

Comparative Observations

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The 12 constitutions examined here are drawn from a universe of 25 federal countries.¹ The constitutions range from the oldest, that of the United States of America (1788), to the youngest, that of the Republic of South Africa (1996). The countries range from Australia, with only six constituent states, to Russia, with 89 “subjects of the federation,” plus Belgium, with its double federation of three territorial regions and three nonterritorial language communities, making for five constituent units because Flanders is both a community and a region. The sample includes common-law and civil-law federations, parliamentary and nonparliamentary federations, and highly homogeneous (e.g., Germany) and highly heterogeneous (e.g., India) federal countries from around the world.

The sample illustrates the diversity of federal constitutionalism and the flexibility of the federal idea as it has been adapted to the circumstances of 12 countries. As such, each constitution reflects its country’s history, culture, and political experiences as well as its population characteristics. There exists, therefore, no single model, or ideal, federal constitution but rather a range of designs from which constitution makers can draw ideas. The suitability of any design depends on the objectives of constitution makers and the circumstances they face when organizing a federal system of self-rule and shared rule.

FEDERALISM AND CONSTITUTIONALISM

The word “federal” comes from the Latin *foedus*, meaning “covenant.” A covenant signifies a partnership, or marriage, in which individuals or groups voluntarily consent to unite for common purposes without giving up their fundamental rights or identities. A covenant represents a theological concept and political idea² that stands in contrast to (1) organic governments based on a common ancestor and (2) governments based on conquest -- or what Alexander Hamilton in 1787 termed governments based on accident or on force rather than on “reflection and choice.”³

Federalism and its related terms (e.g., federal and federation) refer to a type of government and governance that is established voluntarily to achieve unity while preserving diversity by constitutionally uniting separate political communities into a single limited, but encompassing, political community, such as a nation-state. Union may result from the aggregation of separate, even independent, political communities into a federation (e.g., the United States) or from the disaggregation or transformation of a unitary state into a *de jure* or *de facto* federal arrangement (e.g., Belgium and South Africa). Either way, power is divided and shared between (1) a general (federal or national) government that has certain area-wide (or nationwide) responsibilities, such as national defence and monetary policy, and (2) constituent territorial governments (e.g., states, provinces, *Länder*, republics, or cantons) that ordinarily have broad local responsibilities -- such as education, land-use planning, highways, health care, and public safety -- and that are also represented, often equally, in the federal legislature. Most federations have two orders of government: national and regional. A few (e.g., India, Nigeria, and South Africa) recognize municipal government as a third order.⁴ Each order of government, moreover, is authorized to act directly on individuals (e.g., tax, fine, and regulate) within its sphere of authority.

Although, in principle, a federal union is voluntary, in practice, Hobbesian factors and coercive forces, along with positive incentives, also sustain a federation even in the face of disgruntlement on the part of some or all of the federation's constituent political communities. Indeed, in some circumstances, the political choices available are stark: either anarchy or tyranny if not federalism. Consequently, federal polities tend to be dynamic over time as various forces contest for more or less centralization within more or less unity.

One key dynamic in federalism is a contest between majority rule, which is needed for unity, and minority rights, which are needed for diversity. One major rationale for modern federalism first articulated by James Madison in *The Federalist* papers of 1787-88 is the need to restrain simple-majority rule in a large and heterogeneous nation-state so as to prevent the rise of a tyranny of the majority that crushes the rights of minorities or extinguishes their identities. A federal constitution, therefore, ordinarily constrains the rule of any simple national majority (i.e., 50 percent plus one), providing instead for (1) mechanisms of concurrent consent and super-majority rule intended to encourage consensus building, coupled with (2) separations of powers within governments and a division of powers among different autonomous or semiautonomous governments so as to block the concentration of power in any one official or government, along with (3) a high court authorized to resolve legal conflicts and safeguard the constitution.

At the same time, a federation needs to be concerned about majority or minority tyranny emerging in its constituent political communities, such as the existence of slavery in US southern states for the first 75 years of US history, followed by nearly a century of apartheid-like race segregation and oppression. Similarly, the application of strict Muslim *sharia* (law) -- e.g., such as stoning women for adultery -- in several northern states of Nigeria violates commonly accepted human-rights conventions.⁵

The desire of Canada's Francophone minority to protect its rights and preserve its cultural-linguistic identity in the face of the Anglophone majority is an example of a feature common to contemporary federations encompassing racial, cultural, ethnic, religious, and/or linguistic communities that have territorial bases. By contrast, South Africa's constitution makers sought to empower the country's black racial majority after decades of white-minority rule while still protecting everyone from any oppressive majority rule. In more homogeneous federations such as Germany, Mexico, and the United States, the intention, even if not always fulfilled, is to frustrate tyrannical national rule by any single political party or interest group, whether it represent a majority or a minority of the population.

A federal system ordinarily requires a written constitution⁶ because a federation is based on a voluntary agreement, which, like any important agreement, is best placed in writing. A constitution also is essential because a federation consists of political communities with different cultures, customs, preferences, and political institutions. Quite often, moreover, a federation encompasses a large territory and/or population. An unwritten constitution, such as that classically attributed to Great Britain, is unsuitable for a federal system because in order to be effective, an unwritten constitution requires shared customs rooted in a common history. Moreover, a written constitution is needed because, in principle, a federation has no inherent powers of its own; it is the creation of the federating units. In practice, of course, there may be a pre-existing regime, but discarding or transforming this regime is likely to require a constitution-writing process. In addition, a written constitution serves to set forth the division and sharing of powers among the federation's orders of government.

A constitution is usually intended to be a fundamental or organic law that embodies a country's basic choices about the purposes, powers, limits, institutions, organization, and

operation of its government or governments. A constitution designates public offices, stipulates how they are filled, and allocates powers and responsibilities among these offices. A constitution also serves as a basic norm intended to be binding⁷ and is thus a legal mechanism for integration as well. Most important, a constitution establishes the key relationships between the people and their governments, including representation. As originally conceived in the eighteenth century, a constitution was deemed necessary to protect individual rights and personal autonomy against rapacious officials. Thus constitutions place limits on the exercise of power, in part by listing unalienable rights. However, by the twentieth century, a constitution came to be seen also as a mechanism to empower rather than merely to restrain government, especially in order to ensure governmental capacity to provide for social justice and social welfare.

CONSTITUTIONAL GOALS AND PURPOSES

Federal constitutions are framed for a variety of reasons and purposes. Constitution making in Brazil, India, Mexico, Nigeria, and the United States followed the end of colonialism as efforts to maintain unity and establish federal democracy. Some federal constitutions seek to create a democratic order in the aftermath of a history of dictatorship, as in Russia in 1993 and South Africa in 1996. Other federal constitutions are framed to restore a democratic constitutional order, as in Germany in 1949, Brazil in 1988, and Nigeria in 1999. Still other constitutions, such as those of Australia and Canada, reflect rather pragmatic reasons for federation, while others, such as those of Belgium and Switzerland, reflect evolutionary processes of holding together quite different cultural communities.

A common objective of all the federal constitutions is to build a modern nation-state. Indeed, if one takes the founding of the United States as marking the birth of modern federalism as distinguished from premodern confederalism, then modern federalism is aimed at nation-state construction and maintenance. Virtually all federal constitutions aspire to perpetual union. Federalism, of course, is not the only way to build a nation-state, and it is not even the prevalent way, but it may be the appropriate nation-building choice wherever a heterogeneous population and/or large territory and population militate against unitary democratic governance. It is this nation-state orientation that helps to account for trends toward centralization in many federations as well as for the tensions that occur within multinational federations, where construction of a nation-state can remain contested and controversial.

A key purpose of a federal constitution is to establish a stable framework of fundamental law that enables federalism and democracy to work peacefully and effectively over the long term even in the face of pressures for constitutional degradation. For this purpose, institutional design is important, as is the process by which a federal constitution is framed and adopted. Generally, there is a need for good-faith bargaining and negotiation among all relevant actors in an environment of trust, moderation, and pragmatic problem-solving.

Indeed, the objectives to be achieved and problems to be solved in framing a federal constitution are crucial in determining constitutional choices and in designing institutions. Constitutional choices are quite different if the predominant objective is to achieve a common defence, economic development, national unity, the coexistence of cultural communities, a restoration of democracy, or something else. In some cases, the objectives are stated clearly in the constitution, as in the Preamble to the US Constitution and the Preamble to the Indian Constitution. The latter preamble is quite precise in its stated intention to establish “a Sovereign, Socialist, Secular, Democratic Republic.” Other constitutions, such as those of Australia,

Belgium, and Mexico, do not have clear, formally stated objectives; instead, objectives are embedded in the constitution's design.

In most cases, the participants in the framing of a federal constitution have different objectives. Some might give priority to national unity; others might emphasize the coexistence of cultural communities; still others might emphasize economic development. It may be necessary, therefore, for the framers of a constitution to agree to disagree on certain matters so as to move forward on matters of agreement that will achieve unity and establish institutions to facilitate long-term conflict resolution on other matters. This is another reason why there is no ideal, or model, federal constitution; most federal constitutions have an eclectic character that reflects compromised constitutional choices and value tradeoffs made among actors who have different objectives and who look at different federal constitutions for guidance.⁸

Indeed, a common characteristic of federal constitution-making is that the framers examine existing constitutions for ideas. Today, as well, a number of developed federations, such as Canada, Germany, and Switzerland, promote federal constitutionalism. However, the striking characteristics of modern federal constitutions are the legacy of (1) the British colonial tradition, which fostered federal orientations in Australia, Canada, India, Nigeria, South Africa, the United States, and elsewhere, along with (2) the influences of the positive and negative effects of the US Constitution on federal constitution-making in Australia, Brazil, Canada, Germany, Mexico, Nigeria, Switzerland, and elsewhere.

One classical view of the reasons for federation is that the “politicians who offer the [federal] bargain desire to expand their territorial control, usually ... to meet an external military or diplomatic threat,” while those “who accept the bargain, giving up some independence for the sake of union, ... do so because of some external military-diplomatic threat or opportunity.”⁹ These reasons follow from the nation-state premise of modern federalism, but they can also be regarded as a truism because peace and security are necessarily among the objectives of every federal constitution and thus one of the reasons why all or most important foreign-affairs and defence powers are assigned to the national government in a federation. However, these defence reasons fail to explain why a federal constitution is much more than a peace pact and why federal constitutions are dominated by matters that have nothing to do with foreign affairs and defence. Most federal constitutions framed in recent decades have not been motivated by foreign-affairs and defence concerns. Even the US Constitution -- the oldest -- seeks, in addition to “domestic Tranquility” and a “common defence,” to “establish Justice, ... promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”¹⁰

Whereas liberty was a prominent objective of the American founders, the establishment or restoration of freedom, democracy, and a republican form of government stands out as a frequent objective of post-Second World War federal constitutions, beginning with Germany in 1949, where federalism was seen, in part, as a structural barrier to a revival of totalitarianism. Not every federal constitution achieves this objective, but the objective is not mere rhetoric.

Another common objective is to foster economic development through the creation of a common market. Consequently, federal constitutions ordinarily vest common-market powers in the national government and seek to lower and eliminate trade and mobility barriers between the federation's constituent political communities. The social-welfare orientation of most federal constitution-makers also produces mechanisms for wealth redistribution (e.g., fiscal equalization) among the federation's constituent political communities in efforts to alleviate poverty and promote even economic development across the federation.

At least half of the federal constitutions -- Belgium, Canada, India, Nigeria, Russia, and Switzerland -- examined in this volume reflect, as a predominant objective, efforts to accommodate territorially based racial, ethnic, religious, cultural, and/or linguistic diversity and thus to preserve cultural identities along with national unity. The Preamble to the Swiss Constitution, for instance, states the intention of the cantons "to live together with our diversities, with respect for one another and in equity." By giving a country's diverse cultural communities some guaranteed share of national political power coupled with (1) some measure of local self-governing autonomy and (2) procedures for continual negotiation, consultation, and dispute-resolution, a federal constitutional arrangement can, potentially over time, short-circuit secession, dull the sharp edges of militant communalism, foster political and socio-economic integration of cultural communities, and reinforce the constitutional rule of law.

The desire for accommodation can come from cultural minorities that insist on federalism as the price of national unity or from a national majority seeking to construct or maintain national unity against centrifugal forces. Either way, success is likely to require that the positive incentives pulling communities together outweigh both the negative incentives pushing communities together and the counter-incentives pulling communities apart.

However, federations formed mainly around territorially based cultural diversity usually experience recurring rounds, and sometimes crises, of centrifugal versus centripetal pressures. Such federations can also break apart at the first opening of a window of political opportunity (e.g., the former Czechoslovakia, Yugoslavia, and Union of Soviet Socialist Republics). In situations of fractious cultural diversity, those in control of the national government, whether they represent a national majority or minority, may fear that a federal constitution will institutionalize a pathway to fragmentation and secession by draining power and electoral support from the centre and perhaps, as well, opening a Pandora's Box of communal-autonomy claims.

Opponents of federalism, therefore, seize on the examples of failed multicultural federations, especially the bloody break-up of Yugoslavia, in order to discredit federalism. Yet these failed federations were, from the outset, shotgun federations constructed by conquest and held together by an authoritarian political party not democratically accountable to the people. By contrast, the stable and democratic multicultural federations are rooted much more in voluntarism and sustained by virtually continual bargaining and negotiation. Of course, in some situations, militant communalism may reject any offer of a federal bargain and demand, instead, complete national independence. Nevertheless, where federalism is a potential remedy for fractious multiculturalism, there are successful examples from which constitution makers can draw valuable ideas.

A few federal constitutions contain directive principles setting forth instructions for government to pursue certain objectives and ideals, such as the principles of economic and social democracy inscribed in India's Constitution. Nigeria's Constitution contains objectives and principles emphasizing the sovereignty of the people and the idea that government exists to serve the wellbeing [Is well-being one word?] of the people pursuant to principles of democracy and social justice. The Constitution also obligates the federal government to promote national integration by providing adequate facilities for and encouraging the free interstate mobility of people, goods, and services; securing full resident rights for every citizen everywhere in Nigeria; encouraging intermarriage among different religious, ethnic, linguistic, and territorial groups; and fostering a sense of belonging and loyalty to the nation that overrides sectional and sectarian loyalties.

Such principles are ordinarily hortatory and not justiciable. Consequently, even though they reflect admirable, agreed-upon aspirations, they are likely to be difficult to realize in practice. Indeed, their very presence in the constitution suggests an attempt to institutionalize on parchment principles and objectives deemed essential for good federal governance but recognized as being only weakly institutionalized in a country's political culture.

A few constitutions also set forth fundamental duties for citizens, such as the obligations of Indian citizens "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem" and "to safeguard public property and to abjure violence." The Mexican Constitution, which distinguishes between nationals and citizens, stipulates certain duties for each. For example, citizens must, among other things, register on their municipality's tax list, be willing to serve in elected offices, and "fulfill electoral and jury functions."

CHARACTERISTICS OF FEDERAL CONSTITUTIONS

Most federal constitutions are not the product of a big-bang creation but rather of a long gestation, often involving previous successful and unsuccessful constitutional experiences. The US Constitution, for instance, was preceded by the Articles of Confederation of 1781, earlier nonconstitutional agreements of union (e.g., the Continental Congress), 18 state constitutions, and hundreds of regional and local constitution-like documents forged in the colonies for some 170 years. Canada's Constitution Act 1982 followed five earlier constitutional arrangements dating back to the Royal Proclamation of 1763, while Switzerland's Constitution of 1848 reflected 575 years of confederal development involving numerous alliance treaties among various cantons dating back to the *antiqua confoederatio* of 1273. In these and other countries (e.g., Belgium and Germany), previous developments contributed to comparatively successful, contemporary, constitutional, federal democracies.

More problematic are, for example, Brazil's current seventh constitution and Nigeria's current fifth constitution, both of which followed failed constitutions, disruptions of democracy, and military *coups d'état*. Some newer federal constitutions, such as those of Russia (1993) and South Africa (1996), had, by necessity, shorter gestations, although the framers of these constitutions had the benefit of the experiences of many successful and unsuccessful federal arrangements around the world. These newer constitutions, moreover, have yet to withstand the tests of time.

By comparison, two stable, peaceful, and democratic federations -- Canada and Switzerland -- have important constituent political communities that have not ratified the federal constitution, namely Quebec in Canada and six of Switzerland's 26 cantons, which have never accepted any of modern Switzerland's three constitutions. The 1848 Constitution was rejected by eight cantons; the 1874 Constitution was rejected by ten cantons; and the 1999 Constitution was rejected by twelve cantons. Yet the Swiss and Canadian federations are widely regarded as models of success!

Some federal constitutions are short (e.g., the US Constitution); others are long and complex, such as that of India (the longest), where the challenge of establishing a constitution for a highly diverse nation-state of continental size posed issues never previously addressed by Western constitutionalists. For postcolonial nations, moreover, a constitution is an important symbol of national independence. In turn, some constitutions demonstrate remarkable endurance, such as the 217-year-old US Constitution, which is the world's oldest written national

constitution still in operation (and with only 27 amendments). Other constitutions have brief, undistinguished lives. Although Thomas Jefferson argued that a country should adopt a new constitution every 19 years so as to ensure that each living generation is not governed by the dead hand of the past, virtually all constitutional framers have concluded that such frequent change would foster factionalism, incite conflict, perpetuate instability, and undermine democratic government. Instead, framers seek to establish multigenerational stability, but without rigidity, in a federal constitution.

The extent to which a constitution is revered also varies among federal countries. In the United States, the federal Constitution is so highly revered that it is often regarded as the nation's third sacred text, following the Bible and the Declaration of Independence (1776). By contrast, in Australia, the federal Constitution is accorded no particular reverence or even attention by most Australian citizens. Similarly, the extent to which the federal constitution is viewed as a superior law or higher law varies across federations. Generally, the constitution is more likely to be regarded as a higher law where it performs a crucial legitimating function for the federal polity, where statutes can be struck down as violations of the constitution, and where the constitution is not subject to excessive amendment.

Multilayered Hierarchy of Values

An often overlooked characteristic of federal constitutions is their multilayered nature, beginning with a hierarchy of values within the constitution and extending outward to laws, documents, and judicial rulings of a quasi- or para-constitutional nature. Many federal constitutions contain a hierarchy of values that is protected by rules of amendment. That is, in the first place, some provisions (e.g., the German Basic Law's "eternity clause")¹¹ cannot be amended at all. Some other provisions, while not specifically exempted from amendment, are structured in a manner that makes their amendment virtually unimaginable politically, such as equal representation of each constituent unit in one chamber of the national legislature.

Usually, the provisions immune to amendment are those that concern rights and the federal order. The "eternity clause" in Germany's Basic Law protects the division of the country into *Länder*, the participation of the *Länder* in federation legislation, and basic principles stipulated in Articles 1 and 20 regarding such matters as the separation of powers, protection of human dignity and rights, the rule of law, democracy, and the welfare state. In India, the supremacy of the Constitution, the republican and democratic form of the government, the secular character of the Constitution and secular nature of the state, the separation of powers, and the federal character of the Constitution are regarded as not subject to amendment. In Brazil, amendments cannot be considered to abolish the federal system, the separation of powers, the direct secret ballot, and individual rights. In short, federal constitutions treat federalism not as transitory or transitional but as permanent.

Nevertheless, a number of federal constitutions provide for two or more methods of amending various constitutional provisions, each of decreasing difficulty. Changing some provisions requires a super-majority vote in the legislature, while changing others requires only a simple-majority vote. Likewise, some amendments require the consent of some portion of the constituent political communities, whereas others do not.

The hierarchy of values is often protected as well by rules for super-majority votes (e.g., two-thirds or three-fourths) on certain matters and by requirements for concurrent (or dual or double) majority votes on certain matters. Such rules reflect the general orientation of federal constitutions away from simple majority rule and toward rules of governance that favour super-

majoritarian or consensus-based decision-making as a means of protecting minorities and promoting unity.

Another facet of this layering is the extent to which international human-rights law features prominently in some post-1945 federal constitutions (e.g., Germany and South Africa). In South Africa, any court must “consider international law”¹² when interpreting the bill of rights, and priority must be given to interpreting domestic law in conformity with international law whenever possible. These international conventions did not exist when the US Constitution was drafted in 1787, but the Declaration of Independence came to be regarded, especially subsequent to the presidency of Abraham Lincoln (1861-65), as the higher legal mandate for the Constitution. Other important rules may likewise lie outside the constitution, such as the Australia Act 1986, which renounced British sovereignty. In Belgium, special para-constitutional laws specify the details of powers devolved to the regions and communities in light of basic principles expressed in the Constitution. Brazil’s Constitution provides for Congress to enact “supplementary laws” in order to carry out certain provisions, such as the conditions for executing concurrent powers.

In some federations, such as the United States, state or provincial constitutions may complete the national constitution in the sense that the national constitution cannot operate without the aid of the institutions and functions established by the state constitutions.¹³ Lastly, most federations have a body of constitutional law, contained in judicial decisions, that interprets the national constitution as well as, in a few countries, the state or provincial constitutions. In summary, then, the complete operational constitution of a federation is rarely a single, seamless, uniform document.

Federal-Specific Provisions

In addition to matters addressed by all constitutions, a federal constitution must (1) determine what the constituent units (e.g., states, provinces, or cantons) are and whether there is to be two or three orders of government, (2) set forth the extent of the constituent units’ territorial integrity and self-governing autonomy or sovereignty, (3) provide for the admission of new political communities to the union, (4) determine the role of the constituent units in the composition and operation of the national government, (5) provide mechanisms and institutions for accountability to the people by all orders of government, (6) provide for the representation of both individual citizens and the constituent political communities in national-government institutions, (7) distribute powers (or competences) among the orders of government, (8) determine which powers are to be exclusive to each order and which are to be explicitly or implicitly concurrent, (9) conclude where residual powers lie, (10) establish institutions and/or mechanisms to resolve conflicts between the orders of government, especially over the distribution of powers, (11) provide rules for intergovernmental (e.g., federal, provincial, local) and interjurisdictional (e.g., interprovincial and interlocal) relations and mutual obligations, (12) stipulate the supremacy of federal law within the national government’s sphere of constitutional authority, (13) provide for a minimum standard of human-rights protections to be guaranteed by the federal government and by all the constituent governments, (14) provide for a high court to umpire or police the division and sharing of powers among the orders of government, and (15) set forth amendment procedures that protect the hierarchy of values chosen by the framers and that strike a balance between constitutional stability and constitutional adaptability to historical change.

At the same time, most of the federal constitutions also contain provisions that are dead, ineffective, or in abeyance. In Canada, for instance, the federal government has the authority to

reject provincial legislation through powers of reservation and disallowance. The federal government used these powers in the past, but their use was discontinued by custom. Most federal constitutions also have sleeper provisions that appear innocuous or inconsequential at first but rise to prominence later in the federation's history. Using a Canadian example again, the federal government's spending power eventually became a vehicle for what many provincial officials regard as federal-government intrusions into traditional areas of provincial jurisdiction.

Sources of Legitimate Authority

The sovereign source or sources of power to enact a constitution vary across federal countries. The "We the People" formulation in the US Constitution locates sovereignty in the people, but there is contested ambiguity as to whether "We the People" means the entire people of the whole United States or the different peoples of the 50 separate states. The US Constitution was not ratified by a national referendum but by a popularly elected convention in each state. The constitutions of Brazil, India, and Mexico are regarded as emanating from the people of the nation-state as a whole. The Russian Constitution does not recognize any source of power other than the multinational people of Russia; therefore, the only sovereignty presumed is that of the federation. The federation's sovereignty precludes the existence of two orders of sovereign power, each enjoying independence in a single system of state power; consequently, it does not allow for even "limited" sovereignty on the part of republics or of any other unit of the federation. Similarly, in India, the union is not seen as having come into existence as the result of a covenant or compact among the states because the states possessed no sovereignty prior to the union.

Meanwhile, Belgium's Constitution is seen as emanating from the nation, not directly from the people. The Swiss Constitution is, in effect, a compact among the individuals who constitute the whole people of Switzerland as well as a compact among the separate peoples of the cantons. In Canada, there are contested views as to whether the constitution is, or should be, a compact between two peoples (i.e., the English and the French), a compact among multiple peoples (i.e., Aboriginal, English, and French) a compact among ten provinces and three territories, or a compact among the whole people of Canada.

Only a few federal constitutions, such as those of Australia and Switzerland, were submitted to the people as a whole and/or to the peoples of the constituent political communities for final approval by referendum. In recent decades, there has been a trend to convene a special constituent or constitutional assembly, usually elected, to draft a constitution and engage in widespread public consultations rather than having a constitution drafted by a regular legislative body or handed down by a monarch. Final adoption might involve a regular, national, legislative body and/or the legislative bodies in some or all of the constituent political communities.

NATIONAL CONTENTS OF FEDERAL CONSTITUTIONS

All federal constitutions contain provisions that apply nationwide, apply throughout the intergovernmental order, distribute powers, establish national-government institutions, provide for the operation of national institutions, and so on.

Rights

Except for Australia,¹⁴ all of the constitutions examined here list protected civil rights (e.g., freedoms of speech and religion), procedural rights (especially with respect to criminal justice),

and political rights (e.g., the rights to vote and hold public office). The rights protected in these three categories are fairly similar across the constitutions, although there are some variations. Property rights, for example, are protected in some constitutions (e.g., Germany) but not in others (e.g., Canada). There also are some variations in emphasis, such as very stringent provisions on separation of church and state in Mexico's Constitution. In addition, several constitutions (e.g., Germany and Mexico) incorporate international human-rights conventions, such as the United Nations Declaration of Human Rights and the European Convention on the Protection of Human Rights.

Several constitutions -- namely those of Brazil, Nigeria, Russia, South Africa, and Switzerland -- incorporate a fourth set of rights, commonly called social rights. These include, among others, rights to education, health care, housing, work, leisure, and the like. For example, various economic and cultural rights are fixed in the Russian Constitution, such as the right to collective bargaining and the right to strike; the right to social security in old age and in cases of disease, handicap, or loss of family wage earner; the right to bring up one's own children; the right to free health care and medical assistance; the right to education; and the right to participate in cultural life, to use the institutions of culture, and to retain cultural values. These social rights, however, are often difficult to implement and to adjudicate. The Swiss Constitution sets forth a few social rights (e.g., a right to basic education) but then sets forth several social objectives (e.g., social-security and health-care guarantees) that do not confer any special rights to government services. Thus social-rights declarations are often more hortatory than mandatory, although a few high courts, such as that of South Africa, have attempted to enforce such rights.

Many of the federal constitutions provide for the national suspension of certain rights in times of emergency. The US Constitution, for instance, permits suspension of the writ of *habeas corpus* in times of rebellion or invasion, but no other rights are subject to suspension, at least constitutionally. A variation on this theme is the notwithstanding clause in Canada's 1982 Charter of Rights and Freedoms. This clause permits provinces to opt out of certain rights provisions by allowing a provincial law to operate for five-year renewable periods "notwithstanding" certain Charter rights. Not subject to this clause, however, are democratic rights, mobility rights, and language rights.

Interestingly, in light of federalism's commitment to diversity, there are few direct or explicit protections of group or communal rights in the 12 federal constitutions treated in this volume. Instead, there is an emphasis on individual rights, including individual rights to speak a language and retain a culture. Although South Africa's Constitution, for example, recognizes the "right of self-determination of any community sharing a common cultural and language heritage," there is not only a strong emphasis on individual rights befitting the leading framers' commitment to majoritarian democracy but also a tinge of hostility toward group or communal rights due to the country's apartheid history. Instead, therefore, group rights are usually protected indirectly via the freedoms of association, speech, religion, and the like. Otherwise, group rights are protected structurally through representation, regional and local self-government, power-sharing, service-provision rules, and the like.

Distribution of Powers, or Competences

Every federal constitution must determine a distribution of powers, especially the powers to be exercised by the national government. Certain powers can be delegated exclusively to one or more orders of government, while certain other powers can be regarded as concurrent -- that is, capable of being exercised by both the national government and the constituent governments. A

federal constitution also ordinarily stipulates the jurisdictional location of the residual powers, namely legitimate powers that might be exercised by a government but are not listed in the constitution.

Powers commonly assigned, mostly exclusively, to national governments in federations include intranational and international trade and commerce, national currency and monetary policy, the central bank, customs and excise duties, value-added taxes (VAT) and income taxes, foreign affairs, national defence, postal services, patents and copyrights, weights and measures, social welfare, citizenship determination, immigration, major public utilities, certain natural resources, criminal law, and aviation. Of course, a much wider variety of powers is differentially assigned to national governments across federations, making an accurate generalization impossible.

Some federal constitutions (e.g., Russia, India, and Nigeria) contain an explicit list of concurrent powers. Among the concurrent (or joint) powers listed in Russia's Constitution, for example, are establishing general guidelines for organizing the institutions of government power and local self-government; regulating possession, use, and management of land, mineral resources, water, and other natural resources; delimiting state property; protecting historical and cultural monuments; addressing general questions of youth socialization, education, science, culture, physical culture, and sports; establishing general guidelines for taxation and levies in the federation; and protecting the original environment and the traditional way of life of small ethnic communities. Both the federal and subject governments can legislate in the fields of administration, administrative procedure, labour, family, housing, land, water, and forestry as well as legislate on sub-surface matters (e.g., minerals) and environmental protection. In Canada there is concurrency with respect to agriculture, forest products, electricity, exportation of nonrenewable energy resources, immigration, and senior-citizen pensions and benefits. In other federal constitutions, such as the US Constitution, there is no list of concurrent powers, but there is, nevertheless, a huge field of politically and judicially accepted concurrency (e.g., the federal government and 42 states levy income taxes entirely independently of each other). In other cases, such as that of Belgium, there are no truly concurrent powers; instead, the federal system is highly dualistic.

Too much dualism, however, can stifle intergovernmental cooperation and coordination as in Brazil and, potentially, as in Belgium, where there is a high need for coordination and where the system tends to compel cooperation as the only way in which the various orders of government can accomplish their tasks. At the same time, too much cooperation and concurrency can, as in Germany, impede efficient decision-making and even produce gridlock.

In matters within the concurrent or joint jurisdiction of a federation and its constituent units, federal law is almost invariably supreme, and the constituent governments may adopt only laws and regulations that are consistent with federal law. In Canada, however, there is one area of concurrency, old-age pensions and supplementary benefits, where provincial law has paramouncy (so that Quebec can maintain its own pension system). In South Africa, the Constitution attempts to put some constraints on the national government by stipulating that national law usually, but not always, overrides a conflicting provincial law, depending on circumstances.

As a result, the widespread experience in the federations analyzed here is that concurrent powers have served as vehicles for expanding federal power. Although usually, in principle, the national government is intended to enact only framework legislation within concurrent fields, national governments tend to enact increasingly detailed legislation that progressively

circumscribes the discretion of the constituent governments, as has been evident, for example, in Germany, India, Mexico, Russia, and South Africa. Indeed, in Mexico, the federal government long sought to expand the concurrent list so that it could, like the proverbial camel's nose in the tent, intrude upon constituent-state powers. (In India, the Union Parliament can even enact laws under certain circumstances in areas of power delegated to the states.) This expansion of federal power through concurrency appears to be enhanced in federations where the national government captures most of the federation's tax revenue and then redistributes revenue to the constituent governments.

A related trend appears to be the growth of federal criminal law in most of the federations examined here, even where criminal law has been exclusively or substantially a constituent-government responsibility. In 1798 Thomas Jefferson pointed out in opposition to the recently enacted federal Alien and Sedition Acts that the US Constitution "delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the laws of nations, and no other crimes whatever."¹⁵ Today there are more than 3,000 federal criminal statutes, including some 50 death-penalty statutes. In the United States, this growth in federal criminal-law is partly the result of members of Congress seeking to present themselves to the voters as being "tough on crime"; however, more generally, modern technological, corporate, and international developments appear to be driving this trend, a trend that could be accelerated by terrorism. In Mexico, however, there has been some agitation to give the states more criminal-law functions in order to increase criminal-justice efficiency and effectiveness.

A further refinement on the distribution of powers is that in contrast to Australia, Canada, and the United States, for example, where each government has executive or administrative powers adequate to give effect to its own legislative powers so that neither order is dependent on the other to carry out its will, in some other federations, such as Germany, India, and Switzerland, there is a constitutional separation between the federal government's legislative powers and the authority to implement federal legislation. That is, while the federal government is empowered to enact legislation in various, usually domestic and concurrent, policy fields, the legislation must be executed or administered by the constituent governments. Thus legislative power is substantially centralized, while administrative power is decentralized.

Another contemporary aspect of the distribution of powers is that it can be either symmetrical or asymmetrical. In a symmetrical distribution, which characterizes all but one (i.e., Russia) of the 12 federations -- although India is a partial exception, too -- the full-fledged constituent political communities are on an equal footing in terms of having the same constitutionally assigned and/or residual powers and the same status before the national government. In an asymmetrical distribution, the constituent political communities are not on an equal footing, and some have more constitutional and/or residual powers than others. However, it is not uncommon for certain *de facto* asymmetries to emerge over time in a federation characterized by constitutional symmetry.

The residual powers lie with the constituent political communities in Australia, Brazil, Germany, Mexico, Nigeria, Russia, Switzerland, and the United States. The residual powers lie with the national government in Canada, India, and South Africa -- all three of which were motivated by centralizing objectives at their founding. In Belgium, the residual powers actually lie with the national government even though the Constitution says that they lie with the regions and communities. Although the residual powers lie with the states in Brazil, the federal Constitution is so detailed that little room is left for state discretion.

The location of the residual powers was once believed to be crucial because the holder of the residual powers was presumed perpetually to be in a situation enabling it to sustain and expand its powers vis-à-vis the other order or orders of government. Experience suggests, however, that this is rarely so. In Mexico the states' possession of residual powers could not counteract the country's long history of highly centralized, one-party, presidential rule. In Canada, the residual powers were lodged in the federal government as part of an effort to create a centralized federation. Today Canada is widely agreed to be one of the most noncentralized federations. In contrast, the US states insisted on holding the residual powers; yet, the US federal system has become highly centralized in most respects. In both Canada and the United States, residual powers proved to be elusive because courts interpreted specified enumerated powers broadly and unspecified residual powers narrowly.

Fiscal and Monetary Powers

Given that he or she who pays the piper calls the tune, the distribution of tax, spending, and borrowing powers is of crucial, often decisive, importance. Among the 12 federations treated herein, there is tremendous variation with respect to the details of their fiscal systems, but generally, either by constitutional design, historical development, and/or constituent-government preference, the national government in most federations captures the largest portion, sometimes the lion's share, of total tax revenues. In Australia, for instance, the Commonwealth government garners nearly 82 percent of the federation's tax revenue. Although tax powers in all federations are allocated to the national, constituent, and local governments so that each order of government can raise at least some portion of its own revenue, local governments usually have the least own-source revenue-raising authority, followed by the constituent governments.

The major taxes are corporation taxes, personal income taxes, consumption taxes (e.g., a VAT and a sales tax), excise and customs duties, and property or real-estate taxes. Customs duties and excise taxes are ordinarily assigned exclusively to the federal government. All the other major taxes are assigned exclusively or concurrently to the federal, state, and local governments, with property taxation being a common local tax power. However, even where there is concurrent tax authority, the federal government frequently gets the tax's largest share of revenue; in some cases (e.g., Brazil), the federal government also determines the rates and rules for state and local tax levies.

Consequently, every federation engages in fiscal transfers, with the national government ordinarily being the source of the largest transfers to its constituent and/or local governments. In turn, state, provincial, and cantonal governments ordinarily transfer revenues to their local governments. Many federal constitutions mandate that the national government must share certain revenues with the constituent and/or local governments. In Germany, for instance, revenues from certain taxes, such as income and corporation taxes, accrue jointly to the federation, the *Länder*, and the municipalities. Other fiscal transfers in a federation are undertaken at the discretion of the national government. Essentially, such transfers can be unconditional or conditional (matters that are sometimes stipulated in the constitution). Unconditional transfers allow the recipient government to spend the funds as it sees fit. Conditional transfers require the recipient to spend the funds in a manner and on matters stipulated by the national government. Leaders of the constituent political communities usually prefer unconditional transfers. In turn, some fiscal transfers may not require the recipient government to put up any funds of its own; other transfers may require the recipient government to put up matching funds of some proportion from its own revenues. Some fiscal transfers may

be distributed on a simple per-government or per-capita basis; other transfers may be distributed according to highly complex and often contested formulas. Occasionally, some fiscal transfers are competitive; that is, receipt of the funds depends on submitting a successful grant proposal.

Except for the United States, all of the federations examined here engage in some type of fiscal equalization -- that is, a redistribution of revenues (usually from the federal government but also from wealthy *Länder* in Germany) to poor constituent governments in order to ensure that all constituent governments can provide comparable or equal levels of public services at comparable levels of tax costs to citizens. Just how equalizing the equalization program is varies across federations. Some programs are based on an agreed formula (e.g., in Belgium, Canada, Germany, and Switzerland), while others (e.g., in Australia, India, and Nigeria) are based on periodic recommendations of permanent or temporary, and usually independent, commissions. Nigeria's Constitution established a fiscal-equity commission, the Revenue Mobilization Allocation and Fiscal Commission, that must "review, from time to time, the revenue allocation formulae and principles in operation [for the states] to ensure conformity with changing realities."

Fiscal equalization is undertaken overtly for equity reasons; however, such programs are often referred to as "solidarity" or "cohesion" policies because they function as the fiscal glue of national unity. As such, fiscal equalization can also be viewed as covert bribery whereby wealthy constituent units entice poorer units to remain in the federation or, alternately, as covert extortion whereby independence-minded constituent political communities extract redistributive payments as a price for peace or union. Thus safeguards are crucial to ensuring that constituent governments do not substitute transfer funds for own-source revenues, thereby delivering services at an artificially low tax price; that funds given to the governments of poor places actually help poor people; and that fiscal equalization does not reward indolence and therefore retard necessary economic development or migration out of poor jurisdictions.

Generally, intergovernmental fiscal transfers pose issues of accountability and responsibility because the spending decision is separated from the taxing decision. That is, the more that the politicians who enjoy the electoral pleasure of spending tax money must first experience the electoral pain of extracting it from the taxpayers, the more their fiscal behaviour is likely to be responsible and subject to voter accountability. Indeed, this appears to be one factor in the revenue predominance of national governments in most federations. The elected officials of the constituent governments are often content, even eager, to allow the federal government to make the major tax decisions so long as the federal government is generous about sharing its revenues. In some federations (e.g., Australia with respect to the income tax), the constituent governments even refuse to exercise certain revenue authority, preferring instead to leave tax collection to the federal government in return for a share (preferably an unconditional share) of the revenues.

Other tax issues include whether there are rules of intergovernmental tax immunity preventing the national government and the constituent governments from taxing each other's instrumentalities, rules of nondiscrimination ensuring that federal taxes do not discriminate between ~~states~~ constituent political communities or parts of those communities, rules of nondiscriminatory taxation between constituent units, and rules governing extraterritorial taxation by the constituent governments.

Rules covering government borrowing also vary among federations. In some, such as the United States, the federal government and the states borrow independently, with each establishing its own rules for its own borrowing. In turn, each order of government is

responsible for its own debt and for any problems created by excessive or irresponsible borrowing. Likewise, in Australia, both the federal government and the states can borrow independently, but borrowing must be disclosed fully and subject to oversight by a national Loan Council. In many federations, the national government is authorized to regulate and limit constituent-government borrowing, and in some, constituent governments are prohibited from borrowing directly from foreign sources. A key issue, however, is whether the national government is legally obligated or politically obliged to assume the debt service of defaulting subnational governments because, in the absence of adequate controls, subnational governments are likely to borrow excessively whenever the national government has default duties.

Another source of revenue consists of state enterprises, public corporations, parastatals, and the like. Where such entities exist in a federation, they are likely to be established by the constituent governments and local governments in addition to the national government. However, globalization and economic liberalization have been driving many such entities out of existence or into the private sector.

Rarely subject to sharing is monetary policy. The constituent political communities may have some role in influencing monetary policy through their representatives in the national government and through political pressure, but monetary policy is normally a national-government power, much of which is usually assigned to an independent central bank.

Centralization

The federal constitutions represented in this volume vary significantly in terms of centralization, decentralization, and noncentralization. Constitutionally, Australia, Belgium, Canada, Germany, Switzerland, and the United States can be said to be noncentralized in the sense that “the powers of government within them are diffused among many centers, whose existence and authority are guaranteed by the general constitution, rather than being concentrated in a single center”¹⁶ having unilateral authority to centralize or decentralize the federal system. Brazil, India, Mexico, Nigeria, Russia, and South Africa operate along a centralization-decentralization continuum whereby the constitution and/or the operation of the federal system was designed to be centralized or pushed toward centralization. Countries undertaking major social and economic transformations (e.g., Brazil, India, Nigeria, and South Africa, plus Russia under Vladimir Putin) often choose centralized federalism out of beliefs that a strong centre is necessary to guiding the transformation, driving political integration, promoting economic development, redistributing wealth, and maintaining peace and good order. Several countries (e.g., India and Mexico) have been moving toward decentralization in recent years, while Putin appears to have engineered an exponential increase in centralization in Russia.

In the essentially noncentralized federations, there are, nevertheless, trends toward decentralization or centralization, too. Australia, Germany, Switzerland, and the United States moved, to varying degrees and at variable speeds, in a centralizing direction during much of the twentieth century, while Belgium and Canada moved in a decentralizing direction after the 1950s. Factors that foster centralization include federal dominance of tax revenues, national-government use of its spending powers, expansive interpretations of federal powers by courts and politicians, national-government use of its foreign-affairs powers (e.g., the treaty power), and constituent-government agitation, as well as citizen agitation, for increasing uniformity of policies (e.g., business regulation) nationwide and for national-government action to solve social problems. Generally, decentralization is more characteristic of multicultural federations where one or more constituent cultural communities constantly insist on enhancing their own self-rule.

Perhaps even more important is the role of political-party systems in fostering centralization and decentralization.¹⁷ For example, one-party rule in Mexico for most of the twentieth century produced highly centralized federal governance. In India, where Congress was the dominant party until 1988, the federal system was decidedly centralized, but the federal system moved in a decentralizing direction when the Congress party lost national-majority power, regional and state-based parties entered the political arena, and coalition governments emerged in the Union government. Generally speaking, the more nationalized and centralized the party system is, the more centralized is the federal system.

Institutions of the Federal or National Government

The federations examined here have parliamentary systems (e.g., Australia, Belgium, Canada, and Germany), presidential systems (e.g., Brazil, Mexico, Nigeria, Russia, and the United States), and hybrid systems, such as India, South Africa, and Switzerland. Ordinarily, the national legislature is bicameral in some fashion, with one chamber (e.g., a senate) intended to represent the federation's constituent political communities. At the same time, whether parliamentary or presidential, most federal constitutions mandate a separation of powers of some type between the branches of the national government.

No one system is obviously superior to the others, and each has assets and liabilities. One liability of a parliamentary system is that it can give rise to executive federalism in which policy making is dominated by national and regional executives who hammer out agreements, often behind closed doors, with little or no public participation and even with little participation by many of the elected members of the respective parliaments.

In a parliamentary system, there also may be some tension, as in Australia, between the idea of the constitution as a limit on power and the classical notion that parliament is supreme and should have plenary discretion and flexibility. There may also be a tension between the constitutional flexibility available within each order of government and the constitutional limits on flexibility available in relations between the orders of government and the protection of their respective powers.

One liability of a presidential system is that it can give rise to an imperial presidency, as in Mexico historically, Russia presently, and Nigeria potentially. A presidential system can accommodate effective and efficient decision-making, perhaps more so than executive federalism, but it can drive a federal system toward centralization if there are inadequate cultural restraints and institutional checks on presidential power. Yet less-developed federations where the rule of law has been weak tend to choose a pure or hybrid presidential arrangement, which can go awry. In 2004 President Putin virtually decreed that regional governors and presidents in Russia will henceforth be nominated by the federal president and then elected by regional legislatures rather than elected by their constituents. He also declared that district elections for the Duma will be replaced by proportional electoral representation based on national-party lists. Putin's actions were supported by many regional leaders.¹⁸ "Russia has always been a single state," said Dmitriy Rogozin, leader of the Motherland party, who added that Putin is fashioning a more organic federalism that will, among other things, "avoid blackmail of the federal centre by overweening regional barons and oligarchs."¹⁹ Other regional leaders who supported or refused to oppose Putin were apparently intimidated by Kremlin threats.

One striking finding from the 12 case studies presented here is the widespread inability or unwillingness of second chambers representing the constituent political communities to maintain the powers of the federation's constituent governments against expansions of federal power.

Even where this chamber is strong, as in Australia and the United States, the members of the senate more often vote along political-party and interest-group lines than along constituent-government lines. In Brazil the Senate is strong, but the federal system is Union-dominated. The state governors exercise some control over federal legislators but rarely for purposes of asserting state powers over federal powers. In Canada the Senate is simply weak. In South Africa, parliamentary executive federalism has eclipsed the functions of the National Council of Provinces, which was modelled after Germany's *Bundesrat*. In Germany the *Bundesrat* has arguably been fairly effective in sustaining *Land* powers vis-à-vis federal power; however, the *Bundesrat* is not quite a senate because it has an absolute veto only over certain types of federal legislation. Furthermore, the combination of executive federalism and the tendency of voters to elect parties to the *Bundesrat* that oppose the majority party or coalition in the *Bundestag* and government tends to produce political deadlocks and policy-making gridlocks.

In addition to the regional representation formally and informally present in the legislature, regional representation is usually present in the national executive branch, too, even if not mandated by the constitution. The cabinet and its ministries are likely to be staffed by people from all the federation's constituent political communities or, where this is impossible, from all the country's key regions and constituent communities. In Nigeria the president must, in the first place, win regionally dispersed support, not just a simple national majority. Switzerland's executive is constitutionally structured as a seven-member Federal Council. However, even though the Swiss Constitution mandates the Federal Council to represent the country's geographic and linguistic diversity, it is a coalition council of the four major national political parties. In this respect, there are competing representational forces in every federation. In the United States, for example, demands for adequate representation of racial and ethnic minorities and of women compete with the historical emphasis on regional representation in the president's Cabinet.

Court systems differ across federations as well; however, one virtual constant is the establishment of a supreme court or constitutional court having authority to resolve constitutional and legal conflicts among the federation's governments. Moreover, these courts are the venues of last resort on matters involving the federal constitution, federal law, and treaties. Many of these high courts (e.g., in Australia, Brazil, Canada, Germany, India, Russia, South Africa, and the United States) also have the authority to declare a law enacted by the federal government, a constituent government, and/or a local government to be unconstitutional. Usually, the courts of the federation government have jurisdiction, among other things, over federal constitutional, statutory, and treaty law, cases in which the national government is a party, cases involving foreign governments and persons, cases involving different constituent governments, and cases involving individuals from different constituent political communities.

Some federations, such as Brazil and the United States, have dual (federal and state) court systems that are independent except insofar as cases involving matters of federal constitutional or statutory law can be appealed to federal courts. Australia also has federal and state courts, but the Commonwealth government relied heavily for many decades on state courts to fulfil its judicial needs. Germany also has *Land* courts, and the decisions of *Land* courts can be reviewed by federal courts. Canada has provincial courts, joint federal-provincial courts, and federal courts that exist within a hierarchical judicial system.

The Russian Constitution established federal courts that reach into the constituent units, but a constitutional court can be established by a republic, and a charter court can be created by a constituent unit that is not a republic. Regional constitutional (or charter) courts interpret their

own constitution (or charter) and also resolve disputes over whether the laws and other actions of their regional and local governments conform to the regional constitution or charter. A constituent political community can also grant additional powers to its constitutional (or charter) court, provided that the powers are consistent with the aims of the court and do not invade the federal courts' jurisdiction. Virtually all decisions of regional constitutional (or charter) courts are final and cannot be appealed to any federal court of general jurisdiction or to the federal constitutional court.

By contrast, India and South Africa each have a single, integrated, hierarchical judicial system.

In Switzerland the official languages must be represented on the Federal Tribunal (i.e., supreme court), and the court is made up of 39 judges from all 26 cantons. In Canada three of the nine judges on the Supreme Court must be from Quebec, and the other regions must be fairly represented as well. Nevertheless, there is generally less emphasis on regional representation on federal high courts than in federal legislative and executive bodies. Instead, criteria associated with education, legal expertise, judicial experience, partisanship, and philosophical orientation are equally or more important than one's region of origin in the selection of high-court judges.

Intergovernmental Relations

In addition to the division of powers and guarantees of autonomy for the various orders of government, there is a need for rules and mechanisms to facilitate the co-operation [need hyphen here because co-operation is different from cooperation] and coordination of governments in the overall co-governance and co-management of a federation. The Swiss Constitution even mandates that the cantons and the confederation government cooperate with each other and help each other carry out their respective responsibilities.²⁰ Other provisions admonish the cantons to comply with federal law and not to act against the interests of the confederation or other cantons. The Constitution of South Africa also places a major emphasis on cooperation and the avoidance of litigation.

However, most federal constitutions say little about institutions or processes of intergovernmental relations beyond the role of the judiciary in resolving intergovernmental legal disputes. There are institutions and processes intended to foster intergovernmental cooperation and coordination in most federations; some are constitutional, but most are not. In Belgium, there is a Concertation Committee consisting of federal and regional officials, but most problems are solved by political-party leaders. In Australia, the Australian Loan Council once performed coordinating functions with respect to borrowing. Also, the Commonwealth government can enact laws on additional matters referred by state parliaments and can make use of state courts and prisons for federal purposes. Germany's Basic Law provides for joint federal-*Land* planning committees for joint tasks, but there are many other intergovernmental mechanisms, such as the Conference of Prime Ministers and conferences of other ministers. India has quite a number of formal institutions, including the Planning Commission, Finance Commission, National Development Council, Inter-State Council, and National Integration Council. Mexico has various statutory institutions such as the System for National Coordination of Public Security and the System for National Fiscal Coordination. Nigeria has a National Council of States and a Federal Character Commission. In response to expansions of federal power, the Swiss cantons formed the Conference of Cantonal Governments in 1993 to assert cantonal interests more effectively. By contrast, Brazil's Constitution does not provide for any intergovernmental mechanisms or institutions. Intergovernmental relations in Brazil tend to be Union-dominated

and competitive, such that there are few examples of Union-state and interstate cooperation even though there is considerable intermunicipal cooperation.

No federal constitution explicitly endorses intergovernmental or interjurisdictional competition in an effort to improve service efficiency and taxpayer accountability.²¹ Instead, to the extent that intergovernmental relations are mentioned, the emphasis is on cooperation and coordination. Federal constitutions must also provide for relations among the constituent political communities themselves, such as full faith and credit, or mutual recognition, among the constituent units where necessary, as well as provide for guarantees of mobility rights and individual-rights protections for citizens throughout the federation.

In the final analysis, intergovernmental relations are shaped more powerfully by the political-party system, by political leaders and administrators themselves, and by the attitudes they bring to the intergovernmental arena. If national officials favour command-and-control policies and have the ability to implement them, then intergovernmental relations are likely to be more coercive and conflictual than cooperative. If officials from the constituent governments favour excessive self-determination and desire merely to extract concessions and resources from the national government, then intergovernmental relations are likely to be conflictual and competitive.

Citizenship, Elections, and Political Parties

Unlike the United States, which provides for dual (i.e., federal and state) citizenship, most federations do not provide for dual citizenship. Even in Switzerland, where to obtain Swiss citizenship, one must first obtain citizenship in a municipality, there is no dual (i.e., federal and cantonal) citizenship. The Russian Constitution does not recognize dual citizenship either, although some republics assert a dual Russian and republican citizenship.

Usually, only the main principles of voting and elections are enshrined in the federal constitution, such as the principle of nondiscrimination in voting on the basis of race, ethnicity, religion, and gender. Some federal constitutions make provisions for voter qualifications and elections based on universal adult suffrage, but the details (sometimes including a minimum voting age, such as 18) are established by statutes.

Most of the constitutions examined here do not address political parties, although some address election procedures. Mexico's Constitution established the Federal Electoral Institute to oversee elections, and constituent state has an equivalent body. Similarly, South Africa's Constitution entrusts voter registration and the conduct of elections to the Independent Electoral Commission, which is one of the Constitution's "state institutions supporting constitutional democracy" listed in Chapter 9. Nigeria's Constitution established an Independent National Electoral Commission (INEC) that conducts all federal and state elections and regulates political parties. Local-government elections are conducted by state independent electoral commissions (SIECs). Registration of eligible voters is the exclusive responsibility of the INEC, but an attempt to impose stringent registration requirements was blocked by the courts.

As of 2004, 30 registered political parties were regulated by the INEC. In an effort to discourage political parties from confining themselves to one region or remaining mono-ethnic or mono-religious, the Constitution disqualifies a political party for registration if its name, symbol, or logo contains "any ethnic or religious connotation or gives the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria."²² Parties cannot hold or possess any funds or other assets outside of Nigeria and are not entitled to

retain any funds or assets sent to them from outside Nigeria. There is no provision for independent candidates.

In South Africa, the Bill of Rights guarantees the right to form political parties, although freedom of speech does not include “propaganda for war” or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”²³ The Constitution does not explicitly regulate parties, but it requires national-government “funding of political parties participating in national and provincial legislatures on an equitable and proportional basis” in order to “enhance multi-party democracy.”²⁴

Foreign Affairs and Defence

Consistent with modern federalism’s nation-building premise and with the world of nation-states, all the important powers and powers relevant to international law that pertain to defence, foreign affairs, and diplomacy are ordinarily allocated exclusively to the national government in a federation. Only the federation can declare war, for example, although constituent political communities may have self-defence rights in the face of an invasion. The federation dispatches and receives ambassadors, negotiates and signs treaties, and the like.

Yet, since the founding of the first modern federation (i.e., the United States), most federal constitutions also have explicitly and implicitly reserved limited roles for constituent political communities in foreign affairs and defence. In the United States, the states even maintain their own army and air-force units, commanded by the governors. The Constitution authorizes states, with the consent of Congress, to enter agreements or compacts with foreign nations. At the same time, the Constitution does not prohibit the states from engaging in various kinds of international activities such as sending agents abroad and opening offices abroad to attract immigrants, tourists, and investment and to promote foreign exports of state products.

Since the 1960s, there has been a marked increase in the level and variety of international activities undertaken by the constituent political communities and municipalities of most federations (e.g., sister-city or twinning relationships)²⁵ and especially by the developed-country federations, such as Australia, Belgium, Canada, Germany, Switzerland, and the United States. These activities have a substantial economic component involving trade, investment, and tourism as cities and regions seek to be competitive in the global arena. Also common are technical, educational, and cultural exchanges. Frequently, these international activities also have substantial border-management and housekeeping components addressing local matters that cross frontiers, from cows and criminals that slip across borders to such matters as transportation, environmental protection, shared waters, and public health. Indeed, the federations within the European Union have given their constituent political communities substantial authority to conclude agreements and even treaties on cross-broader matters relevant to their jurisdiction. In multicultural federations, international activities also have a strong cultural-identity component as ethnic or linguistic constituent political communities, such as Quebec and Tatarstan, seek to project a quasi-sovereign “national” identity in the international arena. During the 1990s, several Russian republics sought to assert an international status virtually co-sovereign with the federation.

Such activities are less prevalent and more constrained in less-developed-country federations and in federations with more centralist orientations, such as Brazil, India, Mexico, Nigeria, and South Africa.²⁶ Here, there are usually fears, too, that centrifugal forces might be accelerated or unleashed by too much subnational engagement in international affairs.

One area of controversy in many federations is the impact of treaties and trade agreements on the powers of the constituent political communities. In Australia and the United States, for example, treaties and agreements concluded by the federal government are binding on the states. Consequently, treaties and agreements can, and have, become vehicles for expanding federal powers, sometimes at the expense of state powers. In response to the potential centralizing effects of treaties and agreements, the constituent political communities in most federations have sought certain protections and participation rights. In Canada, for example, where treaties and other agreements do not automatically override the watertight compartments of provincial jurisdiction, the federal government has been compelled to engage in extensive consultations with provincial leaders during international negotiations on matters that affect the provinces; however, the federal government has declined to share with the provinces its formal powers to negotiate and sign treaties. In Nigeria, a federal bill that seeks to domesticate an international treaty with respect to matters not included on the federal government's exclusive legislative list requires ratification by a majority of the country's state houses of assembly.

Given the deep domestic impacts of the European Union (EU), all of the Western European federations have significantly enhanced the voice and participatory roles of their constituent political communities with respect to EU negotiations, even allowing in some cases (e.g., Belgium) representatives of these communities to sit with full negotiating authority at EU bargaining tables on matters relevant to their jurisdiction. Belgium has perhaps gone the farthest in that the regions and communities have far-reaching foreign-affairs powers, including the authority to conclude treaties and agreements on all matters pertinent to their competences, including international trade.

THE CONSTITUENT POLITICAL COMMUNITIES

The term "constituent political communities" has been used in this chapter to signify that although the constituent parts of a federation are ordinarily more than only parts, units, or levels, they are also frequently less than co-sovereign or semi-sovereign polities. In addition, some federations constitutionally recognize their local governments as a third order of government, even though none of them have been construed as co-sovereign or semi-sovereign polities. Again, then, there is considerable variation among the federations examined here regarding the status of their constituent political communities.

Territorial Integrity

Historically, as in the US Constitution, federal constitutions have guaranteed the territorial integrity of the constituent units of the federation against unilateral alteration by the federal government and/or other constituent units acting collectively. As the US Supreme Court ruled in 1869, four years after the Civil War, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."²⁷ The usual rule has been that a constituent political community's boundaries cannot be changed without its consent. This guarantee can be regarded as a crucial element of the guarantee of political autonomy for the constituent political communities and as a formal recognition of the continuing sovereignty of political communities that were regarded as sovereign prior to union. However, in a few post-Second World War federations, such as India, either the constitutional guarantee of territorial integrity is weak or, as in Nigeria, unconstitutional or extraconstitutional practices vitiated any such guarantees.

In Nigeria, military governments created new states mainly to accommodate territorially based ethnic and religious groups. Having begun with three regional states at independence in 1960, Nigeria had 36 states by 1996. In India, where the states are in effect creatures of the national government, the federal Parliament can change boundaries and create new states by ordinary legislative processes. Indeed, India's 27 states were reorganized in 1956 into 14 states along linguistic lines; subsequently, the number of states increased to 28.²⁸ In Mexico the creation of a new state requires the approval of two-thirds of the members present in the federal Chamber of Deputies and the Senate. A majority of state legislatures must approve a corresponding decree. However, if a new state is proposed by a two-thirds vote of the Congress to be created within the boundaries of existing states, the effected states must give their consent. If they refuse to consent, creation of the new state requires the approval of two-thirds of the legislatures of all the other unaffected states.

Constituent Constitutions

Federations also vary in the levels either of constitutional sovereignty or of self-governing autonomy available to the constituent political communities. In Australia, Brazil, arguably Canada, Germany, Mexico, Russia, South Africa, Switzerland, and the United States, the constituent political communities have, or can have, their own constitutions. In most of these federations, the constituent political communities have substantial constitutional autonomy and broad legal discretion to establish their own governments, political institutions, government processes, and public policies subject only to certain limits and prohibitions set forth in the federal constitution. However, these limits and prohibitions are ordinarily intended only or mainly to protect the sovereignty or autonomy of the federal government, rather than to dictate forms or functions to the constituent political communities. For example, among the few limits explicitly imposed on the states by the US Constitution are that:

No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.²⁹

Consequently, where the constituent political communities have such broad constitutional autonomy, there is usually no requirement to have a constitution approved or certified by the national government.

In Brazil, however, while the states have constitutions, their constitutional autonomy is quite constrained because state constitutions must conform to mandates and rules set forth in the federal Constitution, which determines such detail as the number of state deputies and their pay ceilings. Likewise, in Mexico, state constitutions are not especially important because most of the important details of state government are mandated by the federal document. In South Africa, provinces can adopt a constitution, but they are sharply circumscribed by the national Constitution, and a provincial constitution must be certified by the national Constitutional Court; thus only the Western Cape adopted a provincial constitution.

Local Government

In contrast to such federations as Australia, Canada, Switzerland,³⁰ and the United States, where local governments are creatures of the constituent political communities, 7 of the 12 federal constitutions represented in this volume accord constitutional status of some sort to local government, usually municipal government, although not all of the seven treat local government as the third order of government. In Germany, for example, municipalities are part of *Land* administration (although three *Länder* are themselves city-states: Berlin, Bremen, and Hamburg), but the Basic Law guarantees municipalities the right to regulate local affairs and gives them some financial autonomy. Brazil's Constitution stipulates three orders of government -- federal, state, and municipal -- although much of municipal government is prescribed by the Constitution. In 1999, Mexico's Constitution was amended to establish municipal governments as a third order of government so as to afford them more autonomy and constitutional protection against adverse state-government action.

Aside from Moscow and St Petersburg, which are constituent units of the Russian federation, Russia's Constitution recognizes a right of local self-government that citizens exercise through referenda and elections and through local-government institutions. These local governments enjoy constitutional status and various independent powers. The structuring of local government is a joint power of both the federation and the constituent governments. Under this arrangement, the federation has promulgated framework legislation for the organization of local government. Most subjects of the federation have enacted laws that regulate local government in detail. However, the Constitution imposes limits on what subjects of the federation can prescribe; for instance, the judiciary struck down one republic's attempt to set up local governing structures because this action violated the federal constitutional right of citizens to exercise local self-government. Thus the judiciary plays a role in guaranteeing local self-government, while the Constitution ensures that local populations retain authority over local issues, such as the ownership, use, and disposal of municipal property, approval and execution of the local budget, establishment of local taxes, and maintenance of law and order. Either the federation or a subject of the federation can grant to local governments additional state powers, which are exercised under the supervision of the granting government. However, the Constitution requires the granting government to provide the material and financial resources needed to carry out those transferred responsibilities.

India's Constitution was amended in 1992 to grant constitutional status to rural and urban local governments, although these governments are not wholly a third order of government. For rural areas, the Constitution recognizes, in ascending order, village, intermediate, and district *panchayats*. There are *nagar panchayats* for urbanizing areas, municipal councils for small urban areas, and municipal corporations for large urban areas. Every state is obliged to establish such local governments. Although these local governments are granted some powers and autonomy by the Constitution, they depend greatly on financing from their state government, and they remain an exclusive subject of state government. Nigeria's 1979 and 1999 constitutions recognize local government (774 local-government councils as of 2004) as a third order of government; however, the "establishment, structure, composition, finance and functions" of local government depend on state law.

South Africa's Constitution holds that "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent, and interrelated."³¹ The word "spheres" is used intentionally to avoid the hierarchical notion of government embedded in the word "levels." Furthermore, the Constitution maintains that the national and provincial

governments “may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.”³²

Globalization and Regional Integration

There have been frequent assertions in recent decades that local rather than national governments, especially municipalities and metropolitan areas, are the key actors in globalization (and thus should have more autonomy). It has been noted, too, that power is generally gravitating “upward” to supranational institutions and “downward” to local institutions worldwide.

Nevertheless, the developed-country federations most deeply and successfully integrated into globalization accord little, if any, constitutional recognition to local government. At the same time, however, the constituent political communities may themselves grant substantial self-governing autonomy or home rule to their local governments -- self-rule powers that might actually make them more autonomous than local governments accorded national constitutional recognition in other federations.

Instead, constitutional recognition of local government is more characteristic of less-developed-country federations; yet even in these federations, the constitutional recognition of local government is not a response to globalization. On the contrary, such recognition is usually linked to democratization, attempts to empower local citizens (including women), and efforts to protect local-government powers and revenues from corrupt and rapacious officials in the constituent governments and national government.

Likewise, it is often argued that globalization has had substantial impacts on the structure and operations of federal systems. Yet, as the case studies in this volume suggest indirectly, and as other studies indicate more directly,³³ globalization has, for the most part, not yet significantly altered the structure and operations of federal systems and has not generated major constitutional changes.

What has had a major impact on both local governments and the constituent political communities of federations, however, has been regional integration, namely the rise of the European Union. Given that the transfer of powers, or competences, to the EU often reduces the powers and competences of constituent political communities, all of the federations within the EU as well as Switzerland have altered their constitutions to give the constituent governments a greater voice or even a veto in such transfers of power to the EU so that the national governments of these federations cannot simply give away the powers of their constituent governments. However, these federations have not, for the most part, extended comparable constitutional protections to their local governments in part because local governments are presumed to be protected by their regional government.

Indigenous Peoples

Indigenous (or aboriginal) peoples are a significant communal presence in at least 7 of the 12 federations: Australia, Brazil, Canada, India, Mexico, Russia, and South Africa. Most commonly, indigenous peoples, having been objects of conquest, were not included as constitutional partners in federations, such as Australia, that were established prior to the widespread movement that began in the 1960s to recognize the rights and revive the cultures of indigenous peoples. In Australia aboriginals were regarded as a state responsibility; now they are a concurrent federal and state responsibility. In Canada and the United States, they are regarded as a federal-government responsibility. The US Constitution vests authority for relations with the Indian tribes in the federal government because they were treated as sovereign

nations with which the United States concluded treaties during the first century of its history. However, in all of these federations, indigenous peoples were nearly extinguished by the early twentieth century due to warfare, disease, and assimilation.

The revival of indigenous peoples' individual, communal, and treaty rights since the early 1960s has resulted in constitutional, statutory, and/or judicial changes in all of these federations that provide greater protections and, in some cases, such as Canada and the United States, greater self-government and self-determination for territorially rooted indigenous communities (e.g., creation of a third territory, Nunavut, for the Inuit in Canada). These changes have usually been accompanied by efforts to protect indigenous lands and to recover some indigenous lands taken by conquest, theft, and treaty violations. Thus Brazil's Constitution of 1988 and Canada's Constitution Act 1982 provide certain protections for indigenous peoples. Mexico amended its Constitution in 2001 to give more protections and benefits to indigenous peoples. Australia amended its Constitution in 1967 to remove provisions stating that aboriginals were explicitly excluded from Commonwealth power under the Constitution and from any population count taken for constitutional purposes.

Russia's 1993 Constitution recognizes rights of indigenous peoples in two ways. Some peoples are members of the federation. For example, ten autonomous areas were created for the aboriginal peoples of Siberia, the North, and the Far East. Additionally, the Constitution requires both the federal and the regional governments to guarantee the rights of indigenous peoples to create different types of communities and to preserve and develop their original environment, traditional way of life, and culture. Some constituent units have established a fixed number of seats in their legislature for representatives of aboriginal peoples. South Africa's Constitution provides no special status for indigenous peoples, although "the institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution."³⁴

Indigenous peoples in some of these federations have agitated for full-scale federation membership as a third or fourth order of government, but they have not been accorded this status. In the United States, Presidents Bill Clinton and George Bush embraced Indian tribes as the fourth partner in intergovernmental administrative relations (i.e., federal-state-local-tribal relations) and thus acknowledged that US relations with the tribes are government-to-government relations, but the US Supreme Court has been issuing decisions generally adverse to tribal autonomy and self-government.³⁵

Secession

Secession, which is or has been a concern in several of the federations examined in this volume - Canada, Nigeria, and Russia --is rarely authorized by a federal constitution. Instead, the preamble to Nigeria's Constitution, which expresses the firm resolve of Nigerians to live in unity and harmony as "one indivisible and indissoluble Sovereign Nation," is typical of anti-secession sentiment. The current exception is Ethiopia's Constitution. In addition, Canada's Supreme Court sketched a secession procedure in 1998, which was then followed by a clarifying federal statute.

Although a leading exponent of the public-choice school of political economy argues that the leverage against tyranny and oppression offered by secession is an essential tool of last resort in an ideal federal system,³⁶ most theorists and practitioners have been hostile to secession³⁷ partly because modern federalism has always been associated with nation building. Some theorists argue that a federal polity is intended to be permanent and perpetual.³⁸ Indeed, the early templates for modern federalism spoke of perpetuity. The US Articles of Confederation (1781)

stipulated a “perpetual Union.” “The German Federal Act of 1815 stated that the members agreed to a ‘permanent federal union’; the Viennese Act of 1820 was said to ‘indissolubly join the bond which unites the whole of Germany in harmony and peace’ and Article V of this act stated: ‘The federation is established as an indissoluble union and therefore no member is free to withdraw.’”³⁹ The Preamble to Australia’s 1901 Constitution Act refers to an “indissoluble federal Commonwealth.”

CONSTITUTIONAL CHANGE

All of the federal constitutions examined here provide for lawful constitutional change via amendment procedures. These procedures seek to protect the constitution against arbitrary change, such as that noted by a Jordanian: “We have a constitution, but the King can change it by making two phone calls.”⁴⁰ They also seek to strike a balance between rigidity and instability. Generally, the procedures also reflect the centralist or noncentralist orientation of the constitution and the extent of sovereignty or autonomy enjoyed by the constituent political communities and, thus, the extent to which their consent is required for constitutional change.

In Australia only the federal Parliament can initiate amendments; however, like the Swiss approval procedure, these amendments must be ratified by a double or concurrent majority of (1) a majority of the people voting nationwide and (2) a majority of the voters in a majority of the states (cantons in Switzerland). However, given Australia’s common-law versus Switzerland’s civil-law system, there have been few amendments to Australia’s Constitution. Furthermore, voters have rejected most proposed amendments, in part because the Constitution is changed through judicial interpretation as well as through issues being referred to the federal Parliament by state parliaments. By contrast, the Swiss Constitution, which is not subject to such judicial interpretation, is amended so frequently that citizens sometimes experience voter fatigue in a climate of amendomania similar to that of California in the United States.

Canada, which has displayed an aversion to constitutional change since the failure of the Meech Lake and Charlottetown Accords, has four amending formulas, each applying to different aspects of the Constitution, plus a fifth formula enabling provinces to amend their own constitutions. Belgium has a complex process in which specific articles must first be identified as needing change. When Parliament approves these specifics, the Parliament is then dissolved. The subsequent new Parliament can change the specified articles by a two-thirds vote in each house. The regions, communities, and people have no direct role. Belgium’s special para-constitutional laws are approved by a two-thirds majority in each house, plus a majority of each language group, in the federal Parliament.

In Brazil, where some parts of the Constitution cannot be altered, amendments need the support of three-fifths of the members of Congress on two rounds of roll-call voting in each house. In Germany, where some parts of the Basic Law also are immune to amendment, constitutional amendments pass through the normal legislative process but require the support of two-thirds of the members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*.

In Nigeria no provision of the Constitution is immune from amendment. Most commonly, an amendment proposal requires the vote of not less than a two-thirds majority of each house of the National Assembly. However, any proposal to amend sections that (1) prescribe the amendment procedure, (2) relate to the creation of new states, boundary adjustments, or creation of new local-government areas, or (3) contain fundamental rights requires the vote of not less than a four-fifths majority of the members of each house of the

National Assembly. In either case, the proposal must be approved by the houses of assembly of not less than two-thirds of all the states.

In India certain provisions (e.g., those regarding names and boundaries of states) can be changed by a simple-majority vote of the national Parliament. Other provisions can be amended by a majority of the total membership of each house and by a majority of not less than two-thirds of the members present and voting, coupled with the president's approval. Still other provisions require these same parliamentary majorities, but coupled with ratification by one-half or more of the state legislatures, followed by presidential assent. Provisions subject to change only with such state consent include election of the president, extent of the Union's executive power, extent of executive power of the states, the Union judiciary, state high-courts, and constitutional amendment procedures.

Russia likewise has three procedures of various stringency and scope of participation for changing the Constitution, depending on the provisions to be changed. South Africa also has several procedures for amending various parts of the Constitution. Most stringent is a requirement that any amendments to Section 1, which sets forth the Constitution's founding values, must garner the support of 75 percent of the members of the National Assembly and six of the nine provinces in the National Council of Provinces.

In Mexico amendments require a two-thirds vote of the members present in each chamber of the Congress of the Union, followed by the approval of 50 percent plus one of the state legislatures. In the United States amendments can be proposed by a two-thirds vote of each house of Congress or by a constitutional convention that must be called by Congress upon the petition of two-thirds of the state legislatures. The latter procedure has never been used, mostly because of fear that it could produce a volatile, runaway convention. Amendments must be ratified by three-fourths of the state legislatures or by popularly elected conventions in three-fourths of the states (used only once). Since 1919, Congress has normally placed a seven-year limit on ratification; however, because the Constitution imposes no time limit, an amendment proposed in 1789 but not ratified by three-fourths of the original 13 states was revived by a university student during the 1980s and ratified in 1992.⁴¹

POTENTIAL ELEMENTS OF CONSTITUTIONAL SUCCESS

Behind the formal constitution, there is always what was once called "the living constitution"⁴² -- that is, how the constitution actually works in practice. The constitution comes alive, so to speak, through the attitudes and behaviours of the political actors empowered by it because no constitution is self-executing and because no constitution can describe and prescribe the sum total of political reality. Where the written constitution is reinforced and enriched by the attitudes and behaviours of political actors, federal democracy is likely to be robust. Where the written constitution is ignored and subverted by political actors, it is likely to be little more than a façade hiding a dark reality. Constitutional governance, therefore, requires a culture of democracy and rule of law supporting adherence to principled rules that are predictable and embodied in a legitimate authority above or outside of government officials.

The process of making a constitution, therefore, appears to be as important as the content of the constitution in fostering success. This is the case partly because the content is not likely to be viewed as legitimate if the process is viewed as illegitimate. Today, legitimacy usually requires transparency and public participation, as in South Africa, where the Constitutional Assembly solicited voter input with the slogan, "You've made your mark, now have your say."

The assembly received some two million public comments. Likewise, in the drafting of Brazil's Constitution (1988), 12 million voters signed petitions proposing 122 provisions, and individuals sent 72,719 suggestions to the Constituent National Assembly, which wrote the Constitution. Both the breadth and depth of public participation are often important at all stages of constitution making, from initial proposals and drafts through deliberations over the final text and adoption of the constitution. Thus the document is not merely majoritarian but reflects a broad, inclusive consensus, or what was termed a "sufficient consensus" in South Africa, among a country's diverse groups.

The development of a sufficient consensus appears to be a key factor because constitutional development can, under certain circumstances, succeed without broad, direct public participation. The process in Belgium, for instance, has been driven by elites in a consociational fashion in which consensus building among leaders is ordinarily sufficient to ensure tacit public consent. However, these leaders are embedded in a democratic rule-of-law culture.

The use of experts, including foreign experts, seen as being above normal partisan politics has gained considerable acceptance in constitution making, as has the appointment or election of representative constitutional-reform commissions seen as being more trustworthy than normal parliamentary and partisan processes. Similarly, the covering security and assistance of international organizations, such as the United Nations and the European Union, can enhance the success of making and maintaining a federal constitution.

Where the political communities that are to constitute a federation value their autonomy and integrity, it is important that they believe that the constitution will protect them against usurpations of their autonomy and integrity by the federal government and/or the other constituent units. In turn, where the sense of nationhood is weak, it is likely to be important that proponents of union believe that the constitution will sustain the union against secession or usurpations of power by constituent units.

Further elements of success in framing a constitution are likely to include commonly recognized problems that can be resolved or at least mitigated by federal power-sharing, a window of opportunity and neutral ground on which to bring all the relevant political actors together for good-faith deliberations and negotiations, a process of trust and confidence building, a sustained commitment on the part of the key actors to strike a bargain, a commitment by those actors to the wellbeing [one word?] of the people of the country, bargaining flexibility and accountability, and a pragmatic problem-solving attitude.

It is not necessary to have a common agreement on why federalism is necessary; it can be sufficient to agree only that federalism is necessary for various reasons. More important are efforts by constitution makers to solve problems in ways that optimize benefits for all the parties and the people in a non-zero-sum, or win-win, fashion. Thus success may also require agreements to take certain issues off the table and leave them for future resolution or agreements to leave them in the hands of the constituent political communities or civil society. Indeed, one advantage of a federal system is that certain volatile political issues can be diffused among the constituent political communities for variable resolutions rather than thrust into the white heat of national politics for a single, uniform resolution.

Maintenance of a federal democratic constitution is likely to require continual bargaining and negotiation within the context of the constitution because process is no less important than structure in the success of federal democracy. In turn, the federation must obtain and maintain the support of the people by, among other things, ensuring their safety and security, protecting

fundamental rights and freedoms, providing recognizable justice, curing problems of corruption and nepotism, preventing usurpations of power anywhere in the federal system, providing effective and efficient government administration, facilitating economic development throughout the federation, and ensuring that all governments in the federation have the capacity and resources to provide public services responsive to people's needs and preferences.

¹ Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St. Kitts and Nevis, Serbia and Montenegro, South Africa, Spain, Switzerland, United Arab Emirates, United States of America, and Venezuela. See also, Ann L. Griffiths, ed., *Handbook of Federal Countries, 2002* (Montreal and Kingston: McGill-Queen's University Press, 2002) and Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Montreal and Kingston: McGill-Queen's University Press, 1999).

² Daniel J. Elazar and John Kincaid, eds, *The Covenant Connection: From Federal Theology to Modern Federalism* (Lanham, MD: Lexington Books, 2000).

³ Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), Federalist No. 1, p. 3.

⁴ The term "orders of government" is used here instead of "levels of government" because "levels" implies a hierarchy of governments. Hierarchy is a characteristic of some but not all federal systems.

⁵ J. Isawa Elaigwu and Habu Galadima, "The Shadow of *Sharia* Over Nigerian Federalism," *Publius: The Journal of Federalism* 33 (Summer 2003): 123-44.

⁶ See also, Cheryl Saunders, "Constitutional Arrangements of Federal Systems," *Publius: The Journal of Federalism* 25 (Winter 1995): 61-79.

⁷ Hans Kelsen, *General Theory of Law and State*, 20th Century Legal Philosophy Series (1945; reprint, New York: Russell and Russell, 1961), Vol. 1.

⁸ John Kincaid, "Values and Value Tradeoffs in Federalism," *Publius: The Journal of Federalism* 25 (Spring 1995): 29-44.

⁹ William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), p. 12.

¹⁰ Constitution of the United States of America (1788), Preamble.

¹¹ Article 79III.

¹² Constitution of the Republic of South Africa (1996), Section 39(1).

¹³ Donald S. Lutz, "The United States Constitution as an Incomplete Text," *Annals of the Academy of Political and Social Science* 496 (March 1988): 23-32.

¹⁴ Australia's constitution does incorporate a few procedural rights, such as a right to a trial by jury.

¹⁵ "Kentucky Resolutions, 1798," *A Source Book of American Political Theory*, ed. Benjamin Fletcher Wright (New York: Macmillan, 1929), p. 322.

¹⁶ Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), p. 34.

¹⁷ See also, David B. Truman, "Federalism and the Party System," *Federalism: Mature and Emergent*, ed. Arthur MacMahon (New York: Doubleday, 1955), pp. 115-36; Riker, *Federalism*; and Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel J. Elazar (Chicago: Rand McNally, 1966), pp. 254-89 and elsewhere.

¹⁸ Steven Lee Myers, "From Those Putin Would Weaken, Praise," *New York Times*, 15 September 2004, pp. A1 and A9, and Matthew Kaminski, "KGB Democracy," *Wall Street Journal*, 17 September 2004, p. A15.

¹⁹ Quoted in ITAR-TASS, "Mixed Reaction from Russian Party Leaders to Putin's Political Proposals," 13 September 2004, at http://www.eng.yabloko.ru/Publ/2004/AGENCIES/040913_itar_tass.html. Accessed 27 September 2004.

²⁰ Constitution of Switzerland (1999), Article 44, Paragraph 1.

²¹ See, for example, Daphne A. Kenyon and John Kincaid, eds, *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (Washington, DC: Urban Institute Press, 1991).

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- ²² Constitution of the Republic of Nigeria (1999), Section 222(e).
- ²³ Constitution of the Republic of South Africa (1996), Section 16(2).
- ²⁴ *Ibid.*, Section 236.
- ²⁵ See, for example, Francisco Aldecoa and Michael Keating, eds, *Paradiplomacy in Action: The Foreign Relations of Subnational Governments* (London: Frank Cass, 1999); Hans J. Michelmann and Panayotis Soldatos, eds, *Federalism and International Relations: The Role of Subnational Units* (Clarendon: Oxford University Press, 1990); and Ivo D. Duchacek, ed, "Federated States and International Relations," *Publius: The Journal of Federalism* 14 (Fall 1984): entire issue.
- ²⁶ See, for example, Rob Jenkins, "India's States and the Making of Foreign Economic Policy: The Limits of the Constituent Diplomacy Paradigm," *Publius: The Journal of Federalism* 33 (Fall 2003): 63-81, and Rudolf Hrbek, ed., *Außenbeziehungen von Regionen in Europa und der Welt* (Baden-Baden: Nomos Verlagsgesellschaft, 2003).
- ²⁷ *Texas v. White*, 7 Wallace 700, 710 (1869).
- ²⁸ See also Akhtar Majeed, "The Changing Politics of States' Reorganization," *Publius: The Journal of Federalism* 33 (Fall 2003): 83-98.
- ²⁹ Constitution of the United States (1788), Article I, Section 10.
- ³⁰ However, Article 50 of the Swiss Constitution holds that municipal autonomy is guaranteed within the limits set by cantonal law.
- ³¹ Constitution of the Republic of South Africa (1996), Section 40(1).
- ³² *Ibid.*, Section 151(4).
- ³³ See, for example, Harvey Lazar, Hamish Telford, and Ronald L. Watts, eds, *The Impact of Global and Regional Integration on Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 2003).
- ³⁴ *Ibid.*, Section 211(1).
- ³⁵ See, for example, David E. Wilkins and Keith Richotte, "The Rehnquist Court and Indigenous Rights: The Expedited Diminution of Native Powers of Governance," *Publius: The Journal of Federalism* 33 (Summer 2003): 83-110.
- ³⁶ James M. Buchanan, "Federalism as an Ideal Political Order and an Objective for Constitutional Reform," *Publius: The Journal of Federalism* 25 (Winter 1995): 19-27.
- ³⁷ See recently, for example, Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001).
- ³⁸ Carl Schmitt, "The Constitutional Theory of Federation (1928)," *Telos* 91 (Spring 1992): 30.
- ³⁹ *Ibid.*
- ⁴⁰ Quoted in Amos Elon, "An Unsentimental Education," *New York Review of Books* 50 (29 May 2003): 6.
- ⁴¹ Constitution of the United States (1788), Amendment XXVII.
- ⁴² Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (New York: Workers' Education Bureau, 1927).