presented the provinces with the possibility of pre-empting federal mandates on same-sex marriage. Additionally, it is instructive to observe how the provinces individually confronted the issue prior to passage of the Civil Marriage Act.

¹⁰³ "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination . . ."
Section 15, *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Provincial Responses to Demands for Legalization of Same-Sex Marriage

Although table 2 shows that no province legalized same-sex marriage prior to the summer of 2003, the groundwork had been laid by a series of federal and provincial court decisions related to gay rights during the 1990s. The most significant of these were the Supreme Court of Canada decisions in *Egan and Nesbit v. Canada*¹⁰⁴ and *M. v. H.*¹⁰⁵ In *Egan*, which concerned the right of same-sex partners to receive spousal benefits under a provision of the federal Old Age Security Act, which allows the spouse of a pensioner to receive benefits if their combined income falls below a designated level, the Court was asked to address the application of equality rights to same-sex couples. A plurality of the Court determined that while the Old Age Security Act discriminated against same-sex couples, the violation of equality rights was reasonable under Section 1 of the Charter of Rights and Freedoms, which allows for the restriction of equality rights to the extent that such restrictions “can be demonstrably justified in a free and democratic society.”¹⁰⁶ The actual outcome of the case was somewhat equivocal. The Court was highly divided, and sent no clear message to either the provincial courts or the legislatures on the issue of same-sex marriage rights *per se*.¹⁰⁷ As a result, there was little pressure at either the federal or provincial level to address the issue of gay rights following the *Egan* decision.

¹⁰⁴ *Egan and Nesbit v. Canada* (1995) 2 S.C.R. 513

¹⁰⁵ *M. v. H.* (1999) 2 S.C.R. 3

¹⁰⁶ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰⁷ Four justices found that the Act was an unacceptable violation of equality rights, four rejected the equality claim and upheld the Act, and one agreed that it was a violation of equality, but that the violation was a “reasonable limit” under Section 1 of the Charter of Rights and Freedoms, which states that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
Egan and Nesbit v. Canada

Four years later, in *M. v. H.*, the Court rejected the *Egan* precedent in a case concerning the payment of support following the break-up of a same-sex relationship. In this case, the decision was unequivocal in determining that same-sex couples were entitled to equal treatment under the law with heterosexual couples, and that the Section 1 allowance for the denial of equality which was the basis of their ruling in *Egan* could not justify inequality in this case. The Court's ruling has been characterized as a turning point for gay rights in Canada and as a clear statement by the Court that equality before the law for homosexual couples was compulsory, rather than voluntary.¹⁰⁸ The result was a scramble by provincial legislatures to implement the decision. Most importantly, *M. v. H.* framed the discussion about gay rights in Canada as an issue of equality and basic human rights. In doing so, it paved the way for recognition of same-sex marriage, first at the provincial level, and ultimately at the federal level with the passage of the Civil Marriage Act in 2005.

The first province to legalize same-sex marriage was Ontario, in June 2003. It was followed one month later by British Columbia. In each case, legalization came as a result of court decisions in cases brought specifically to challenge provincial refusal to recognize same-sex marriage, in violation of Section 15. Both provinces immediately took steps to implement the courts' decisions, with the result that by the end of that summer slightly over half of the citizens of Canada lived in jurisdictions which recognized same-sex marriage.¹⁰⁹ Success in Ontario and British Columbia led same-sex

¹⁰⁸ J. Scott Matthews, "The Political Foundations of Support for Same-Sex Marriage in Canada," *Canadian Journal of Political Science/Revue canadienne de science politique* 38, no. 4 (December 2005), 849.

¹⁰⁹ See table 1.

marriage proponents to challenge the law in other provinces, as well. All were successful, so that by the end of 2004 same-sex marriage was legally recognized in eight provinces and the Yukon Territory. Among the provinces, only Alberta and Prince Edward Island had not acted.

From an American perspective, perhaps the most extraordinary aspect of the rapid spread of legal acceptance of same-sex marriage in Canada is the level of compliance with the courts' rulings. In the eight provinces and one territory that had legalized such unions prior to the federal Civil Marriage Act, no serious challenges to what many Americans would likely characterize as extreme judicial activism were mounted. In addition, Prince Edward Island was prepared to alter its laws to permit same-sex marriage without being required to do so by court order in the spring of 2005, but halted that process when it became apparent that the federal government was going to effectively address the issue on a national basis.

Provincial compliance with the courts has been attributed to two factors which seem to distinguish the Canadian experience from what we have seen thus far in the United States. First, there is compelling evidence that Canadians tend to have a greater degree of respect for the judicial system and court decisions, and are therefore likely to accept even controversial decisions more readily than Americans.¹¹⁰ Second, unlike in the United States, where the initiative process provides opposition groups in many states the requisite points of entry into public policy issues at the state level, with the possibility

¹¹⁰ Matthews, 846-847.

For a brief discussion of American attitudes toward judges and the judicial system, see Robert A. Carp, Ronald Stidham, and Kenneth L. Manning, *Judicial Process in America*, 6th ed. (Washington, D.C.: CQ Press, 2004), 12-16.

of removing certain issues from the courts' jurisdiction through constitutional amendment in several of the states, the Canadian federal system provides for much more restricted public access to the policy making process, and thus forces acceptance of court decisions that might be challenged by the people in the United States.¹¹¹ Canadians are not only more accepting of judicial policy-making and controversial decisions, but also more favorably inclined to social reform and less likely to defend the current social structure than Americans.¹¹²

It is necessary also to consider the unique Canadian political culture in order to understand the relatively quick acquiescence to court decisions mandating recognition of same-sex marriage. American political culture and tradition is firmly grounded in the revolutionary experience and resistance to governmental tyranny. Distrust of government is the enduring legacy of the American path to independence and the separation of powers form of government adopted by the United States. The American experience stands in stark contrast to that of Canada. While the United States was born out of revolution, Canada (or at least English Canada) has been characterized as the home of the "counter-revolution."¹¹³ The influence of American Loyalists, Tory conservatism, and a hierarchical colonial society all have been cited as factors contributing to a Canadian political culture of statism and paternalism at odds with the Lockean liberalism embraced

¹¹¹ Miriam Smith, 226-227.

¹¹² Ronald Inglehart, "The Renaissance of Political Culture," *The American Political Science Review* 82, no. 4 (December 1988), 1213.

¹¹³ Numerous Canadian and American scholars have noted the American Revolution as a significant point of departure in Canadian and American political cultures. Seymour Martin Lipset, *Revolution and Counter-Revolution* (New York: Basic Books, 1968), 40-48.

by the United States.¹¹⁴ Thus, while the United States places great value on individualism and classical liberalism, in Canada a more statist and communitarian conservative tradition has resulted in what some scholars have called “paternalistic socialism.”¹¹⁵ Each of these factors has been identified as contributing to the greater acceptance by Canadians of social interventionism by the government.¹¹⁶

The combination of federal authority over the definition of marriage, Section 15 equality rights, as interpreted by the Supreme Court of Canada, a political culture which tolerates greater judicial activism, social change, and governmental paternalism, along with a relative lack of access to the legislative process, would seem to leave the provinces with little constitutional space to work with on the issue of same-sex marriage. However, there is one uniquely Canadian constitutional provision which, some Canadians believed, might give the provinces the necessary latitude to regulate marriage within their own provinces. This is the Notwithstanding Clause of Section 33 of the Charter of Rights and Freedoms.

The Notwithstanding Clause as a Mechanism of Provincial Constitutional Space

Section 33 of the Charter of Rights and Freedoms is a uniquely Canadian provision intended as a compromise between those who desired an entrenched bill of rights in the new Canadian constitution and those who were opposed to federally

¹¹⁴ Robert Finbow, “Ideology and Institutions in North America,” *Canadian Journal of Political Science/Revue canadienne de science politique* 26, no. 4 (December 1993), 676-677.

¹¹⁵ Seymour Martin Lipset, “The Values of Canadians and Americans: A Reply,” *Social Forces* 69, no. 1 (September 1990), 268.

¹¹⁶ Finbow, 677.

guaranteed rights. It allows Parliament or the legislatures to pass laws restricting many of the rights protected by the Charter by stating that a law will operate “notwithstanding a provision included in section 2 or sections 7 to 15” of the Charter.¹¹⁷ The idea that a legislative body may choose to violate the constitutionally guaranteed rights of its citizens (as interpreted by the Supreme Court) is a foreign one to American constitutionalism, but, in the context of this paper, seems to have provided Canadian provinces with a degree of constitutional space that is unavailable to the American states.

There has been some debate among Canadian constitutional scholars over the true meaning and intent of the Notwithstanding Clause. Three competing viewpoints have emerged, with each seeming to enjoy some measure of support based on the records of the drafting of the Charter of Rights and Freedoms. First, it has been suggested that the Clause was intended as a means of correcting judicial errors by allowing Parliament or the legislatures to override court decisions. Second, it has been viewed as a preemptive tool which allows legislatures to prevent such errors from occurring in the first place. Finally, it has been suggested by University of Toronto professor and Canadian constitutional scholar Lorraine Weinrib that the Notwithstanding Clause exists specifically for the purpose of enabling legislatures to nullify Charter rights based on majoritarian values.¹¹⁸

¹¹⁷ The Charter distinguishes between several types of rights. The Notwithstanding Clause does not apply to democratic rights (those associated with voting and elections), mobility rights, or language rights. It may, however, be used to curtail fundamental rights (such as those protected by the First Amendment in the United States), legal rights, and equality rights.

Canadian Charter of Rights and Freedoms.

¹¹⁸ Tsvi Kahani, “Understanding the Nothwithstanding Mechanism,” *The University of Toronto Law Journal* 52, no. 2 (Spring 2002), 224-230.

Professor Weinrib's position seems to best fit the title of Section 33, "Exception where express declaration." The idea of an "exception" appears to be consistent with the imposition of majoritarian values into the constitutional arena. Because such considerations undermine the very concept of fundamental rights,¹¹⁹ it is appropriate to label them as "exceptions" and to view the Notwithstanding Clause as a constitutional provision for nullification. As such, it would appear to have great potential as a means of exploiting constitutional space and increasing provincial autonomy. Used properly, the Notwithstanding Clause should allow provinces to maximize their own autonomy by opting out of federal legislation or court decisions which conflict with the views of a provincial majority. In practice, however, several complicating factors make the effective use of the Notwithstanding Clause somewhat difficult.

In order to invoke the Notwithstanding Clause, a provincial legislature must pass an act which expressly states that it will operate notwithstanding a specific provision of the Charter. Such an act is good only for five years, and must then be renewed. Because use of the Notwithstanding Clause requires an express declaration, its use risks public outcry if the people oppose the violation of rights it allows. The five year time limit ensures that an election will occur prior to renewal, meaning that the voters will have the opportunity to hold legislators accountable for their decision to restrict constitutionally protected rights.

In addition to the requirements for an express declaration of the restriction of Charter rights and the need periodically to renew the notwithstanding provision of

¹¹⁹ The term "fundamental rights" is used in this section in its generic sense, rather than to specifically refer to those rights enumerated in Section 2 of the Charter of Rights and Freedoms.

legislation, use of the Clause is majoritarian by its nature, and, it has been suggested, incompatible with the concept of a constitutional democracy.¹²⁰ Excessive resort to nullification as a means of increasing provincial autonomy at the expense of fundamental rights¹²¹ protections is likely to either undermine the value placed on rights in the first place or to bring into question the legitimacy of the Charter.

Since adoption of the Charter of Rights and Freedoms, the Notwithstanding Clause has been only rarely invoked by provincial governments. In most cases, it has been used preemptively (prior to a ruling on the constitutionality of the act in question) and escaped notice by the media or general public.¹²² Most notably, it was used by Quebec in 1988 to allow for the use of French-only signs outside of businesses in response to Supreme Court of Canada rulings in two cases which held that prohibiting the use of languages other than French on commercial signs was an unreasonable limitation on the freedom of expression guaranteed by Section 2 of the Charter of Rights and Freedoms. When this use of the Clause expired in 1993, it was not renewed by the Quebec National Assembly.

With respect to the issue of same-sex marriage, only Alberta has attempted to use the Notwithstanding Clause in order to preserve the traditional definition of marriage. In March 2000, the Legislative Assembly adopted a bill amending the provincial Marriage Act to define marriage as a heterosexual institution. The bill included a Section 33 invocation to override the Charter's Section 15 equality rights.

¹²⁰ Ibid., 257.

¹²¹ See note 119.

¹²² Ibid., 239.

As an exercise in the utilization of constitutional space, Alberta's use of the Notwithstanding Clause was flawed in at least two ways. First, it attempted to usurp a power specifically given to the federal government. The BNA left provinces no authority over the definition of marriage; therefore Alberta had no legitimate constitutional space in which to operate with regard to defining marriage. Because we have defined constitutional space as "the range of discretion (space) available to the component units in a federal system in designing their constitutional arrangements,"¹²³ it is clear that sub-national units may not claim to be acting within their own constitutional space when they attempt to act within the sphere reserved to the federal government.

In addition, it appears that in attempting to use the Notwithstanding Clause to protect legislation which was outside of its own jurisdiction, Alberta subjected itself to a high-profile battle it could not win. Given the Supreme Court of Canada's reaffirmation of the exclusive federal jurisdiction over the definition of marriage,¹²⁴ Alberta eventually was forced to abandon its attempt to preserve the traditional common law definition within its borders. A better use of the Notwithstanding Clause, from the standpoint of its use as a tool for the exploitation of constitutional space, might have been to enact legislation discriminating against same-sex marriage, invoking the Notwithstanding Clause. The province might, for example, have attempted to prohibit same-sex marriages from being eligible for provincial spousal benefits. No doubt, this would have resulted in a great deal of publicity and public outcry from supporters of same-sex marriage, but legislation of this type might have stood a better chance of surviving a court challenge.

¹²³ Tarr and Williams, 5.

¹²⁴ *Reference re Same-Sex Marriage* (2004) 3 S.C.R. 698

Alberta would have avoided the embarrassment of being forced to back away from a clearly untenable constitutional argument, and instead would have had the opportunity to attempt to defend its actions as consistent with the intent of Section 33, and a permissible exception to the equality rights contained in Section 15. There is no guarantee that this course of action would have been successful, but this type of invocation of the Notwithstanding Clause appears to be more in keeping with the apparent intent of the Clause when it was included in the Charter if we accept Professor Weinrib's explanation of Section 33's purpose as discussed above.

Same-Sex Marriage in the United States

Contrary to the situation in Canada, in the United States marriage (both its definition and its solemnization) falls squarely within the reserved powers of the states. The federal Constitution makes no mention of marriage, and the federal government has only rarely chosen to concern itself with questions related to marriage. Most notably, the Supreme Court has weighed in on the specific issues of polygamy¹²⁵ and interracial marriage.¹²⁶ Significantly, and also contrary to the situation in Canada, it does not appear that the issue of same-sex marriage has yet come to be framed as a basic human rights (or civil rights) issue at the national level in the United States.¹²⁷ This effectively precludes a national mandate to recognize same-sex marriage and has allowed the states individually a great deal of constitutional space in confronting the issues of whether to recognize

¹²⁵ *Reynolds v. United States*, 98 U.S. 145 (1878)

¹²⁶ *Loving v. Virginia*, 388 U.S. 1 (1967)

¹²⁷ See note 100.

same-sex relationships, what form state recognition should take, and how to address differences between states regarding the status of same-sex couples.

The Supreme Court has consistently reaffirmed the principle that the federal government has no authority over marriages performed in the states,¹²⁸ and has even dismissed challenges to state laws banning same-sex marriage “for want of a substantial federal question.”¹²⁹ Furthermore, federal courts have consistently held that states are not bound by the Full Faith and Credit Clause to honor all marriages performed in other states.¹³⁰ Although the Supreme Court has heard relatively few cases related to conflicts over the validity of marriages under the Full Faith and Credit Clause, it has generally ruled in Full Faith and Credit cases that a state may not be compelled to recognize the public acts of another state “in violation of its own legitimate public policy.”¹³¹ No federal court has yet ruled that state same-sex marriage prohibitions are not legitimate public policy. This is in direct contrast to the situation in Canada, where the federal government was able to impose a uniform national definition and set of qualifications for marriage which was binding upon all Canadian jurisdictions. In the United States, no such federal authority has been recognized. However, it is not inconceivable that at some point in the future the Supreme Court could find that there is no legitimate state interest to be served through a policy restricting marriage to heterosexual couples. In that case, it

¹²⁸ *Pennoy v. Neff*, 95 U.S. 714, 734-35 (1878) and *Sosna v. Iowa*, 419 U.S. 393 (1975)

¹²⁹ *Baker v. Nelson*, 409 U.S. 810 (1972)

This dismissal constituted a ruling on the merits of the case by the Supreme Court, and continues to be cited as binding precedent by federal courts to this day. This precludes challenges to state same-sex marriage laws in federal courts.

¹³⁰ It would appear that Congress relied upon the continuing validity of *Modianos* and *Loughran* in passing the federal Defense of Marriage Act in 1996.

United States ex rel. Modianos v. Tuttle, 12 F2d 927 (1925); *Loughran v. Loughran*, 292 U.S. 216 (1934)

¹³¹ *Nevada v. Hall*, 440 U.S. 410 (1980)

would seem that the states would be bound by the Full Faith and Credit Clause to recognize same-sex marriages performed in other states.

It has been suggested that the Supreme Court's decision in *Loving v. Virginia* provides a precedent which might be used to justify federal intervention on behalf of same-sex marriage. In that case, the Court struck down Virginia's anti-miscegenation law on the basis of the Fourteenth Amendment's Equal Protection Clause. It found that the law was based on a classification (race) which "constitute[d] an arbitrary and invidious discrimination."¹³² In such cases, the Court typically subjects state legislation to the strict scrutiny standard, and requires that the suspect classification "be necessary to the accomplishment of some permissible state objective."¹³³ For *Loving* to be valid as a precedent for striking down state laws prohibiting same-sex marriage, therefore, it would be necessary to determine that sexual orientation is a suspect classification. Thus far, no federal court has done so with regard to marriage.

In 2003, the Supreme Court struck down state anti-sodomy laws in *Lawrence v. Texas*.¹³⁴ In deciding the case, the Court declared that private homosexual conduct was protected under the Due Process Clause of the Fourteenth Amendment and that with regard to "personal decisions related to marriage, procreation, contraception, family relationships, child rearing, and education" couples in a same-sex relationship "may seek autonomy for these purposes, just as heterosexual persons do."¹³⁵ The majority stopped short, however, of explicitly endorsing a constitutional right to same-sex marriage. In the

¹³² *Loving v. Virginia*, 388 U.S. 1 (1967)

¹³³ *Ibid.*

¹³⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003)

¹³⁵ *Ibid.*

six years since the *Lawrence* decision, the Court has not yet had occasion to revisit the issue of discrimination based on sexual orientation, leaving its prior precedents (most significantly *Baker v. Nelson*; see note 119 above) as controlling law.

Given the reluctance of the Supreme Court to confront directly the issue of same-sex marriage, the states have had the opportunity to exploit fully the constitutional space available to them. The result of this latitude has been a patchwork of laws regarding same-sex relationships that varies from full recognition of same-sex marriage to state constitutional amendments which preserve the traditional heterosexual definition of marriage. Left unresolved at this point are conflict of laws issues related to the recognition of marriages and the provision of benefits associated with marriage to same-sex couples married in one state and travelling to or living in another state. It seems likely that this will be a point on which the Supreme Court will be called upon for guidance, perhaps providing an opportunity to revisit the question of whether sexual orientation is a suspect classification requiring greater protection under the Fourteenth Amendment.

The Romer Decision and State Responses

In examining the potential for states to utilize their constitutional space in addressing the issue of same-sex marriage, it is instructive to look at a few specific examples. To some extent, states which took the lead in this area have served as either trailblazers or warnings to other states as they attempt to pass legislation or amend their constitutions. Perhaps first among these is Colorado, which attempted in 1992 to amend

its constitution to prevent any level of government within its jurisdiction from using new or existing anti-discrimination laws for the purpose of preventing discrimination based on sexual orientation. The motivation behind the state's action was the extension of anti-discrimination protection to homosexuals by the municipalities of Denver, Aspen, and Boulder. The proposed amendment was placed on the ballot by initiative, and passed with the support of 53.4 percent of voters. It was immediately challenged by an employee of the city of Denver as a violation of the Fourteenth Amendment's Equal Protection Clause in the case *Romer v. Evans* in 1996. The Colorado Supreme Court, in a 6-1 decision, found the amendment unconstitutional on those grounds, and the state appealed to the U.S. Supreme Court.

In a 6-3 decision, the Court affirmed the Colorado Supreme Court's decision to strike down the amendment, but side-stepped the issue of what level of scrutiny is appropriate in evaluating claims of discrimination based on sexual orientation by stating that the Colorado amendment would not withstand even the lowest level of judicial scrutiny, the rational basis test.¹³⁶ Although the Court recognized that Colorado was classifying homosexuals, it declined to rule that such classifications are automatically suspect, and therefore subject to strict scrutiny. Instead, Justice Kennedy's majority

¹³⁶ The United States Supreme Court has identified three levels of review which may be applied in discrimination cases. The rational basis standard requires only that a legislative classification (such as homosexuality) must not infringe upon a fundamental right or target a suspect class (normally race-based classifications), and that it be rationally related to a legitimate end. The heightened scrutiny standard (used thus far only in sex discrimination cases) requires that a legislative classification be substantially related to an important government objective. The strict scrutiny standard applies in cases involving classifications based on race or in the case of infringements of fundamental rights. This standard presumes that a classification is unconstitutional and requires the state to prove that its action is the least restrictive means of achieving a compelling state interest. The burden of proof required by the strict scrutiny standard is very difficult for a state to meet, and this was the standard that gay rights proponents hoped the Court would employ in *Romer*.

opinion held that there is no legitimate legislative end to be accomplished by generally barring homosexuals from rights protections given to all other citizens solely on the basis of sexual orientation.

Although the *Romer* decision must be considered as a victory for gay rights supporters, the ruling was actually quite narrow in scope. The Court's main objections to Colorado's action seem to have been that the state was attempting to take away rights previously granted¹³⁷ and that the amendment was overly broad with no reasonable connection to any legitimate state interest. It did not specifically address the issue of same-sex marriage.

Most importantly to a discussion of constitutional space, the Supreme Court's decision in *Romer* expressly deferred to the Colorado Supreme Court's interpretation of the amendment as a matter of state constitutional law.¹³⁸ This is significant, and suggests that had the state court found the amendment to be constitutional, such a determination might have been taken into consideration by the Supreme Court. The seemingly clear implication is that in dealing with issues of state constitutional space, the federal courts are unlikely to grant the states greater leeway than their own courts have previously allowed.

¹³⁷ The Court specifically noted that the amendment to the Colorado constitution not only barred protection of homosexuals through existing anti-discrimination laws, but also "nullifies specific legal protections for this targeted class" and "operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. . . ."
Romer v. Evans, 517 U.S. 620 (1996)

¹³⁸ Justice Kennedy wrote that the Court did not rely on its own interpretation of the amendment "but upon the authoritative construction of Colorado's Supreme Court."
Ibid.

This analysis of the *Romer* decision seems to lead to the conclusion that had Colorado limited itself to a constitutional amendment defining marriage as a union between one man and one woman, rather than attempting to broadly prohibit basic anti-discrimination statutes from being applied to homosexuals, that neither the state nor federal courts would have found it to violate the Fourteenth Amendment's Equal Protection Clause. Neither court found sexual orientation to be a suspect classification, meaning that there would not have been an automatic presumption of unconstitutionality if the state had limited itself to the single issue of same-sex marriage. Like Alberta in its attempt to use the Notwithstanding Clause of the Charter of Rights and Freedoms in order to shield itself from federal constitutional challenges to its definition of marriage, Colorado simply over-stepped its own authority. Unlike in Alberta, however, there is significant constitutional space remaining for the states to address individually questions related to same-sex relationships. Other states learned the lesson of *Romer*, and were more careful in their own responses to pressure for and against recognition of same-sex marriage.

Colorado's attempt to amend its constitution to exclude sexual orientation from anti-discrimination laws undoubtedly would have been used to prohibit same-sex marriage as well as to deny homosexuals numerous other rights enjoyed by most Colorado citizens. In the wake of *Romer*, more states have begun to address the issue of same-sex marriage specifically. In early 2009, it appears that there are two distinct patterns emerging. In response to state court rulings, states have either amended their constitutions to nullify court orders for recognition of same-sex marriage, or they have

chosen to recognize some form of same-sex relationship which may or may not be the legal equivalent of marriage. Only Massachusetts, Connecticut, and California have chosen to allow same-sex marriages.¹³⁹ An increasing number of states have preemptively amended their constitutions to recognize only traditional marriages prior to any court ruling.

Given the relatively large degree of constitutional space available to the states with regard to same-sex marriage, it should not be surprising that they have come up with diverse ways to respond to the issue. While only two states currently issue marriage licenses to same-sex couples, a third will recognize legal same-sex marriages from other states, four allow civil unions¹⁴⁰ which extend all state-level benefits of marriage to same-sex couples, and six states (plus the District of Columbia) allow domestic partnerships which provide varying levels of spousal benefits to same-sex partners. In twelve states, therefore, same-sex couples enjoy some form of state recognition for their relationships. Table 3 categorizes state actions with regard to same-sex marriage.

Since *Romer*, as table 3 demonstrates, many states have taken advantage of the constitutional space available to them in responding to pressures for and against same-sex marriage. In Massachusetts, Connecticut, and California, court determinations that their respective state constitutions required equal treatment for same-sex couples seeking to marry led to the legalization of same-sex marriage. Of these three states, California presents the most interesting example of the use of constitutional space.

¹³⁹ In California, Proposition 8, passed by the voters in 2008, amended the state constitution to prohibit same-sex marriage. It is unclear at this time what effect this will have on existing marriages. Further discussion of the situation in California follows.

¹⁴⁰ This number includes Connecticut, which also issues marriage licenses to same-sex couples.

Table 3. State Actions Regarding Same-Sex Marriage¹⁴¹

	Issues Marriage Licenses	Recognizes Out-of-State Marriages	Civil Union	Domestic Partnership	Constitutional Prohibition	Statutory Prohibition	No Legal Prohibition
Alabama					X	X	
Alaska					X	X	
Arizona					X	X	
Arkansas					X	X	
California				X	X		
Colorado					X	X	
Connecticut	X		X				
Delaware						X	
Florida					X	X	
Georgia					X	X	
Hawaii				X	X	X	
Idaho					X	X	
Illinois						X	
Indiana						X	
Iowa						X	
Kansas					X	X	
Kentucky					X	X	
Louisiana					X	X	
Maine				X		X	
Maryland				X		X	
Massachusetts	X						X
Michigan					X	X	
Minnesota						X	
Mississippi					X	X	
Missouri					X	X	
Montana					X	X	
Nebraska					X		
Nevada					X		
New Hampshire			X			X	
New Jersey			X				X
New Mexico							X
New York							X
North Carolina						X	
North Dakota					X	X	
Ohio					X	X	
Oklahoma					X	X	
Oregon				X	X		
Pennsylvania						X	
Rhode Island		X					X
South Carolina					X	X	
South Dakota					X	X	
Tennessee					X	X	
Texas					X	X	
Utah					X	X	
Vermont			X			X	
Virginia					X	X	
Washington				X		X	
West Virginia						X	
Wisconsin					X	X	
Wyoming						X	

¹⁴¹ Information compiled by author from the National Conference of State Legislatures. "Same Sex Marriage, Civil Unions and Domestic Partnerships," National Conference of State Legislatures, <http://www.ncsl.org/programs/cyf/samesex.htm> (accessed February 26, 2009).

Same-Sex Marriage and Constitutional Space in California

In May 2008, the California Supreme Court issued a decision mandating the legalization of same-sex marriage.¹⁴² California already had one of the most comprehensive domestic partnership laws in the country, affording same-sex couples what was, in effect, marriage in everything but name. The question addressed by the California court, therefore, was somewhat different than that considered by other states which had previously addressed this issue. In California, the question was not one of providing benefits associated with marriage to same-sex couples, but whether same-sex couples were entitled under the state constitution to have their state-recognized legal relationships designated as marriages rather than domestic partnerships or any other term.

The relevant provision of the state constitution is the Equal Protection Clause, contained in Article 1, Section 7.¹⁴³ The substance of the California Supreme Court's ruling was based on two significant points related to the Equal Protection Clause. First, the justices found that marriage is a fundamental right and that it is accorded a level of "respect and dignity" which is not likely to be attached to any other designation given to a state-recognized relationship regardless of the legal rights attached to such a designation. Second, the California Supreme Court became the first court in the United States to recognize sexual orientation as a suspect classification¹⁴⁴ requiring the use of

¹⁴² *In re Marriage Cases*, 43 Cal. 4th 757 (2008)

¹⁴³ The state Equal Protection Clause contains the same wording as the Equal Protection Clause of the Fourteenth Amendment.

¹⁴⁴ In American constitutional law, a "suspect classification" is one which is based upon an immutable characteristic (such as race or national origin). Subjects of such classifications are entitled to judicial review of the classification with a presumption of the classification's unconstitutionality under the Fourteenth Amendment's Equal Protection Clause.

the strict scrutiny standard¹⁴⁵ (applicable under California state jurisprudence as well as in federal cases) and therefore carrying a presumption of unconstitutionality when the state enacts legislation specifically based on it. The Court found no compelling state interest in preserving the traditional definition of marriage, and could not identify any reason why it would be necessary for the legislature to designate a union between a same-sex couple as anything other than marriage if it is intended to provide the same benefits as marriage.¹⁴⁶

Reaction to the *In re Marriage Cases* decision was immediate. While gay rights advocates across the country applauded it, and particularly appreciated the standard of review applied by the California Court, opponents of same-sex marriage decried the decision as an attack on traditional values and an unnecessary instance of judicial activism given the state's liberal domestic partnership law. They vowed to overturn the ruling through constitutional amendment.

California, like many other states, allows for use of the initiative process to amend the state constitution. This use of the initiative gives the voters a significant point of entry into the legislative process that Canadians lack, and potentially allows for the restriction of rights through majoritarianism in much the same way that Lorraine Weinrib has suggested the Notwithstanding Clause allows in Canada.¹⁴⁷ As such, it should be viewed as a powerful tool for the exploitation of constitutional space which allows the

¹⁴⁵ See note 136.

¹⁴⁶ The Court included lengthy discussions of state precedents, including cases related to inter-racial marriage, and a review of the line of cases leading up to their decisions, which are outside the scope of this paper. For the purpose of analyzing the current status of same-sex marriage in California as an issue of constitutional space, it is only necessary to understand the basis for the Court's decision.

people, as the originators of state governmental authority, to express their will in the fundamental law of the state and safely out of reach from judicial review. Because marriage falls within the sphere of state competencies in the American federal system, use of the initiative, in those states which allow it, to define marriage and nullify state court decisions may be understood as an example of the ultimate use of constitutional space by the people of the state. The initiative process, however, is also problematic as it allows for the enactment of legislation without the benefit of the deliberative process which would normally attend it in the legislature, gives influence to voters who may be uneducated or uninformed on the issues, and has the potential to be manipulated by well-funded interest groups.¹⁴⁸

Following the California Supreme Court's decision to require the issuance of marriage licenses to same-sex couples, there was an immediate move to place a constitutional amendment on the November 2008 ballot to reinstate the traditional definition of marriage. Known as Proposition 8, the ballot initiative stated that "Only marriage between a man and a woman is valid or recognized in California." The initiative was supported by a coalition of groups interested in preserving the traditional definition of marriage, including several religious groups.¹⁴⁹

¹⁴⁷ See note 118.

A significant difference between use of the initiative process in the United States and the Notwithstanding Clause in Canada to achieve majoritarian ends, however, is that in Canada this power is reserved to the legislatures.

¹⁴⁸ Thomas E. Cronin, "Public Opinion and Direct Democracy," *PS: Political Science and Politics* 21, no. 3 (Summer 1988), 616.

¹⁴⁹ In January 2009, the U.S. District Court, Eastern District of California ruled that California's Political Reform Act of 1974, requiring the disclosure of the names of donors contributing more than \$100 to a political campaign does not violate the First Amendment rights of donors who wish to remain anonymous. A variety of searchable databases of Proposition 8 contributors were made available on the internet. A brief search shows that major contributors in support of Proposition 8 included the U.S. Conference of

On November 4, 2008, Proposition 8 passed by a margin of 52.30 percent to 47.70 percent.¹⁵⁰ Voter turnout was the highest in state history.¹⁵¹ Although there has been some speculation about the influence of high voter turnout related to the presidential election, exit polling data are not conclusive in this regard. One analysis of the results commissioned after the election determined that although many initial media reports credited high African American turnout in support of Barack Obama with contributing significantly to the passage of Proposition 8, much of this higher level of support among both African Americans and Latinos can be accounted for by their higher than average religiosity rather than race.¹⁵²

Regardless of the reasons for Proposition 8's passage, in the context of an analysis of the use of constitutional space the ongoing conflict over same-sex marriage in California provides an interesting case study. Although the use of a ballot initiative to amend the state constitution seems to have been successful in preserving the traditional and majoritarian definition of marriage for the time being, the status of same-sex marriages performed in California prior to Proposition 8's going into effect on November

Catholic Bishops, the California State Council of the Knights of Columbus, Focus on the Family, and many additional religious organizations affiliated with several denominations.

"Search for Prop 8 Donors," The Sacramento Bee, <http://www.sacbee.com/1098/story/1392716.html> (accessed March 29, 2009).

¹⁵⁰ "Summary of Vote: Summary pages," California Secretary of State-Vote 2008, http://www.sos.ca.gov/elections/sov/2008_general/8_13_sov_summary_final.pdf (accessed March 1, 2009).

¹⁵¹ "Poll Worker Training/Election Observation Program: November 4, 2008, General Election Report," http://www.sos.ca.gov/elections/voting_systems/historic/poll-worker-training-observ-prog-11042008.pdf (accessed March 25, 2009).

¹⁵² Patrick J. Egan and Kenneth Sherrill, *California's Proposition 8: What Happened, and What Does the Future Hold?*, a report commissioned by the Evelyn and Walter Haas, Jr. Fund in San Francisco, January 2009, 6. http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf (accessed March 25, 2009).

5, 2008 remains unclear and will be decided by the California Supreme Court. Oral arguments in that case are scheduled for March 2009, with a decision expected within ninety days.

Proposition 8 is perhaps as significant for what it did not do as for what it did. It did not alter any of the rights accorded to same-sex couples with legally recognized relationships, be they domestic partnerships or marriages. There was no attempt in this case to do anything but prevent same-sex unions from being officially recognized with the name “marriage.” Furthermore, and even more importantly, Proposition 8 did not seek to overturn that portion of the *In re Marriage Cases* decision that identified sexual orientation as a suspect classification. Thus, California remains the only jurisdiction in the country in which homosexuals are fully protected from discrimination to the same extent as racial minorities.¹⁵³ What impact this will have on future cases in other states remains to be determined. It appears to be clear, however, that in this particular case, the use of constitutional space to impose the will of the majority has been successful.

Conclusions on the Use of Constitutional Space in Relation to Conflicts over Rights

Issues in Canada and the United States

Alfred Stepan has suggested that American style federalism is *demos*-constraining due to the equal representation of the states in the Senate and the reserved powers of the

¹⁵³ In October 2008, the Connecticut Supreme Court ruled that the state’s civil union law was discriminatory, and that the state must issue marriage licenses to same-sex couples. However, unlike in California, the Connecticut Court found sexual orientation to be a quasi-suspect classification, necessitating the use of heightened scrutiny rather than strict scrutiny.
Elizabeth Kerrigan et al. v. Commissioner of Public Health et al. S.C. 17716 (Conn. 2008)

states. By this, Stepan means that the powers reserved to the states, although their exercise may be democratic, constrain the options available to the people (*demos*) of the federation taken as a whole. As discussed in the previous chapter, he believes that the effect of such a *demos*-constraining system is to give the states a greater voice in the federal government than the people, to the detriment of minority rights.¹⁵⁴ Stepan bases his conclusion on an examination of federal systems from the perspective of the federation as a whole. His criticism is flawed, however, when applied to the issue of the protection of rights at the sub-national, rather than national, level. Furthermore, it could be argued that Canadian federalism is more *demos*-constraining at the provincial level than American federalism is at the state level.

Stepan's conception of American federalism is dependent upon the common "top-down" perception of federal systems. In this sense, it is true that the states may have disproportionate power compared to the people. However, the view of American federalism as *demos*-constraining does not take into account the possibility that the *demos* may be empowered at the state level. The success of Proposition 8 in California amply demonstrates this. In states which allow legislation or constitutional amendment through the initiative process, the citizens have a greater voice in constitutional issues.¹⁵⁵ In this case, the problem is not that American federalism is *demos*-constraining, but rather that

¹⁵⁴ Stepan, *Theories of Federalism*, 266-267.

¹⁵⁵ Twenty-four states allow statutory initiatives. Of these, eighteen also permit constitutional initiatives. While use of the initiative is by no means universal in the United States, almost half of the states allow some use of the initiative process. This is a significant point of entry into the legislative process which is completely unavailable to Canadians.

"Initiative and Referendum in the 21st Century: Final Report and Recommendations to the NCSL I&R Task Force," National Conference of State Legislatures, http://www.ncsl.org/programs/legismgt/irtaskfc/final_report.htm#chp3 (accessed March 29, 2009).

the protection of certain rights (in this case the right to marry) falls within the constitutional space of the states and that the citizens of the states are able to express majoritarian preferences with regard to rights issues. Stepan's criticism, therefore, is invalid at the state level. If anything, within the eighteen states that permit constitutional amendment by initiative, American federalism has the potential to be excessively *demos*-enabling by subjecting the rights of minority groups, which are not protected by the federal Constitution, to the will of the majority. The only protection available to groups seeking rights denied by the will of the majority, then, is to resort to the courts. In the case of Proposition 8, it is likely that even the state supreme court will be unable to counter the *demos*-enabling qualities of American federalism at the state level, and that any relief for same-sex couples seeking the right to marry will have to come from the United States Supreme Court.

In Canada, when observed from the provincial level, federalism appears to be significantly more *demos*-constraining than in the states. As we have seen in examining the path to legalization of same-sex marriage in the provinces, the Canadian federal system, based on parliamentary supremacy and grounded in the "paternalistic socialism"¹⁵⁶ of Canadian political culture, rather than the American concept of all sovereignty originating with the people and incorporating progressive ideas like the initiative, does not allow for public points of entry into the legislative process which enable the citizens to express their will through direct legislation or constitutional amendment.

¹⁵⁶ Lipset, "The Values of Canadians and Americans," 268.

Canadian federalism appears to be much more in the hands of provincial and federal political elites rather than being accessible to and influenced by the people. The paternalistic and statist aspects of Canadian political culture, as discussed at the beginning of this chapter, suggest that even citizens of states which do not allow constitutional amendment by initiative have a greater ability to influence their legislators through public opinion than Canadians do. While it may be true that Canada's status as a multinational federation and multicultural society has resulted in a greater concern for the protection of minority rights, it does not follow that this is the result of any *demos*-enabling characteristics of Canadian federalism. To the contrary, from the provincial point of view, Canadian federalism seems to be quite *demos*-constraining. The relatively lower permeability of the policy making process to citizen influence is reinforced by the disposition of residual powers, including the power to define marriage, with the federal government.

Our analysis of the evolution of state and provincial reactions to the issue of same-sex marriage leads to several conclusions with regard to the use of constitutional space. First, Stepan's *demos*-constraining/*demos*-enabling concept does not seem to apply at the sub-national level in either the United States or Canada. When dealing with rights-based issues, of far more importance is the disposition of residual powers. In the United States, where marriage falls within the constitutional space of the states, it is possible for local majoritarianism to restrict the extension of rights to groups which have traditionally been excluded. In Canada, while it may be possible for provincial governments to use the Notwithstanding Clause to infringe upon certain rights, provincial

constitutional space is severely limited by the assignment of residual powers to the federal government and the relatively small number of enumerated provincial powers.

Second, with regard to the protection or extension of rights, attempts to utilize state or provincial constitutional space are as likely, if not more so, to impose the will of the majority as to extend or protect rights for groups seeking protections. For this reason, Stepan's reasoning appears to be severely flawed, because he assumes that a *demos*-enabling federal structure will result in greater protections for minorities. At the sub-national level, the opposite seems to be true. In American history, we can see evidence of state infringement on the rights of minorities in opposition to the Civil Rights Act of 1964 and racial segregation in public places. The Voting Rights Act of 1965 and the continuing federal oversight of the redistricting process in some states demonstrates the tendency of states to resist protection of minority rights, and of the federal government to become the protector of minority groups and their rights.

Finally, it appears that, with respect to the protection or extension of rights, both the Canadian and American federal systems rely heavily on the courts. This should not be surprising, because federation has been characterized as "rule by judges" by some scholars and as a form of government which invites litigation by others.¹⁵⁷ From the sub-national perspective, this legalistic characteristic of federalism suggests that the extension of rights is dependent on favorable court rulings in both the provinces and the states. The spread of same-sex marriage in both Canada and the United States supports this conclusion, as in every case the extension of marriage rights to same-sex couples has

¹⁵⁷ Helms and McBeath, E-2.

been the result of judicial decisions rather than legislative action. When examining the role and potential of constitutional space, it becomes apparent that states and provinces must rely not only on constitutional authority to legislate on the issue in question, but also on favorable court interpretations of their actions. In Canada, owing to the lack of recourse to the initiative process, the role of the courts is particularly important. In the United States, constitutional space is enhanced in many states by the ability of the people to substantively participate in the constitutional debate through initiatives to amend their state constitutions and nullify court decisions. Nevertheless, the exploitation of constitutional space in areas related to the extension of rights is dependent upon favorable court decisions in both the United States and Canada. History suggests that when an issue comes to be perceived as one of fundamental civil or human rights, sub-national constitutional space will be insufficient to maintain sub-national autonomy, and that the courts will place a higher priority on the protection of rights.

The conclusions drawn here apply specifically to the constitutional space available to states and provinces with regard to the provision or extension of rights. It appears that in this area there is significantly more constitutional space available to American states than to Canadian provinces, but that the states currently exploit their constitutional space only in the absence of a federal judicial interpretation of the Fourteenth Amendment which finds sexual orientation to be a suspect classification. As same-sex marriage is legalized in additional states, and same-sex couples seek recognition of their marriages throughout the United States, it appears ever more likely that the Supreme Court will be forced to address this issue. History suggests that the

Court is likely to place a higher priority on the protection of rights than on the preservation of state constitutional space. It therefore appears that the constitutional space available to states with regard to rights issues in general, and same-sex marriage in particular, is likely to be diminished. In the next chapter we will examine the constitutional space available to each in issues related to land and resource management to determine if the outlook for enhanced sub-national autonomy is more optimistic in an area not related to the protection or extension of rights.

Chapter 4: State and Provincial Constitutional Space in Resource Management

Land Ownership and Resource Management

An increasingly significant difference between the Canadian and American federal systems is the ownership and control of land and natural resources. Particularly in the western parts of each country, resource-extraction based economies render the decision making authority over resources and land access critically important to states and provinces. To understand the differing degrees of constitutional space available to the states and provinces in resource management, it is necessary to briefly review the constitutional basis for the disposition of lands and resource management in both countries.

In Canada, resource management was one of the enumerated powers given to the provincial governments by the British North America Act of 1867 (BNA) which stated, in Section 92, that the provincial legislatures “may exclusively make Laws in relation to . . . The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.”¹⁵⁸ Section 92A, effective upon ratification of the Constitution Act of 1982 and commonly referred to as the Resource Amendment, specifies that the provinces have the exclusive authority to explore for, develop, conserve, and manage non-renewable natural resources and timber, and to develop,

¹⁵⁸ *British North America Act, 1867* (U.K.), 1867, Sec. 92 (5).

conserve, and manage the generation of electricity.¹⁵⁹ In addition, Section 109 reserves to the provinces jurisdiction over land, mines, minerals, and royalties.¹⁶⁰

In order to understand the significance of Sections 92, 92A, and 109, it is important to consider the differing disposition of public lands in Canada and the United States. In the provinces, the Canadian federal government has retained ownership of relatively small amounts of land (mainly national parks, wilderness areas, military installations, and reserve lands for First Nations peoples). The vast majority of land in the provinces is provincial Crown land. Jurisdiction over land was given to the provinces under the BNA, following the British practice of assigning control over land and natural resources to the government of the territory in which they are located.¹⁶¹ In British Columbia, for example, the province owns 94 percent of the land area, with only 1 percent being federal Crown land.¹⁶² In Newfoundland and Labrador, approximately 95 percent of the land mass is provincial Crown land.¹⁶³ The federal government, however, is the largest land owner in Canada due to federal ownership of virtually all land in territorial Canada, which comprises approximately 40 percent of Canada's total land mass.

The situation in the United States is dramatically different. The federal government owns approximately 29 percent of the total land area (over 650 million

¹⁵⁹ *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

¹⁶⁰ *British North America Act, 1867*.

¹⁶¹ Michael Howlett, "The Politics of Constitutional Change in a Federal System: Negotiating Section 92A of the Canadian Constitution Act (1982)," *Publius: The Journal of Federalism* 21, no. 1 (Winter 1991), 124.

¹⁶² "Crown Land Factsheet," British Columbia Ministry of Agriculture and Lands, http://www.agf.gov.bc.ca/clad/crownland_factsheet.pdf (accessed March 11, 2009).

¹⁶³ "Frequently Asked Questions-Land," Environment and Conservation: Government of Newfoundland and Labrador, <http://www.env.gov.nl.ca/env/lands/cla/faq.html#2> (accessed March 12, 2009).

acres). In several states, the federal government owns more than half of the total land area. Table 4 provides data on federal land ownership in total acres per state, and as a percentage of the total land area in each state.¹⁶⁴

As table 4 shows, the majority of federal land in the United States is located in the western states. In several eastern states, federal land holdings are limited to less than 2 percent of total land area, with the highest percentage of federal land ownership in New Hampshire (13.45 percent). This percentage is significantly lower than in any state in the west. Average federal land ownership from the Rocky Mountains west (including Alaska and Hawaii) is 46.77 percent, while east of the Rocky Mountains (excluding Washington D.C.) it is 4.25 percent.

The discrepancies in federal land ownership between the United States and Canada can be explained by the different processes of expansion in the two countries and by the differences in the formation of the two federations discussed in Chapter 1. In Canada, the original four provinces were guaranteed control of their lands by the BNA. As additional provinces joined the Confederation, they also retained or were given control of their lands because land and resource issues were considered to be local concerns. In the United States, following the cession of western lands to the federal government in the late eighteenth and early nineteenth centuries, a precedent was

¹⁶⁴ Federal land ownership statistics for the United States taken from the Fiscal Year 2004 Federal Real Property Profile, published by the General Services Administration Office of Governmentwide Policy. Beginning with the 2005 report public domain lands and certain other federal assets were left out of the calculation of total federal real property ownership. The 2004 report therefore provides a more complete picture of federal land ownership.

“Annual Report FY 2004 Final,” General Services Administration Office of Governmentwide Policy, http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/Annual%20Report%20%20FY2004%20Final_R2M-n11_0Z5RDZ-i34K-pR.pdf (accessed March 11, 2009).

Table 4. Federal Land Ownership by State¹⁶⁵

State	Federally Owned Acres	Federally Owned Percentage
Alabama	513,913.0	1.57
Alaska ¹⁶⁶	252,495,811.3	69.09
Arizona	34,933,236.1	48.06
Arkansas	2,407,948.0	7.17
California	45,393,237.5	45.30
Colorado	24,354,712.8	36.63
Connecticut	13,937.7	0.44
Delaware	25,874.4	2.04
Florida	2,858,781.8	8.23
Georgia	1,409,406.3	3.78
Hawaii	796,725.5	19.41
Idaho	26,565,411.8	50.19
Illinois	641,959.0	1.79
Indiana	463,244.6	2.00
Iowa	273,954.3	0.76
Kansas	631,351.2	1.20
Kentucky	1,378,677.1	5.40
Louisiana	1,474,788.4	5.11
Maine	208,421.8	1.05
Maryland	178,526.9	2.83
Massachusetts	93,950.1	1.87
Michigan	3,637,873.4	9.97
Minnesota	2,873,517.4	5.61
Mississippi	2,196,940.3	7.27
Missouri	2,224,787.8	5.03
Montana	27,910,151.8	29.92
Nebraska	655,481.4	1.36
Nevada	59,362,642.5	84.48
New Hampshire	775,665.1	13.45
New Jersey	148,440.8	3.08
New Mexico	32,483,876.5	41.77
New York	233,533.4	0.76
North Carolina	3,710,338.3	11.82
North Dakota	1,185,776.9	2.67
Ohio	448,381.4	1.71
Oklahoma	1,586,148.3	3.60
Oregon	32,715,514.1	53.11
Pennsylvania	719,863.6	2.50
Rhode Island	2,923.0	0.43
South Carolina	560,955.9	2.90
South Dakota	3,028,002.7	6.19
Tennessee	865,836.9	3.24
Texas	3,130,345.0	1.86
Utah	30,271,905.2	57.45
Vermont	443,249.2	7.47
Virginia	2,534,177.6	9.94
Washington	12,949,661.7	30.33
West Virginia	1,146,210.8	7.44
Wisconsin	1,971,901.8	5.63
Wyoming	26,391,487.2	42.33

¹⁶⁵ Compiled by author from Fiscal Year 2004 Federal Real Property Profile. "Annual Report FY 2004 Final," General Services Administration.

¹⁶⁶ Figures include some Native Corporation land as well as non-conveyed state land. A more widely accepted figure for federal land ownership in Alaska is 222,000,000 acres, or 60 percent of the state's area. "Land Ownership in Alaska," Alaska Department of Natural Resources, http://dnr.alaska.gov/mlw/factsht/land_own.pdf, (accessed March 11, 2009).

established whereby the federal government allowed the creation of new states out of the federal public domain and granted to each new state a portion of the land within its borders. These disparate dispositions of lands within provincial and state boundaries have had significant impacts on the constitutional space available to states and provinces with respect to resource management.

State vs. Provincial Constitutional Arrangements

In analyzing the constitutional space available to states and provinces with regard to resource management it is important to consider the different sub-national constitutional arrangements in the United States and Canada and to assess how these affect the assignment of constitutional authority over natural resources. The most significant and obvious difference between state and provincial constitutions is that while every state has an entrenched written constitution which serves as fundamental law for the state, written constitutions have been considered unnecessary by most of the provinces. This is undoubtedly a legacy of the British notion of the unwritten constitution. Each province has the authority under both the BNA and the Constitution Act, 1982 to unilaterally amend its own constitution. Only British Columbia, however, has used that authority to establish a written constitution.¹⁶⁷

¹⁶⁷ The constitution of British Columbia is a statutory act, which can therefore be amended or repealed by the legislature. From the American perspective, this hardly qualifies as a constitution at all.

Constitutional Space and Unwritten Sub-National Constitutions

There appear to be advantages to the lack of entrenched written constitutions in the provinces. Not only is the idea of binding future generations through the creation of an entrenched constitution anathema to the British (and, by extension, Canadian) concept of parliamentary supremacy, entrenchment runs the risk of unfavorable interpretations of provincial fundamental law by federally appointed judges.¹⁶⁸ Given the nature of the Canadian federal system, there does not seem to be a pressing need for written American-style sub-national constitutions which could potentially be more limiting of provincial constitutional space than liberating.

Two important factors account for the potential of written provincial constitutions to be detrimental to the exercise of provincial constitutional space. First, given the generally broad interpretation of the enumerated provincial powers under Section 92 and the express prohibition against provincial action in areas of exclusive federal authority (such as marriage) under Section 91, it seems unlikely that a province could significantly enhance its own constitutional space with regard to resource management or any other area through the adoption of an entrenched constitution. On the contrary, judging from the interpretation of the federal Constitution, it has been suggested that a province which adopted an entrenched constitution would be inviting closer judicial scrutiny of provincial action.¹⁶⁹

¹⁶⁸ In Canada, most provincial, as well as all federal judges are appointed by the federal government.

¹⁶⁹ F. L. Morton, "Provincial Constitutions in Canada" (paper presented at the conference "Federalism and Sub-National Constitutions: Design and Reform," Bellagio, Italy, March 22-26, 2004).

This brings us to the second reason why it may be advantageous for provinces not to adopt entrenched written constitutions. Unlike in the United States, where state constitutional issues are typically resolved within the state court system, relying on the state supreme court for an authoritative interpretation of the state constitution, there is no guarantee that a provincial constitution would be interpreted by judges with any vested interest in preserving provincial autonomy. The Canadian judicial system consists of three types of courts at the provincial level. Provincial courts handle most criminal offenses, family law, and money matters. Provincial court judges are appointed by the provincial government, with the exact method of appointment varying somewhat among the provinces. Superior courts hear major criminal and civil cases, and have jurisdiction over divorce. Provincial appeals courts hear appeals from both of the lower levels of provincial courts. Both superior court and appeals court judges are formally appointed by the governor general of Canada on the recommendation of the cabinet.

Because of the limited jurisdiction of the provincial courts, it is unlikely that provincial constitutional issues would be resolved by judges owing their appointments to the provincial government. It is far more likely that federally appointed superior court or appeals court judges, who are likely to share the sympathies of the government which appointed them rather than of the province in which they serve, will decide constitutional cases at the provincial level. Alberta court rulings regarding same-sex marriage provide ample evidence of this. The Canadian judicial appointment process does not allow for minority party input, and there is no parliamentary confirmation vote. Furthermore, with the exception of Quebec, which is guaranteed three seats on the Supreme Court of

Canada, there is no guarantee that any other province will have even one justice on the Court (although, in practice, Ontario is generally given the same number of seats as Quebec). Therefore, an entrenched provincial constitution would ultimately be interpreted by a Supreme Court which might be made up entirely of justices from other provinces with little understanding of local conditions and no interest in promoting the expansion of provincial constitutional space through the provincial constitution. This is much less likely to happen in the United States because state constitutional issues are almost always either resolved by the state courts, or, in the case of appeal to the United States Supreme Court, state supreme court interpretations of state constitutional provisions are generally given great deference.¹⁷⁰

There is the possibility that a province that chose to write and entrench a constitution might be able to defend it against unfavorable interpretation through use of the Notwithstanding Clause in order to protect its own right to amend its constitutional arrangements. Contrary to Alberta's use of the Clause in an attempt to define marriage within the province, this likely would be upheld as a legitimate exercise of provincial constitutional authority. A province might also exercise its constitutional space in altering its own constitutional arrangements to create a provincial constitutional council with exclusive authority over provincial constitutional questions. Canadian constitutional

¹⁷⁰ *Romer v. Evans* (as discussed in Chapter 3) is a good example of a case in which the U.S. Supreme Court deferred to a state court's interpretation of its own constitution. It has been suggested that *Bush v. Gore*, 531 U.S. 98 (2000), is an exception to this general rule. However, it should be noted that the *Bush v. Gore* decision concerned Fourteenth Amendment equal protection questions as well as questions of constitutional space with regard to the power of the state legislature to determine the proper method for selecting electors under Article II, Section 1, clause 2 of the U.S. Constitution which gave rise to separation of powers concerns. The Court's decision was based primarily on these federal issues, rather than on the state court's interpretation of either state laws or the state constitution, which were central to the decision in *Romer*.

scholars have suggested both of these solutions, but no province has, as yet, adopted them.¹⁷¹ This suggests that Canadians do not perceive a pressing need for American-style entrenched sub-national constitutions, and feel well served with their current constitutional arrangements.

Constitutional Space and Written Sub-National Constitutions

Owing to the different nature of American federalism, there do appear to be advantages to having entrenched written constitutions for the states. The most important factor here is the existence of a legitimate state court system made up of judges selected (through election, appointment, or a combination of the two) by the states in which they serve. This process reduces the chance that state constitutional provisions will be disadvantageously (from the standpoint of state constitutional space) interpreted by federally appointed judges.

It is true that the states are slightly more restricted in their ability to amend their constitutional arrangements than Canadian provinces are through the Article IV, Section 4 Guarantee Clause of the U.S. Constitution, which guarantees each state a republican form of government. In practice, however, this federal power has been all but ignored since the Reconstruction Era, with the Supreme Court tending to favor use of the Fourteenth Amendment's Equal Protection Clause over the Guarantee Clause when deciding cases relating to state constitutional arrangements.¹⁷² Thus, the states have been

¹⁷¹ Morton.

¹⁷² See *Baker v. Carr*, 369 U.S. 186 (1962).

relatively free to design and alter their own constitutional arrangements without interference from the federal government, so long as they do not expressly infringe upon or contradict federal constitutional authority.

One notable limitation on state ability to exploit constitutional space, which does not appear to be a factor for Canadian provinces, is the necessity of staying not only within the bounds of their own spheres of authority as established by the federal Constitution, but also not overstepping the limits placed upon them by their own constitutions. Thus, while authority to act in a certain policy area may not be denied to a state according to the federal Constitution, the state may lack express authority to act, or may even be denied the power to act, by the state constitution. This failure on the part of many states to fully utilize the constitutional space available to them brings us to our discussion of the use of constitutional space by states and provinces in managing natural resources. We have already seen that American federalism appears to be more empowering than Canadian federalism at the sub-national level with respect to “rights” issues. The question which will be addressed in the remainder of this chapter is whether the same holds true for resource management issues, and whether a written sub-national constitution can be advantageous to the full utilization of sub-national constitutional space.

Provincial Resource Management in Canada

The National Energy Program

As mentioned at the beginning of this chapter, the 1982 reforms to the Canadian Constitution reaffirmed and strengthened provincial control over resource management. The addition of Section 92A, the Resource Amendment, must be understood in the context of the Trudeau government's National Energy Program (NEP). The NEP was an attempt by the Canadian federal government to combat rising world oil prices and allow all Canadians to benefit from Canadian oil production. It had several specific goals, including the establishment of domestic price controls on Canadian oil and gas, exploration and production incentives, revenue sharing, federal taxation of oil and gas production, and increased Canadian ownership of firms engaged in oil and gas production in Canada.

The NEP was announced in October, 1980. The Canadian Constitution had not yet been patriated, and provincial control of natural resources did not yet include the more explicit protections which would be included in Section 92A. Nevertheless, reaction to the NEP was immediate and negative on the part of the oil producing provinces, particularly Alberta. A period of intense negotiations between Alberta and the Trudeau government followed, in which each side attempted to gain the upper hand in the dispute over control of the Canadian oil and gas industry. The situation was further complicated by instability in the world oil market and the global economic crisis of the late 1970s and early 1980s. The dispute also threatened the patriation of the Canadian

Constitution, when western support became necessary owing to Quebec's opposition to the new amendment process (see Chapter 1).¹⁷³

As would later be the case with opposition to same-sex marriage, Alberta took the lead in resisting the NEP. In response to the announcement of the NEP, Alberta reduced oil shipments to Ontario and Quebec, delayed development of the province's oil sands, and challenged the NEP in court on constitutional grounds related to Sections 92 and 125 (which prevent the federal and provincial governments from taxing each other). Through a series of negotiations, Alberta finally reached an agreement with the federal government whereby a two-tiered oil pricing system would apply to "old" oil and "new" oil. Old oil (that discovered prior to 1981), would be capped at 75 percent of the world market price, while "new" oil would be allowed to rise to the market price.

As mentioned above, during this period, the Trudeau government was engaged in negotiations with the provincial governments over the patriation of the Constitution. The NEP provided added incentive to the governments of energy producing provinces (mainly Alberta, Saskatchewan, and Manitoba) to seek explicit constitutional safeguards for their authority over resource management. While the Trudeau government had been willing to make some concessions regarding provincial resource management in the late 1970s, following the 1980 election in which the Liberals regained control of Parliament, Trudeau saw little reason to compromise. As a result, the Resolution on the Constitution placed before Parliament did not include a resource amendment. Its final inclusion in the

¹⁷³ For a more in-depth discussion of the Canadian and global context of the dispute over the NEP, see: Patrick James, "'Energy Politics in Canada, 1980-1981: Threat Power in a Sequential Game,'" *Canadian Journal of Political Science/Revue canadienne de science politique* 26, no. 1 (March 1993), 31-38.

Constitution was the result not of provincial/federal negotiation, but the efforts of the federal New Democratic Party (NDP) in Parliament, which secured the addition of Section 92A to the Constitution Act, 1982 in the Special Senate and House of Commons Committee on the Constitution.¹⁷⁴ The NDP has traditionally been strongest in the western and prairie provinces, and, unlike other Canadian political parties, is integrated with its provincial parties. The party's structure, therefore, tends to give greater priority to provincial concerns than is generally the case with Canada's other national parties. This undoubtedly helps to explain the NDP's determination to secure provincial control over natural resources through the resource amendment.

Impact of the Resource Amendment

The long-term impact of the resource amendment seems to have been twofold. Clearly, it has given the provinces more explicit and, in some ways, enhanced authority over resource development. It has also contributed, along with continuing efforts to refine Canadian federalism and settle lingering constitutional questions not fully resolved by the Constitution Act, 1982, to the rise of collaborative federalism in Canada. This second effect of the resource amendment may have been unintentional, but is perhaps more important than the first. Both bear further examination.

As previously discussed, the addition of the resource amendment in 1982 must be understood in the context of ongoing conflicts over resource management which

¹⁷⁴ Marsha A. Chandler, "Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92A)," *Canadian Journal of Political Science/Revue canadienne de science politique* 19, no. 1 (March 1986), 113-114.

culminated in the dispute (mainly between Alberta and the Trudeau government) over the NEP in the early 1980s. There is little doubt that the provincial governments saw Section 92A as a means of protecting themselves from future encroachment upon what they had previously believed to be an area of exclusive provincial authority.¹⁷⁵ Although the provinces pressed for the complete abdication of federal authority over resource-related issues such as taxation and trade, the resource amendment instead provided for increased concurrency of provincial and federal powers over areas which had previously been the sole domain of the federal government. Thus, although the provinces did not achieve complete control of natural resources, Section 92A preserved what had always been provincial, and in addition gave the provinces the power to act in areas related to resource management and development which had previously been exclusively federal. Given the Trudeau government's need to win support for the Constitution in the western provinces (particularly when it became apparent that Quebec would not give its approval), the addition of Section 92A by the NDP in the Committee on the Constitution could be viewed as a necessary, albeit distasteful, compromise which the Trudeau government accepted as the price of achieving the prime minister's agenda.

The specific provisions of the resource amendment are clearly a compromise. Previous drafts of the amendment would have virtually eliminated federal authority to

¹⁷⁵ Robert D. Cairns, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution," *Publius: The Journal of Federalism* 22, no. 1 (Winter 1992), 65. For further discussion, see Ronald L. Watts, "The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada," *The Journal of American History* 74, no. 3 (December 1987), 776.

intervene in provincial resource management.¹⁷⁶ The final version of the amendment, however, while expanding provincial authority, also left federal authority intact. The provinces gained the right to regulate resources on private as well as Crown land. In addition, the amendment removed the prohibition of indirect provincial taxation of resource production, removed the distinction between provincial and inter-provincial markets, and gave the provinces exclusive power to make laws regarding nonrenewable resources, forestry, and agriculture. The most significant effects of Section 92A on the provinces, therefore, were to give them authority over all resources within their borders and to give them concurrent authority (with Parliament) over the inter-provincial export of resource production.

These were important gains for the resource producing provinces, which gave them a seemingly extraordinary amount of constitutional space in which to enact laws related to resource management. However, the resource amendment authority of the provinces is subject to two limitations. First, provincial legislative authority may not be exercised in a discriminatory manner with respect to other provinces. It should be noted that Section 92A(2) only applies to discrimination with regard to resource production exported to other provinces. That is, the same price for resource products must be offered to all other provinces. It does not appear to prevent the provinces from establishing lower prices for resource products used within the producing province.

¹⁷⁶ The so-called “Best Efforts” draft was submitted to the first ministers in 1979 by the Continuing Committee of Ministers on the Constitution. In addition to the eventual provisions contained in Section 92A, it suggested preeminence of provincial regulations with respect to inter-provincial trade and limits on use of Parliament’s declaratory power requiring provincial consent.

The second limitation on provincial authority over resource management stems from continuing federal authority over trade and commerce. Section 92A(3) preserves federal primacy in the case of a conflict with provincial law. Section 92(10)(c) also provides Parliament with the constitutional space necessary to take a much larger role in resource management than has heretofore been the case through the use of its “declaratory power.”¹⁷⁷

All of this suggests that while Section 92A is certainly significant for the enhanced control over resource management that it guaranteed to the provincial governments, it was a compromise by which the Trudeau government secured the support of the western provinces for the constitutional reforms he desired. Although the provinces gained certain important powers (most notably authority over Crown and non-Crown lands and the ability to impose both direct and indirect taxes on resource production), the federal government did not surrender any of its own authority. The new concurrent powers over inter-provincial trade and taxation are subject to the federal ability to override conflicting provincial legislation in areas of concurrent authority. The resource amendment, therefore, appears to enhance provincial constitutional space only to the extent that the federal government is unwilling to provoke a confrontation with the provinces through the full exercise of its own authority. It is conceivable that at some point in the future, the federal government could take increasing control over resource

¹⁷⁷ This subsection allows Parliament to unilaterally declare that a “work” situated within a province exists for the “general advantage” of Canada or of two or more provinces, and to transfer legislative authority over it to the federal government. Within the context of this provision, a “work” could be a mine, oil field, or dam. In the area of natural resources, the most significant use of the declaratory power was the 1945 federal assumption of control over all uranium production in Canada. The provincial governments seem to have little recourse in such a situation.

management using its authority under the Peace, Order, and Good Government Clause or Section 92(10)(c) to regulate resource industries in order to enforce domestic environmental standards, as a means of meeting treaty obligations with respect to greenhouse gas emissions, or to enact a new version of the NEP. None of these actions would be clearly unconstitutional, notwithstanding the existence of the Resource Amendment.

The more significant impact of the Resource Amendment may have been its effect on Canadian federalism. This was not necessarily intentional, but has proven to be an important piece in the relatively recent evolutionary developments of the Canadian federal system. Dissatisfaction with “executive federalism,” which was dominated by the first ministers (the prime minister and the ten provincial premiers), and characterized the patriation of the Constitution under Pierre Trudeau and the failed Meech Lake Accord¹⁷⁸ under Brian Mulroney, has led to the emergence of a new style of collaborative federalism in Canada.

Collaborative federalism is a relatively new development in Canada. It has been defined as the “co-determination of broad national policies” by the federal and provincial governments.¹⁷⁹ It is characterized by collaboration between the federal and one or more provincial governments working together as equals, or by provincial governments acting

¹⁷⁸ The Meech Lake Accord was negotiated by the Mulroney government and the ten provincial premiers in 1987. It was intended to enact constitutional amendments which were seen as preconditions for Quebec’s ratification of the Constitution Act, 1982. Quebec Premier Robert Bourassa gave five conditions for Quebec’s ratification: recognition of Quebec as a “distinct society” within Canada; a constitutional veto for Quebec; increased provincial authority over immigration; financial compensation for provinces choosing to opt out of federal programs; and provincial input on the appointment of Senators and Supreme Court justices. The Accord required unanimous provincial approval for ratification within three years, which it did not receive.

¹⁷⁹ David Cameron and Richard Simeon, “Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism,” *Publius: The Journal of Federalism* 32, no. 2 (Spring 2002), 49.

together in the absence of federal action to establish national policy. In the latter case, collaborative federalism may be viewed as the ultimate exploitation of their collective constitutional space by the provincial governments.

Although the resource amendment became part of the Canadian Constitution years before the notion of collaborative federalism gained recognition, the amendment has contributed to the rise of this new form of federalism in Canada. The NEP and the Trudeau government's determination to patriate the Constitution resulted in a strain on federal/provincial relations which necessitated the inclusion of the resource amendment in the Constitution Act, 1982 as a condition of western support. The specific provisions of the resource amendment, and the provinces' desire fully to exploit the new concurrent jurisdiction powers they were granted under it, have led to the necessity of a more collaborative relationship between provincial governments and the federal government. Recognition of the necessity seems to be mutual, as the provinces do not want to trigger federal takeovers of resource management under Sections 91, 92(10)(c), or 92A(3).

From the federal perspective, collaborative federalism with respect to resource management has several apparent advantages. First, it avoids the direct conflict with the provinces which characterized the Trudeau years. Second, in the post-Charter era, it has been suggested that the view of Canadian federalism as simply the division of federal and provincial jurisdictions is no longer acceptable, and that the people must have a greater voice in constitutional debates in recognition of their rights as participants in the federal system. Such citizen participation necessitates the devolution of power from the first ministers to a more broad-based system of decision making which affords greater public

influence and participation.¹⁸⁰ Collaborative federalism appears to hold some promise in this respect, and, from the federal point of view, reduces the risk of alienating the voters through the perception that policy is being dictated by political elites in Ottawa.

It has been suggested, however, that in practice collaborative federalism merely results in policy being determined and implemented by provincial elites in inter-provincial collaboration, rather than in Ottawa by either the federal government or the first ministers. The Social Union Framework Agreement, recognizing federal power to spend in areas of provincial jurisdiction only with the consent of the provincial governments, is one example of this. The agreement was negotiated in closed-door meetings of provincial officials with little or no public input, and was not revealed to the public until it was formally concluded in February 1999.¹⁸¹ Nevertheless, residents of the respective provinces may feel that they have more points of access to and opportunity to be heard by their provincial governments than by the federal government.

With respect to the resource amendment, we can observe collaborative federalism at work in one of the first examples of collaborative action taken by the federal and provincial governments after the failure of the Meech Lake and Charlottetown Accords. The resource amendment gave the provinces concurrent powers to regulate inter-provincial commerce in resource products, subject to federal legislative primacy and conditioned upon non-discrimination. In 1994, the first ministers signed the Agreement on Internal Trade. This agreement was the result of collaborative efforts to reduce inter-provincial trade barriers. It was a de facto recognition of the fact that while Ottawa may

¹⁸⁰ Ibid., 52.

¹⁸¹ Ibid., 56-58.

have the constitutional authority to regulate, or even take control of resource production through its power over trade, in reality the federal government cannot enforce its will without the cooperation of the provinces. This reality has made collaborative federalism a necessity, and seems also to have provided protection for the constitutional space given to the provinces by the resource amendment.

Before moving on to a discussion of the constitutional space available to American states in the area of resource management, it must be acknowledged that whatever success collaborative federalism has had in Canada cannot be easily duplicated in the United States for at least two reasons. First, the Canadian federal government, as a result of massive reductions in transfer payments to the provinces in the early 1990s, lost a commensurate degree of control over provincial actions.¹⁸² Second, with only ten provinces, as opposed to fifty states, each sub-national unit in Canada (and particularly Ontario, Quebec, British Columbia, and, owing to its importance as an energy producer, Alberta) has a greater amount of leverage over the federal government than any individual state in the United States can have. Both of these factors make collaboration between the federal and provincial governments in Canada more important than between the federal and state governments in the United States.

State Resource Management in the United States

There are several similarities in resource ownership and management between Canada and the United States. In each country the majority of natural resources are

¹⁸² Cameron and Simeon, 53-54.

owned by one or the other level of government. Private ownership of surface rights does not always extend to subsurface rights. Resource extraction is most commonly done by private corporations, and resources extracted from public lands are generally subject to tariffs or royalties payable to the government (national or sub-national).

There are, however, also significant differences in resource management policies between the two countries. In the United States, the federal government is the major landowner (see table 4), and therefore the major owner of natural resources. In provincial Canada, the federal government has no major land holdings. In the United States, federal authority over commerce has been interpreted broadly enough to play a major role in intra-state resource management. In Canada, although the federal government has constitutional authority over trade and commerce, the resource amendment has given concurrent power to the provinces with respect to inter-provincial commerce. Federal authority has rarely been so broadly interpreted as to have significant effects on provincial resource management, and the federal government has been much less assertive in using its power over trade to influence resource management than has been the case in the United States.¹⁸³ In addition, as previously discussed, the emergence of collaborative federalism in Canada has resulted in a more multilateral approach to resource management (particularly as it pertains to trade and commerce) than has been the norm in the United States.

¹⁸³ Cairns, 55.

Use of the Commerce Clause to Limit State Constitutional Space in the Area of Resource Management

Since 1937, congressional use of the Commerce Clause to justify increasing regulation of a broad range of activities generally has been upheld by the Supreme Court.¹⁸⁴ This includes cases regarding the management and production of natural resources. Often, congressional action has been the result of attempts at environmental regulation, justified by an assertion of authority under the Commerce Clause.

Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981), provides one such example of use of the Commerce Clause to limit state constitutional space to regulate resource management. In *Hodel*, the Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977. This act was intended to regulate strip mining, but was challenged on the grounds that the Commerce Clause did not extend to regulation of “the use of private lands within the borders of the States.” In its decision (written by Justice Marshall), the Court stated that the commerce authority of Congress was “broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” Citing congressional findings which described the potential deleterious effects of strip mining, the Court concluded that Congress had a “rational basis” for believing that strip mining “has substantial effects on interstate commerce.” Even William Rehnquist, the future Chief Justice and proponent of a new

¹⁸⁴ The Rehnquist Court, with its renewed interest in federalism, did issue decisions which seemed to define more restrictive limits on the commerce authority of Congress; most notably *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). It remains to be seen how durable the Rehnquist Court’s Commerce Clause precedents will be.

Supreme Court emphasis on federalism, concurred in the judgment in *Hodel*, noting that there was a rational basis for believing that strip mining could have a “substantial effect” on interstate commerce.

Although the clear trend in cases involving congressional commerce authority and the management of natural resources, as evidenced by *Hodel* and other similar cases over the past thirty years,¹⁸⁵ has been to limit the constitutional space available to states in managing resources within their own borders, one recent case suggests that the Court may be prepared to reconsider the validity of such federal legislation. In *Rapanos v. United States*, 547 U.S. 715 (2006), a divided Court¹⁸⁶ ruled that there are limits on congressional authority to enact legislation protecting wetlands under the Commerce Clause. What is notable about *Rapanos*, however, is that in this case the state of Michigan sided with the federal government in support of the Clean Water Act and its restriction of state constitutional space in the area of resource management and development.

State Utilization of Constitutional Space in Resource Management

In spite of the limits which have been imposed on the states with regard to resource management, some states have attempted to use the constitutional space

¹⁸⁵ See also: *Secretary of Interior v. California*, 464 U.S. 312 (1984) and *Hodel v. Indiana*, 452 U.S. 314 (1981). Both of these cases restrict state action with regard to resource management, although the specific state actions varied from environmental protection to resource production.

¹⁸⁶ There is some question about the precedential value of *Rapanos*, as the Court was deeply divided. Although a five justice majority ruled that the Army Corps of Engineers overstepped federal authority, there was no majority opinion in the case. Justice Kennedy concurred in the judgment, Justice Stevens wrote a dissent joined by Justices Ginsburg, Souter, and Breyer, and Justice Breyer also wrote a separate dissenting opinion which was not joined by any other justices.

available to them in order to manage their own land and resources. In recent years, as environmental protection has become a more important issue, states have also attempted to utilize their constitutional space to manage land and resources not only for development and financial gain, but also to protect the environment. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2006), provides one example of this trend.

In *Massachusetts v. Environmental Protection Agency*, the Court ruled that the state had standing to sue the Environmental Protection Agency (EPA) over its refusal to regulate greenhouse gas emissions owing to legitimate concerns that rising sea levels resulting from global warming posed a risk of substantial coastal erosion which would negatively impact the state's interest in protecting its land. The Court further ruled that the Clean Air Act required the EPA to regulate emissions of carbon dioxide. Several other states had also attempted to sue the EPA, but the Court only recognized Massachusetts as having legal standing to do so, based on the potential erosion of its coastline. The decision, therefore, was clearly predicated on the state's authority to manage and protect its own natural resources (in this case, land).¹⁸⁷ The narrowness of the Court's reasoning, however, left the question of whether an inland state would prevail in a similar suit unresolved. Inland states which had also filed suit against the EPA were not granted standing by the Court, and the Court did not address additional potential effects of global warming in granting standing to Massachusetts.

¹⁸⁷ In the Court's opinion, Justice Stevens based the decision to grant Massachusetts legal standing in the case on the state's "quasi-sovereign interests" in preserving its coastline. This could be interpreted as an acknowledgement of the constitutional space available to the state on this issue. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2006).

Perhaps the most significant state attempt to utilize the constitutional space available to it in the area of resource management is Article VIII of the Alaska state constitution. Given that Alaska control of state resources was an important issue in the drive for statehood, it is not surprising that the framers would constitutionalize principles for resource management. This was a use of constitutional space which was unique among the states at the time of Alaska's admission to the Union.

During Alaska's drive for statehood, the most contentious resource issue was lack of control over fisheries. Fish traps, absentee control, and the resulting lack of income from an Alaska resource all contributed to the desire to ensure that Alaskans would be the primary beneficiaries of resource exploitation. Providing for Alaska control over resources in the state constitution seemed to be the most secure method of ensuring the maximum Alaska benefit from natural resources.

The specific provisions of Article VIII are fairly straightforward. It contains 18 sections which sought to establish an "Alaskans first" approach to resource issues.¹⁸⁸ Sections 3 and 15 are of particular interest to our discussion of constitutional space. We will address section 15 first, and then return to section 3.

Article VIII, section 15 originally stated that "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Although fish traps are not specifically mentioned, the section was meant, in part, to prevent individuals or companies from establishing exclusive fishing rights in a specific location, as fish trap owners had done. Section 15 was amended in 1972 to allow for the

¹⁸⁸ Gerald A. McBeath and Thomas A. Morehouse, *Alaska Government and Politics*. (Lincoln: University of Nebraska Press, 1994), 125-126.

creation of limited entry fisheries which are open only to permit holders. The amendment specifies that such fisheries may be established as conservation measures to “prevent economic distress among fishermen.”

The unintended result of the limited entry system, observers have noted, has been the creation of highly valued limited entry permits, which may be sold to non-residents. The system has been criticized as a massive transfer of a public resource into private hands.¹⁸⁹ The taxes and fees paid to the state by permit holders do not cover the cost of managing the fishery, and the prohibitively high cost of permits has led to complaints that many Alaskans (particularly in rural areas) have been effectively priced out of limited entry fisheries. The state’s Commercial Fisheries Entry Commission estimates that the market price of permits ranges from \$2000 to about \$300,000, depending on the fishery.¹⁹⁰ As of 2007, the last year for which data are available, the trend in limited entry permit ownership appears to be toward increased ownership by non-local residents and nonresident fishermen.¹⁹¹

The loss of limited entry permits by local users suggests a significant problem with Alaska’s use of constitutional space to protect resident access to Alaska’s resources.

The establishment of limited entry fisheries seems to contradict the original intent of

¹⁸⁹ Ibid., 126.

¹⁹⁰ “Commercial Fishing Permits,” Alaska Commercial Fisheries Entry Commission, http://www.cfec.state.ak.us/Publications/Commercial_Fishing_Permits.pdf (accessed March 31, 2009).

¹⁹¹ The state’s Commercial Fisheries Entry Commission prepares an annual report on the ownership of limited entry permits. Permit ownership is broken down into five categories: Alaska Rural Local; Alaska Rural Non-Local; Alaska Urban Local; Alaska Urban Non-Local; and Nonresident. Local permit holders must live in a community which is local to the fishery in question. The 2008 report indicates that the only categories of permit holders which show increased ownership are Alaska Rural Non-Local, Alaska Urban Non-Local, and Nonresident.

Nancy Free-Sloan, et al., *Changes in the Distribution of Alaska’s Commercial Fisheries Entry Permits, 1975 to 2007*, Alaska Commercial Fisheries Entry Commission, CFEC Report No. 08-5N-EXEC (Juneau, 2008), 15.

Article VIII, Section 15 and to nullify the prohibition of exclusive fishing rights by creating a system in which only those who can afford one of a limited number of very costly permits are able to benefit from the state's resource, which is supposed to be utilized for the maximum benefit of all Alaskans and "reserved to the people for common use."¹⁹² Since the 1972 amendment to section 15 was the result of a ballot initiative, we must return to the question of whether the initiative process is a suitable means for amending the state constitution. In this case, it would appear that Alaska voters, despite their tendency to be fiercely protective of their rights to the state's natural resources, undermined the constitution's original protection of those very rights.

The amendment to section 15 does not detract from the constitutional space available to the state. Indeed, the amendment enhances constitutional space by removing a self-imposed constitutional restriction. Recall that at the beginning of this chapter, in our discussion of the benefits of written and unwritten sub-national constitutions, we noted that a potential drawback to a written constitution is that it may impose additional limitations on sub-national constitutional space which do not exist under the federal constitution. The original text of Article VIII, section 15 contained such a limitation. Amendment was necessary, therefore, in order to regain constitutional space which the state denied itself. Furthermore, the state's additional authority over fishery regulation under the amended section was upheld by both the Alaska Supreme Court and the United

¹⁹² Alaska Constitution, art. 8, sec. 3.

States Supreme Court.¹⁹³ Nevertheless, the creation of the limited entry system illustrates that the exploitation of constitutional space will not necessarily protect residents of sub-national units in the way one might expect.

Article VIII, section 3 of the Alaska constitution states that “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” This section has created the most significant conflict over the state’s attempted use of constitutional space for the purpose of resource management. In addition to the apparent conflict with the amended section 15, section 3 provides the basis for the extended subsistence debate within the state.

Subsistence has proven to be the most contentious constitutional space issue between the state of Alaska and the federal government. Resource issues in general tend to inflame public opinion in Alaska, but the direct confrontation with the federal government over access to Alaskan fish and game has undoubtedly stirred up more passions than any other resource related topic, with the possible exception of the state’s predator control program. Since the passage of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980, the state has repeatedly clashed with the federal government over subsistence, and the issue has divided Alaskans.

In Alaska, subsistence can be defined as the reliance on fish, game, and other wild resources (such as edible plants) for food, shelter, and other personal, family, or cultural needs. The subsistence lifestyle is a significant part of traditional Native culture, and is

¹⁹³ In *State of Alaska v. Ostrosky*, 667 P.2d 1184 (1983), the Alaska Supreme Court ruled that the Limited Entry Act, established under the authority given by Art. VIII, sec. 15, was constitutional. The U.S. Supreme Court acknowledged the constitutional space of the state on the issue of fishery regulation by dismissing Ostrosky’s appeal for want of a significant federal question.

also important to many non-Natives, particularly in rural areas of the state. Prior to the 1980s, subsistence was not a particularly controversial issue in Alaska, and many Alaskans assumed that Article VIII of the state constitution protected the subsistence rights of all residents.

At the heart of the federal/state debate over subsistence are the conflicting provisions of Article VIII, section 3 of the state constitution and Title VIII of ANILCA. According to the state constitution, Alaska's fish, wildlife, and waters are reserved for the common use of the people. No distinction is made between rural and urban Alaskans, or between Alaska Natives and non-Natives. ANILCA, however, provides for a rural subsistence priority in the allocation of Alaska fish and game on public lands.

In order to understand more fully the subsistence conflict, it is necessary to place it within the context of the Alaska Native Claims Settlement Act (ANCSA) and ANILCA. The Alaska Native Claims Settlement Act (ANCSA) of 1971 had authorized the Secretary of the Interior to withdraw up to 80 million acres of Alaska land for possible inclusion in the national park and forest systems, as wildlife refuges, and as wild and scenic rivers. ANILCA was signed into law in the final days of the Carter administration, following Ronald Reagan's victory in the 1980 presidential election. Attempts to preserve Alaska land had been ongoing in Congress for several years, meeting with fierce opposition from the state's congressional delegation. Supporters of an Alaska lands bill were unable to muster the needed votes for passage.

Following repeated stalemates in Congress over competing Alaska lands bills, Secretary of the Interior Cecil Andrus proposed the withdrawal of 92 million acres, of

which 43 million acres would be designated as wilderness. This proposal met with immediate opposition within the state of Alaska and by Alaska's two senators, Ted Stevens and Mike Gravel. Although the original proposal was amended to include a lower percentage of wilderness acreage, supporters were unable to reach a compromise which was suitable to both houses of Congress. By the fall of 1978, the bill was dead. At this point, the Carter administration stepped in and, acting under the authority of the Federal Land Policy and Development Act of 1976, unilaterally withdrew 110 million acres of Alaska lands, along with an additional 56 million acres withdrawn by the president under the Antiquities Act of 1906. Carter further directed Secretary Andrus to designate 40 million acres as permanent wilderness areas and Secretary of Agriculture Robert Bergland to close 11 million acres in two national forests to mining.

The Carter administration's land withdrawals provided additional impetus in Congress for the settlement of the Alaska lands issue. In 1979, as the result of a Senate compromise, a new bill authorizing the withdrawal of 104 million acres, of which 57 million acres were to be designated wilderness, was approved by the Senate leadership, and the bill was approved by the entire Senate in the summer of 1980. There were significant differences between the House and Senate versions of the Alaska lands bill, and Senators Stevens and Gravel threatened to filibuster the final bill if the House did not accept the Senate version.

The election of 1980, in which Ronald Reagan won the presidency and the Republicans won control of the Senate, prompted congressional Democrats to accept the Senate lands bill prior to the new Congress and president taking office. The bill passed,

and Carter signed ANILCA into law in December 1980. Included within the act, under Title VIII, are the protections for rural subsistence use of Alaska's fish and game.¹⁹⁴

The conflict between ANILCA and the state's utilization of constitutional space under Article VIII, section 3 was immediately apparent. In order to comply with ANILCA, the state would have been put in the position of violating its own constitution through the establishment of a rural subsistence priority. Furthermore, ANILCA seemed to nullify a portion of the constitutional space Alaska explicitly sought to claim for itself in the area of resource management. The state, therefore, was left with two options. It could either relinquish its claim to the constitutional space it believed it was entitled to with respect to the management of fish and wildlife by altering the state constitution, or it could relinquish de facto control over fish and wildlife on federal lands within Alaska by continuing to claim the constitutional space to reserve the people's common use of Alaska's fish and game without respect to rural or urban residency.

Although ANCSA had extinguished traditional Native hunting and fishing privileges within Alaska, the federal government had remained concerned with the ability of Alaska Natives to engage in subsistence activities in the years between the passage of ANCSA and ANILCA. In response to this concern, the Alaska legislature in 1978 passed a rural subsistence priority law, and the federal government gave the state conditional authority over fish and game management on federal lands. This law was already in

¹⁹⁴ This is only a very brief overview of the events leading to the passage of ANILCA. For a more in-depth discussion of this process, see Claus-M. Naske and Herman E. Slotnick, *Alaska: A History of the 49th State*, 2nd ed. (Norman: University of Oklahoma Press, 1987), 224-240.

place when ANILCA became law, and state management of fish and game on federal lands continued unaffected by Title VIII.

However, in 1985, the 1978 subsistence law was found unconstitutional by the Alaska Supreme Court, owing to its method of using drawing permits for subsistence hunts in order to manage the number of animals taken and its practice of excluding non-resident hunters from some hunts. The court found these provisions to violate Article VIII of the state constitution, and instead required the state to develop a system whereby subsistence hunting of any game population which had been hunted for food by Alaskans would be allowed. Under the court's interpretation of Article VIII, the constitution would permit the restriction of non-resident participation and a determination subsistence priority based on "customary and direct dependence" on subsistence hunting of the game population in question, local residency, and availability of alternative resources in cases where subsistence hunting would jeopardize a specific game population. The court did not require a rural priority as such in the new requirements.¹⁹⁵

In response to the Alaska Supreme Court's ruling on the 1978 subsistence law, the legislature enacted a new law in 1986. The 1986 law contained specific provisions ensuring a rural subsistence preference. Lawmakers believed that these provisions were required in order to ensure continued state management of fish and game on federal lands in accordance with ANILCA, although they were not required by the state court's 1985 ruling. In 1989, the state supreme court again found the state's subsistence law to be unconstitutional under the provisions of Article VIII of the state constitution because the

¹⁹⁵ *Madison v. Alaska Department of Fish and Game*, 696 P.2d 168 (Alaska 1985).

rural preference discriminated against urban residents.¹⁹⁶ Thus the state faced a constitutional crisis. The state constitution would not permit the crafting of legislation that would allow state fish and game officials to manage fish and game on federal lands within the state in compliance with ANILCA.

Throughout the remainder of 1989 and into 1990, the legislature and Governor Cowper attempted to reach a subsistence compromise. Most proposals would have required the legislature to approve a constitutional amendment which would then have been submitted to the voters for approval. None obtained the required number of votes in the legislature. As a result, in July of 1990 the federal government assumed responsibility for game management on all federal lands in Alaska due to the state's non-compliance with Title VIII of ANILCA.

Successive attempts to resolve the conflict between the state constitution and ANILCA have proven to be unsuccessful,¹⁹⁷ and federal management of Alaska fish and game populations remains a contentious issue in state/federal relations to this day. Ironically, Alaska, as the only state to attempt to utilize the constitutional space available to it in the area of resource management, has become the only state to lose management control of a significant portion of its fish and wildlife. In every other state, wildlife management is the responsibility of state fish and game officials on private, state, and

¹⁹⁶ *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

¹⁹⁷ Efforts to resolve the subsistence conflict continued under Governor Hickel. During his administration, a proposal to amend the constitution to make subsistence the highest priority use of Alaskan fish and game in times of shortage and to give priority to residents of each Game Management Unit for subsistence use also failed to gain sufficient support in the legislature. The Knowles administration declined to pursue an appeal to the United States Supreme Court in the Katie John case (247 F.3d 1032 (9th Cir. 2001)), which extended the rural subsistence priority to federally controlled navigable waterways within the state. Although Alaskan's resentment of federal wildlife management continues, no significant further developments occurred under the Murkowski and Palin administrations.

federal land. Only in Alaska has the attempt to provide constitutional protection for equal access to fish and game come into conflict with subsistence and Native cultural survival. The result has been a de facto loss of state constitutional space. While state courts have viewed Article VIII of the state constitution as requiring equality for all residents, federal courts have ruled in favor of the subsistence rights of rural residents over state assertion of autonomy through the exploitation of constitutional space.

Conclusions on Resource Management and the Use of Constitutional Space in the United States and Canada

The preceding discussion of certain characteristics of land ownership and resource management in the United States and Canada, and the degree and utilization of sub-national constitutional space in each country, allows us to draw some general conclusions about the ability of states and provinces to maintain or increase their autonomy in the area of resource management. As is the case with the issue of same-sex marriage, resource management has been a highly charged political issue in both countries, with the potential for divisive national/sub-national conflict. The different ways in which resource management has been approached in the United States and Canada not only illustrate fundamental constitutional differences, but also provide insight into the ability of federal systems effectively to balance national and sub-national interests.

The most important conclusion to be drawn from an examination of the constitutional space available to American states and Canadian provinces in the area of resource management is that the provinces have a distinct advantage over the states for

two primary reasons. First, land ownership plays a significant role in the degree to which a state or province can control the resources within its borders, and the U.S. government owns significantly more land within the states than the Canadian government does in the provinces. Second, the U.S. government has been far more effective in asserting its commerce authority as a means of limiting sub-national constitutional space in resource management than the Canadian government has.

The importance of land ownership is particularly evident in the subsistence conflict in Alaska. Owing to the federal government's large land holdings within the state,¹⁹⁸ and the inability of the state to comply with federal law, the federal government regulates game management on the majority of the land within Alaska's borders.

Although Alaska was more proactive in attempting to utilize the constitutional space available to it in this area than any other state, it is the only state in which the federal government exercises regulatory authority over fish and game (with the exception of threatened and endangered species protections). This is a situation which would not be possible were it not for the American (or, more accurately, the western U.S.) pattern of federal land ownership. Resentment over federal land ownership and restrictions led to the Sagebrush Rebellion in the western United States in the early 1980s, and its Alaska counterpart, the Tundra Rebellion. Western resistance to changes in federal land policy under the Carter administration resulted in the backlash against federal land ownership and management and undoubtedly contributed to Reagan's victory in the West. In no Canadian province does the federal government exert the degree of control over any

¹⁹⁸ See note 166.

resource that the U.S. government has over fish and game in Alaska. This can be almost entirely attributed to the differences in land ownership between the two federal governments. It is therefore reasonable to conclude that extensive federal land ownership can effectively trump sub-national constitutional space in the area of resource management.

Although both the U.S. and Canadian federal governments claim extensive commerce authority, in the United States the much broader interpretation of federal authority has proven to be a major limitation on the amount of sub-national constitutional space available in resource management. While the Trudeau government certainly attempted to increase federal authority in this area through use of the Canadian government's commerce authority in the National Energy Program, the necessity of winning the support of western provinces in the patriation of the Constitution, and the inclusion of the resource amendment in the constitutional reforms of 1982, effectively limited the federal government's ability to expand control of natural resources greatly through its commerce power. The rise of collaborative federalism, working in conjunction with the provinces' new concurrent powers over inter-provincial export of resource production, has ensured that federal commerce authority in Canada will not be used to restrict sub-national constitutional space to the same degree it has been in the United States.

In contrast to the situation in Canada, in the United States, Congress has been quite assertive in expanding its authority under the Commerce Clause, and the Supreme Court has generally upheld congressional actions in the area of resource management.

Under American constitutional law, there needs only to be a rational basis for believing that an activity will have a substantial effect on interstate commerce in order for congressional regulation to be upheld. In the area of resource management, when environmental effects on navigable waterways (for example) are taken into consideration, this is a relatively easy standard to meet. The Commerce Clause, therefore, represents a significant limitation on state constitutional space which goes far beyond the impact of federal commerce authority in Canada.

Finally, it must be noted that the almost universal practice in Canada of relying upon unwritten sub-national constitutions appears to contribute in at least a small way to the additional constitutional space available to provinces in dealing with resource management. Although Article VIII of the Alaska constitution was intended to exploit the constitutional space available to the state, it in fact introduced limitations which have necessitated amendment of the constitution. The prohibition of exclusive rights to fisheries contained in section 15, which was amended to allow for limited entry fisheries, exemplifies how a state, in seeking to exploit constitutional space through a written constitution, may at the same time limit its own future actions. In Canada, such self-imposed constitutional limitations are non-existent. Even in British Columbia, the only province to adopt a written constitution, this is not a significant issue because the constitution is a mere legislative act rather than entrenched fundamental law.

Each of these points supports the conclusion that the Canadian provinces enjoy a considerable advantage over American states in the amount of constitutional space available to them in the area of resource management. This advantage manifests itself in

the necessity of federal/provincial and inter-provincial collaboration in achieving national goals related to resource management, production, and export. Such collaboration is unnecessary in the United States owing to the states' much weaker relative position vis-a-vis the federal government in issues of resource management.

Chapter 5: Conclusion

This thesis began with a basic overview of the American and Canadian federal systems and an acknowledgement of the prevailing bias in the growing literature on comparative federalism toward an examination of federation “from the top down.” We noted that this was particularly true in the study of constitutionalism in federations, in which federal constitutions have been the focus of most scholarly interest, while the constitutional arrangements of sub-national units have received considerably less attention. The degree and exercise of sub-national autonomy, however, seems to be a vital component in understanding the complex relationships between the national and sub-national levels of governments in federations. A useful concept for examining sub-national autonomy is the idea of sub-national constitutional space, which we defined as “the range of discretion (space) available to the component units in a federal system in designing their constitutional arrangements.”¹⁹⁹

After placing the concept of constitutional space within the context of the larger literature on comparative federalism, we moved on to a discussion of the exercise of sub-national constitutional space in the United States and Canada in “rights” and “resource” issues. Our specific focus was on the issues of same-sex marriage and resource management, each of which has been a significant source of tension between the federal and sub-national governments in the United States and Canada. In looking at each of

¹⁹⁹ Tarr and Williams, 5.

these issues, our purpose was to answer the question of whether it is possible for sub-national units in a federal system to utilize constitutional space in order to maintain or increase their individual autonomy. Based on our analysis of the utilization of constitutional space in the U.S. and Canada with regard to same-sex marriage and resource management, it is now possible for us to suggest some broad conclusions which will at least partially answer this question.

Sub-National Constitutional Space and Rights

There appears to be a fundamentally different conception of “rights” in the United States and Canada. American federalism, the U.S. Constitution, and the Bill of Rights were all created in an era in which there was an emphasis on rights as protections against government. The United States Constitution as a whole is a document meant to limit and divide the powers of government as a means of protecting liberty.²⁰⁰ American tradition sees government as the primary threat to individual rights, and therefore seeks to protect rights from governmental infringement. This is particularly true with regard to the federal government, and it should be noted that the Bill of Rights was originally applicable only to the federal government.

In post-Charter Canada, the conception of rights and their relation to government is significantly different. The Canadian Charter of Rights and Freedoms is grounded in a post-World War II understanding of human rights and governmental responsibility, rather than the Enlightenment philosophy of Montesquieu and Locke which so greatly

²⁰⁰ Madison, *Federalist No. 51*, 318.

influenced the American framers.²⁰¹ In Canada, government is seen as the guarantor of individual rights and liberty, instead of as the primary threat to them. The American Bill of Rights embodies a negative conception of rights as protections from the government, while the Charter represents a more positive vision of rights which will be protected and guaranteed by the government. The two visions are at odds and incompatible with each other; the products of different historical eras. Their distinction is essential to understanding the differing degrees of constitutional space available to states and provinces and the disparate policy outcomes in rights issues.

As our discussion of same-sex marriage has illustrated, the different Canadian and American conceptions of rights have had significant ramifications. In Canada, the issue has been framed as one of fundamental human rights, while in the U.S. the legacy of homosexuality as a matter of criminal law has been a contributing factor in preventing the paradigm shift which seems to be necessary for more widespread acceptance of same-sex marriage as right, instead of a privilege which may be denied by the state.²⁰² These differing understandings of the root issue determine the amount of constitutional space available to the states and provinces with regard to such marriages.

Federal authority over marriage in Canada, coupled with the Charter's Section 15 guarantee of "equality rights," strips away almost all potential provincial constitutional space in the debate over same-sex marriage. In the United States, state authority over marriage, the reluctance of federal courts to regard sexual orientation as a suspect classification, and the comparative ease of access to the legislative process which allows

²⁰¹ Watts, "The American Constitution in Comparative Perspective," 787.

²⁰² Miriam Smith, 226.

for more influence of majority public opinion and citizen input through the initiative process in many states all combine to enhance state constitutional space. These factors apply not only to same-sex marriage, but, seemingly, to rights issues in general.

The conclusion we can draw about the degree of sub-national constitutional space in the area of rights in Canada and the United States, then, is that states appear to have a significant advantage over provinces in the absence of federal judicial decisions mandating rights protection. This is not to suggest that the constitutional space available to the states necessarily works to the benefit of their citizens. For the proponents of same-sex marriage, quite the opposite is true. American federalism, at the sub-national level and with regard to the extension and protection of rights, is significantly more majoritarian than Canadian federalism. Although, as in all federal systems, the courts may be the ultimate arbiters of rights in both Canada and the United States, the Canadian conception of the government's role in protecting rights, the explicit guarantees of equality contained in the Charter, and the specific assignment of residual powers to the federal government all suggest that the provinces have very little constitutional space available to them in preserving local or traditional values related to rights issues. Conversely, in the United States, the American conception of government (and especially the federal government) as a threat to rights and liberty, the reluctance of the courts to expand on federal constitutional guarantees of equality, and the assignment of residual powers to the state governments all combine to preserve the constitutional space available to the states in dealing with rights issues.

With respect to rights issues, we can therefore now offer an answer to the question of whether it is possible for sub-national units to maintain or increase their autonomy through the utilization of constitutional space. The example of same-sex marriage in Canada and the United States suggests that sub-national constitutional space is severely limited when a specific issue becomes viewed primarily as one of fundamental rights. In spite of the differing beliefs about the role of government in relation to the protection of rights in the United States and Canada, history suggests that states and provinces cannot successfully exploit constitutional space to deny what is publicly perceived as a basic human right in the long term. In Canada, relatively quick and widespread acceptance of court rulings mandating same-sex marriage undermined provincial attempts to oppose it. In the United States, while same-sex marriage remains the exception,²⁰³ the history of the legalization and acceptance of interracial marriage, spurred by court decisions framing it as an issue of basic human rights, suggests a path toward legalization of same-sex marriage which state constitutional space may be unable to withstand.

We can therefore conclude that, in general, both the Canadian and American federal systems tend to value rights over sub-national autonomy. Sub-national constitutional space, when it is subject to national constitutional supremacy, is insufficient to protect sub-national autonomy. The potential for increased, or simply preserved, autonomy through the exploitation of sub-national constitutional space when dealing with issues which have been successfully framed as rights issues at the national

²⁰³ See table 3.

level therefore seems to be quite small. This is true both in Canada, where the provinces seem to have slowly acquired increasing autonomy in a system which was designed to be highly centralized, and in the United States, where the evolution of federalism has resulted in a trend toward greater centralization dating back to the adoption of the Fourteenth Amendment.

Sub-National Constitutional Space and Resource Management

In analyzing the potential for states and provinces to maintain or increase their autonomy with regard to resource management through the utilization of constitutional space, it is clear that the single most important factor is land ownership. Although the issue of resource management is further complicated by its close relationship to commerce, taxation, and environmental protection, sub-national constitutional space is of little use in cases where federal land ownership is prevalent. The huge disparity between federal land ownership in the provinces and the states amply illustrates this point. Although the states have a great deal of constitutional space in theory, in practice they are severely limited by the much greater incidence of federal land ownership.

The states are placed at a further comparative disadvantage by the much broader interpretation of federal commerce authority in the United States than in Canada. In the U.S., congressional regulation of resource management and production requires only the finding of a rational basis for believing that such activities have a substantial effect on interstate commerce. The rational basis test carries with it an implicit assumption of the validity of federal legislative action, which results in a general reluctance on the part of

the courts to overturn acts of Congress as they relate to resource management and production. For a state which relies heavily on natural resources as the foundation of its economy, as Alaska does, federal commerce authority has the potential to greatly impact the state's economic wellbeing.

The rise of collaborative federalism in Canada and the adoption of the resource amendment have resulted in a more multi-lateral approach to issues such as commerce, trade, taxation, export, and environmental regulation, which tends to preserve the constitutional space of the provinces in resource management. This is largely the result of the bitter federal/provincial battles over the National Energy Program, the patriation of the Constitution, and subsequent attempts to bring Quebec into the constitutional family through the Meech Lake and Charlottetown Accords. Massive reductions in federal transfer payments to the provinces also contributed to the necessity of adopting a more collaborative relationship.

When viewed in comparison to Canada, it becomes apparent that even extraordinary attempts on the part of a state to utilize its constitutional space in the area of resource management, such as Article VIII of the Alaska constitution, are severely limited by extensive federal land ownership and broad interpretation of federal commerce authority. It is unclear what more a state could do within the American federal system to utilize its constitutional space in resource management than Alaska has done, and yet even this has been insufficient to maintain or increase the state's autonomy. The answer to our question, therefore, appears to be that the utilization of constitutional space is also not sufficient, by itself, to increase sub-national autonomy over resource management.

While there may be a great deal of constitutional space available in this area, it is of little practical importance if it cannot be exercised over a significant portion of the land within a state's borders.

Implications for Alaska

Finally, we must conclude that this limited analysis of the potential for increasing sub-national autonomy through the use of constitutional space does not appear to offer great potential for Alaska. In both of the areas upon which we have focused, the state of Alaska has been proactive in the utilization of its constitutional space. The state's attempt has failed to achieve the desired result in one area, and depends on the continued forbearance of the U.S. Supreme Court for success in the other.

Alaska is one of thirty states to define marriage in its constitution in order to exclude same-sex couples.²⁰⁴ The state's marriage amendment has allowed it to preserve the traditional definition of marriage, but it has not prevented the Alaska Supreme Court from requiring the state to offer benefits to same-sex partners of state employees.²⁰⁵ Given the reasoning behind the court's opinion,²⁰⁶ it is logical to expect that, were it not for the amendment to the state constitution prohibiting recognition of same-sex marriage, the same justification could have been used to permit such marriages.

²⁰⁴ See table 3.

²⁰⁵ *ACLU v. State of Alaska*, 122 P.3d 781, 794 (Alaska 2005).

²⁰⁶ The Alaska Supreme Court found that "disparate treatment" of same-sex partnerships could not meet the court's "minimum scrutiny" and was not "substantially related" to any legitimate government interest. *Ibid.*

It is likely only a matter of time before the United States Supreme Court takes up the issue of same-sex marriage. This may come as the result of challenges to the federal Defense of Marriage Act, prima facie challenges to state laws or constitutional amendments denying recognition to valid marriages performed in other states, or as a result of continuing appeals over Proposition 8 in California. The California Supreme Court has already established the precedent of considering sexual orientation to be a suspect classification subject to strict scrutiny. As more states move to allow or recognize same-sex marriage, there likely will be increasing pressure to adopt the position of the California Supreme Court nationwide. Although the United States Supreme Court has generally been reluctant to interfere with state jurisdiction over marriage, it appears ever more likely that *Loving v. Virginia* will serve as the precedent for overturning state laws prohibiting same-sex marriage. Alaska's use of constitutional space in this area, therefore, remains valid only so long as the issue is not taken up by the Supreme Court.

Alaska's unique attempt to utilize constitutional space in resource management, Article VIII of the state constitution, initially held great promise. The subsistence conflict, still unresolved after almost twenty years, demonstrates the failure of that promise. Indeed, since the Knowles administration chose not to pursue the Katie John case²⁰⁷ to the Supreme Court, it appears that there has been a lack of political will within the state to find a resolution. The state has essentially abdicated a portion of the constitutional space it originally claimed under Article VIII.

²⁰⁷ See note 197.

The state of Alaska has had a periodically strained relationship with the federal government, as is natural in the relationship between national and sub-national governments in federal systems. After scarcely twenty years of statehood, it initiated the first official review of a state's status within the Union since the Civil War.²⁰⁸ Alaskans simultaneously resent federal regulation, which they blame for many of the state's problems, and depend on federal money through congressional earmarks and spending of the federal government to support extensive federal programs and activities in Alaska. Although Alaskans like to think of themselves as independent, the realities of life in Alaska, including its vast expanses, sparse population, and narrow economic base, necessitate extensive federal involvement and support, and Alaska's resource based economy makes the state vulnerable to global market conditions over which neither Alaska nor the United States has control.

While the utilization of constitutional space holds some promise for enhanced Alaskan control over intra-state concerns, so long as it does not come into conflict with federal policy, it does not appear to be the answer to most of the frustrations Alaskans have felt with the federal government. The state has been only marginally successful in achieving the goals desired in the exercises of constitutional space discussed in this thesis. It seems unlikely, given the current state of the American federal system, that Alaska or any other state can expect a greater degree of success in attempting to utilize the constitutional space available to it in additional policy areas.

²⁰⁸ The Alaska Statehood Commission was created by voters in 1980. It was charged with reviewing the status of Alaska and Alaskans within the United States. The Commission's creation was the result of widespread dissatisfaction by Alaskans with the federal land withdrawals under the Carter administration.

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