

FEDERALISM'S GLOBAL GENERALITY

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*Introduction: A Bargained-For Federalism*

In a 2009 article Professor John Manning criticized the United States Supreme Court's federalism case law on the ground that they betrayed an affirmation of a "freestanding" federalism. Manning defines a "freestanding" federalism results from structural or purposive interpretive methodologies that resulted in the Court's deciding federalism disputes on grounds not dictated by specific textual provisions of the Constitution. Manning suggests that in some cases—commanderring case law and sovereign immunity to name two—the Rehnquist Court "ascribe[ed] to the document as a whole a *general purpose* to preserve a significant element of state sovereignty."<sup>1</sup> Manning criticized this practice as antithetical to the textualist interpretive methodology that the Court had championed in its statutory interpretation case law. More importantly for our purposes, however, Manning criticized the Court's case law as inconsistent with its own foundational "premise that it was [was] reconstructing decisions that can reasonably be attributed to the constitutionmaking process."<sup>2</sup> In response, Manning offered a defense textualist interpretive practices in constitutional interpretation, which implicate how federalism is conceived.

Manning began with the assumption that the "written Constitution" ought to be the starting point of all efforts at constitutional meaning.<sup>3</sup> The search for constitutional meaning "welds interpretation to the authority of the constitutionmaking process."<sup>4</sup> Once an interpreter yields to the authority of process

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<sup>1</sup> John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006 (2009). In fairness, Manning does not attempt to argue for the correctness of the Court's constitutional interpretive practices from a federalism perspective. His primary objective is methodological comparison of the interpretive strategies deployed in statutory and constitutional interpretation. Nevertheless, Manning's attention to textualism raises issues for the nature of federalism that comports with a conception of textualist interpretive practice.

<sup>2</sup> *Id.* at 2009.

<sup>3</sup> *Id.* at 2038-39.

<sup>4</sup> *Id.*

of constitutionmaking, the interpreter becomes cognizant of the fact that “the original Constitution in fact reflects the end result of hard-fought compromise.”<sup>5</sup> Manning argued that the Constitution’s conception of federalism is limited to “its adoption of a number of *particular* measures that collectively reflect the background aim of establishing a federal system.”<sup>6</sup> For Manning, abstracting from these particular compromises “devalues the choice” that the Framers made.

What is important for our immediate purpose is the conceptual nature of federalism that Manning’s argument suggests. Federalism is understood as a clear constitutional value for Manning, but its status is restricted to the specific textual “bargains” that were struck by the Framers in establishing a constitutional framework. Federalism becomes no more constraining than the specific bargained-for provisions within the constitutional text. Manning defends the bargained-for conception of federalism as necessary in the light of the fact that the Constitution instantiates multiple norms—including national supremacy and nationalism. He suggests that a constitutional doctrine derived from the Court’s resort to a freestanding federalism undermines the compromises that the Framers made in directions that compete with the values that the Court’s interpretive abstractions identify.

Manning’s important critique of the Rehnquist Court’s federalism jurisprudence has important consequences for how we think about judicial federalism enforcement as a “domestic” practice, but it also has significance for how we conceptualize federalism enforcement as a comparative or global exercise. While I have addressed the significance of Manning’s argument in the enforcement of state court duties to federal law in the domestic context, at a more global or comparative level Manning’s arguments rest on a particular conception of the enforcement of federalism generally, in any polity where there is a written constitution. To the extent that Manning’s arguments sound predominantly in textualist, as opposed to originalist terms, underlying his criticism of the Rehnquist Court is a larger criticism of the judicial

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<sup>5</sup> *Id* at 2040.

<sup>6</sup> *Id.*

enforcement of a “freestanding” federalism by judicial actors in any society where there text might be understood to serve as the instantiation of the “bargain” that federalism structure represents.

This brief discussion that follows seeks to do two things. First, it will briefly canvass extent to which other constitutional courts have deployed a “freestanding” conception of federalism when addressing particular challenges to national or state authority. Specifically, this discussion will briefly address the Federal Constitutional Court of Germany’s deployment of the *Bundestreue* principle as a example of the judicial enforcement of federalism-based constraints on state and national actors not specifically warranted in the text of the German Constitution. The Court’s imposition of corresponding duties on both the national and state governments that arise from the fact of relationship federal relationship suggests that the Federal Constitutional Court recognizes the legitimacy of a “freestanding” federalism enforcement by the judiciary.

Second, the discussion will turn to Supreme Court of Canada’s enforcement of the “federalism” principle in its 1998 decision in *Reference re: Secession of Quebec* as an example of the role that a freestanding federalism principle played in the Court’s decision on a significant issue of national-state relationship.

Finally, the discussion will include a discussion of the United States Supreme Court decision in *Texas v. White* to demonstrate the underlying conception of national-state relationship that might underwrite the Court’s resort to freestanding federalism as the basis of constraints and duties that govern the behavior of state and national actors.

In addition to this brief demonstration, the discussion that follows will also take up the question of the consequence of “global freestanding federalism” canon for the project of comparative constitutional jurisprudence. Specifically, our ability to think about constitutionalism as a comparative enterprise is based on our ability to conceptualize generalizable principles of constitutions that are not limited to local domains. The central question with which I end this discussion is whether a freestanding

federalism canon allows us to think more broadly about federalism beyond specific institutional bargains that might allow comparative constitutional scholars to address questions of constitutional structure with less skepticism.

*Freestanding Federalism in Global Perspective*

*Federal Constitutional Court of Germany and the Bundestreue Principle*

Comparisons between the practice of judicial federalism enforcement in Germany and its American counterpart have been made in recent years.<sup>7</sup> Among the leading commentators has been Professor Daniel Halberstam, who contrasts the two forms of federalism enforcement as “fidelity” approach and “entitlement” approach, respectively.<sup>8</sup> The fidelity approach is marked its attention to the duties that each level of government owes to the proper functioning of the governmental system as a whole, without special regard for the locus of substantive regulatory authority.<sup>9</sup> By contrast, the “entitlement” approach enforces federalism similar to its declarations of individual rights, which are deployed “without regard to whether [their exercise] serves the system of democratic governance as a whole.”<sup>10</sup> While this Article evidences an attempt to highlight the “fidelity” dimensions of American federalism enforcement, an analysis of German federalism enforcement is important as a model of how the judiciary translates from a governmental system (read: enduring relationship) to a behavioral norm that serves to analytically organize its enforcement of federalism commitments.

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<sup>7</sup> See e.g., Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal System*, 90 VA. L. REV. 731 (2004); Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223 (2001); Daniel Halberstam and Roderick Hills, *State Autonomy in Germany and the United States*, For skepticism about the use of comparative constitutional decisions on justifying judicial federalism enforcement, see Mark Tushnet, *Judicial Enforcement of Federalist-Based Constitutional Arrangements: Some Skeptical Comparative Observations*, 57 EMORY L. J. 135 (2007).

<sup>8</sup> Halberstam, *Power and Responsibility*, at 731-34.

<sup>9</sup> *Id.*, at 734.

<sup>10</sup> *Id.* at 733.

The Federal Constitutional Court first articulated the principle of pro-federal comity, *Bundestreue*,<sup>11</sup> in the *Housing Funding* case in 1952. The principle is not a part of the text of Germany's Basic Law. According to Donald Kommers, the Court has inferred the duty of fidelity based upon "the various structures and relationships created by the Constitution."<sup>12</sup> The Court has pressed the principle into service in several cases in the intervening years, in areas such as state duty to honor federal treaties,<sup>13</sup> administrative commands from the federal government to the Länder (states),<sup>14</sup> and the subsidization of the poorer states by wealthier states.<sup>15</sup>

The Kalkar II Case serves as a paradigmatic example of the Court's *Bundestreue* principle. Kalkar originated from a dispute over conflicting federal and state administrative directives regarding measures to ensure the safety of nuclear reactors.<sup>16</sup> Pursuant to the Basic Law, the states are authorized to administer federal law as agents of the federal government.<sup>17</sup> The conflict stemmed from the state minister's issuance of a directive that required the reassessment of the nuclear plant's safety system before permitting construction on the nuclear reactor. The federal minister issued a contrary directive, ordering the construction to begin without a safety assessment of the nuclear reactor. The Court did not hesitate to declare that the federal government had extraordinary power over the state governments to guide their actions over the administration of state law. Nevertheless, the Court declared that in the

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<sup>11</sup> The term is a combination of the word *Bund*, meaning form of federation, and the word *Treue*, meaning trust or faith. Thus *Bundestreue* is an duty to "keep faith" with the federation, which obligates both the states and the federal government to respect the other level of governmental authority.

<sup>12</sup> DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1997).

<sup>13</sup> Concordat Case, 6 BVerfGE 309 (1957) (holding that the Länder (states) owed a profederal duty to the federal government's ability to enter into a treaty with the Holy See concerning the provision of religious education in state-supported schools, despite the Länder's exclusive authority in this substantive area).

<sup>14</sup> Kalkar II Case, 81 BVerfGE 310 (1990).

<sup>15</sup> Finance Equalization Case 1 BVerfGE 117 (1952).

<sup>16</sup> Concern over the safety of Germany's nuclear reactors was provoked by the Chernobyl disaster in the Soviet Union.

<sup>17</sup> Under a separate provision, the states are empowered to implement federal laws with greater freedom. Kommers writes, "Under Article 84 the Länder are empowered to implement federal laws as a matter of their concern, in accord with their procedures, and through their own agencies unless otherwise provided with the Bundesrat's consent." KOMMERS, at 83.

exercise of even these extraordinary powers, the federal government was “bound by a duty of reciprocal loyalty.”<sup>18</sup> The Court further declared,

Certain conditions and restrictions for the execution of competences can be derived from this. In the German federal state the entire constitutional relationship between the federal government and its member Länder is guided by the unwritten constitutional principle of a duty of reciprocal loyalty; that is, the federal government and the Länder must act in a manner that promotes the interests of the federation as a whole. . . The federal government does not violate its duty solely by executing a constitutionally assigned competence. Rather, it can be deduced from the principle that the exercise must be abusive or in violation of procedural requirements.<sup>19</sup>

*The Supreme Court of Canada and the Federalism Principle*

In its decision in the *Reference re Quebec Secession* the Supreme Court of Canada addressed whether the Constitution permitted Quebec to unilaterally secede from Canada. In rejecting a unilateral right to secede the Court rested its decision, in part, on its analysis of four “general constitutional principles” that impacted its determination. Though the Court recognized the fact that the general constitutional principles “are not explicitly made part of the Constitution by any written provision,” the Court maintained that “it would be impossible to conceive of our constitutional structure without them.”<sup>20</sup> The relationship between the written and “unwritten” constitutional principles is explained by the Court’s description of their role as “the filling of gaps in the express terms of the constitutional text.”<sup>21</sup> The Court first discussed federalism as one of the four central principles at issue in the question before it.

Though the Court recognized the tension between the written Constitution and the federalism principle in constitutional adjudication. The Court pointed to the “sweeping” authority possessed by the national government in the Constitution’s textual provisions, but stated that “the written provisions of the Constitution do[] not provide the entire picture.”<sup>22</sup> Rather the Court declared, “Our political and constitutional practice has adhered to an underlying principle of federalism, as has interpreted the written

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<sup>18</sup> *Id.* at 86 (English translation of Kalkar II).

<sup>19</sup> *Id.* at 86.

<sup>20</sup> *Reference re Quebec Secession* [1998] 2 S.C.R. 217 at para. 51.

<sup>21</sup> *Id.* at para. 53.

<sup>22</sup> *Id.* at para. 55.

provisions of the Constitution in this light.”<sup>23</sup> Further, the Court describes the federalism principle as the “lodestar” of its enforcement of the constitutional structure of federalism. Substantively, the Court describes the federalism principle as affirming the “the underlying social and political realities” of a diverse Canada. Federalism underwrites the both the protection of societal diversity and the facilitation of political participation “by distributing power to the governmental thought to be most suited to achieving the particular societal objective having regard to this diversity.”<sup>24</sup>

In the Court’s application of the federalism principle to the specific question of the right of unilateral secession is not altogether clear what specific role the principle plays. Nevertheless, the Court alludes to the federal structure of the Canadian government as the basis for the imposition of both the recognizing some right of secession, while constraining the contours of such a right. The Court explicit points to the federalism principle, in conjunction with the democratic principle as the basis for recognizing the legitimacy of a democratically-expressed desire of a sub-national unit to withdraw from confederation with the larger whole. The legitimacy of this request results in a corresponding obligation on the national government and other subunits to “respect the expression of democratic will by entering into negotiations.”<sup>25</sup> The Court emphasized the fact that the duty to negotiate was more than a mere procedural formality en route to secession. The Court stated that the recognition “an absolute legal entitlement” to secession on the part of Quebec would undermine the mutual obligation to negotiate. While it is not exactly clear what the operational outcome of the judicially-imposed mutual obligation would be, the Court’s decision clearly recognizes that the federal relationship imposes duties on both the national and state government that do not exist on a purely textual reading of the Canadian Constitution.

Though the Supreme Court of Canada’s federalism jurisprudence has been described as eschewing a “global theories of federalism,” the Court’s deployment of the federalism principle to support the imposition of a mutual obligation on the part of the central and provincial to negotiate the

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<sup>23</sup> Id.

<sup>24</sup> Id at para. 58.

<sup>25</sup> Id. at para 88.

terms of a possible secession suggests something about the Court's thinking about federalism. Specifically, it suggests that, like the Federal Constitutional Court in Germany, the Supreme Court of Canada recognizes the possibility that the relationship between the central government and the provinces is capable of generating behavioral norms that owe to the existence of the relationship, apart from either the specific textual declarations of substantive authority or rights. The Court's refusal to specify the nature of the rights possessed by either the provinces or the central government regarding secession suggests that federalism disputes might involve more than merely the declaration of rights that serve as trumps in the interaction between the central government and the provinces.

Texas v. White:<sup>26</sup> *An Indestructible Union of Indestructible States*

Though the dispute in *Texas v. White* raised the issue of a state seeking an injunction against the holders of federal bonds payable to the state of Texas, which had been acquired in 1851, the decision raised a central question about the nature of American federalism and the constitutionality of Reconstruction in the post-Civil War South. The state argued that the bonds had been illegally transferred to a third party by the confederate government after Texas seceded from the Union in 1861. The state sought to prevent the bearers from receiving payment from the United States Treasury, and for the return of the bonds to its possession. The defendants challenged the United States Supreme Court's jurisdiction to entertain the suit pursuant to its original jurisdiction. They maintained that the Court could not hear Texas's action because Texas's secession from the Union had changed its status from a state within the meaning of Article III's jurisdictional grant, as Texas was no longer a state.<sup>27</sup> The Court's attempt to address this

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26. 74 U.S. (1 Wall.) 700 (1868). Although *Texas v. White* has been hailed as the Court's "most definitive statement of the relationship between the states and the Union," it receives very little attention in major constitutional law casebooks. See KATHLEEN SULLIVAN AND GERALD GUNTHER, *CONSTITUTIONAL LAW* (2007); ERWIN CHEMEREINSKY, *CONSTITUTIONAL LAW* (2005); GEOFFREY R. STONE AND LOUIS MICHAEL SEIDMAN, ET AL., *CONSTITUTIONAL LAW* (2005); PAUL BREST AND SANFORD LEVINSON ET AL., *PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (2006). CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* (2003).

27. *See id.* at 718-19. This question went to the very heart of the Reconstruction logic of the Radical Republicans. They argued that the former Confederate states could not be seated in the Congress because their secession from the Union robbed them of their status as states, thereby robbing them of their representation in the Congress. This argument was completely opposite of the contention of Unionists both before and after secession, which rested on the proposition that the Union was perpetual and inviolable, and there could be no such thing as a constitutional right to secede. Unsurprisingly, the former Confederate states argued a position directly opposite that argued before and during the Civil War. After their defeat, they challenged the constitutionality of Reconstruction (including their exclusion from Congress) on the ground that they remained a part of the Union, despite secession and formation of a separate government. *See* MICHAEL LES BENEDICT, *PRESERVING THE*

fundamental challenge to its jurisdictional authority provides central insights into the nature of the nature of American federalism, the state as a political community, and the supremacy of the Constitution. Before the Court determined whether Texas remained a state, within the meaning of the Constitution, it attempted to ascertain the nature of the state in abstract terms. The Court's discussion is important because it is here that the Court offers a theory of the nature of the state that has implications for limitations that are placed on legitimate state authority. The Court declared that the term "state" has various meanings, including "a people or community . . . in political relations"; "a territorial region"; "the government under which the people live"; or a combination of "people, territory and government."<sup>28</sup> The Court concluded, however, that in all these definitions, "the primary conception [of the state] is that of a people or community." The Court continued, saying: The people, in whatever territory dwelling . . . and whether organized under a regular government, or united by looser and less definite relations, constitute the state."<sup>29</sup>

The Court moved from the abstract conception of the state to the more concrete conception of the state within the meaning of the Constitution, concluding that state as used in the Constitution "expresses the combined idea . . . of the people, territory, and government." The Court declared, "A state, in the ordinary sense of the Constitution is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." Although the Court asserted that the term is a combination of conceptions of people, territory and government, the Court asserts that the "principle sense" of the term is that of "a people or political community, as distinguished from a government."<sup>30</sup>

The Court supported its conclusion that the Constitution distinguished between the state and the government by pointing to the Guarantee Clause of Article IV. The Court stated that the Constitution's

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CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 147-148 (2006); *See also* Herman Belz, *Deep-Conviction Jurisprudence and Texas v. White: On G. Edward White's Historicist Interpretation of Chief Justice Chase*, 21 N. KY. L. REV. 117, 124 (1993)

<sup>28</sup> Texas, at 720.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at 721.

guarantee that every state should have a republican form of government expressed a “distinction between a State and the government of a State.”<sup>31</sup>

Having begun at a high level of abstraction, the Court was faced determining whether Texas’s secession from the Union resulted in its relinquishment of its status as a state of the Union. The issue was fraught with controversy because to declare that Texas was not a state would accept the proposition that Texas could have constitutionally seceded from the Union, a position that Unionists rejected.<sup>32</sup> However, to declare that Texas’s status as a state was unaffected by its act of rebellion against the Union—that it remained a state without qualification—would have undermined the constitutionality of the Reconstruction program, which prohibited representatives of the former confederate states from participation in the House and Senate until they had been deemed reconstructed by the Republican-controlled Congress. It is here that the Court’s earlier distinction between the state and the government become important in the Court’s declaration of the conditional status of a state’s sovereign authority under the Constitution.

The Court rejected the proposition that Texas’s secession could deprive it of its status as a state the Court declared the indissoluble nature of the “perpetual Union.”<sup>33</sup> The Court went into great detail describing the actions undertaken by state officials after secession in rendering the state’s relationship with the United States, and establishing a new relationship with the Confederate States of America. The Court described conventions, and legislative acts, the adoption of ordinances and resolutions. The Court detailed the completeness of the State’s withdrawal from the Union, saying: “In all respects, so far as could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established

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<sup>31</sup> Texas, at 721.

<sup>32</sup> The Court’s opinion represents an acceptance of Lincoln’s rejection of secession, as articulated in his First Inaugural Address. Lincoln asserted: “I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. . . Descending from these general principles, we find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself.” See First Inaugural Address (March 4, 1861), in LINCOLN: SELECTED SPEECHES AND WRITINGS 289 (1992). See also DANIEL FARBER, LINCOLN’S CONSTITUTION 79 (2003); Belz, *supra* note 143, at 125. 33.*Id.* at 725.

for them.”<sup>34</sup> The Court continued by stating that there were no officers in the State of Texas who recognized the authority of the national government.

What did the Court make of all of these seemingly official state acts to perfect its intent to secede from the Union? Keeping with its earlier conclusion that the Union is perpetual and indissoluble, the Court deems the acts as “transactions *under* the Constitution”<sup>35</sup> The Court concluded that “the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance . . . absolutely null.” This conclusion makes two central points for our purposes. First, the conclusion affirmed the consequence of the Union’s perpetual nature. The Court’s declaration that Texas’s admission to the Union was “more than a compact,” but rather an adoption into a “political body.” The finality of such inclusion left Texas and the states constituting the “Confederacy” “no place for reconsideration, or revocation, except through revolution, or through the consent of the States.”<sup>36</sup>

Secondly, the Court’s conclusion has larger ramifications for the potential unconstitutionality of official acts of state. Again, the Constitution represents the People’s highest expression of will. It stands as the fundamental law, ready to chasten even when the People act in ways that are inconsistent with its dictates. The Court’s explicit detailing of the procedural formalities through which the secession and subsequent activities passed does not accord, or the description of the officialdom involved in these decisions does not endow them with the imprimatur of constitutionality if they violate the meaning of the Constitution.<sup>37</sup>

The Court explicitly stated that the relations between the state and the national government will vary depending on the whether the state adheres to its constitutionally-imposed obligation. The Court explained, “[T]he relations which subsist while these [constitutional] obligations are performed [] are essentially different from those which arise when they are disregarded and set at nought.” It is in

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<sup>34</sup> *Id.*, at 724.

<sup>35</sup> *Id.*, at 726.

<sup>36</sup> For a qualified rejection of this statement, see MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 167-199 (1998).

<sup>37</sup> One need not agree that the Court has interpreted the Constitution correctly as it regard the right of secession. What is important for the argument’s purposes is that the Court declares that inconsistency with the Constitution’s dictates transforms official acts into acts done without authority.

recognition of such “new relations” that the Court identified as having “imposed new duties on the United States” that the Court seems to affirm the constitutionality of the Reconstruction Acts.

The Court’s acceptance of the dramatic new powers of the national government to reconstruct the former confederate states was, however, articulated in a way that emphasized the status of the states as separate political communities.<sup>38</sup> The Court reasoned that the national government was empowered to reconstruct the states based on the Constitution’s imposition of a duty on the national government to “guarantee to every State in the Union a republican form of government.”<sup>39</sup> The Court declared that the newly reconstituted State of Texas was “entitled to the benefit of the constitutional guaranty.”<sup>40</sup> This entitlement suggests a recognition of the state’s—even the former Confederate states—as possessing attributes of sovereignty. The Court suggested that the state’s achievement of a republican form of government rests, in part, on the principle of inclusion of the whole people into the apparatus of the state, including freed slaves.<sup>41</sup>

Having recognized the states as political communities, the Court further reoriented the conception of American federalism, even in the aftermath of a more powerful post-Civil War national government. Alongside earlier Supreme Court case law that declared that the preservation of the national government’s supremacy was the central principle of the Constitution. *White* established the preservation of the states as an equivalent constitutional value.<sup>42</sup> The perpetuity notwithstanding, the Court declared:

[T]he perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States.... Not only therefore, can there be no loss of separate and independent

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38.*Id.* at 722.

39.U.S. CONST. art. IV, § 4.

40.*White*, 74 U.S. (1 Wall.) at 729.

41.*See Texas v. White*, 74 U.S. (1 Wall.) 700, 729 (1868).

<sup>42</sup> It is significant that Chief Justice Salmon Chase, the author of *Texas v. White*, is credited with crafting a state’s rights defense of the right of non-slave states to refuse to enforce the Fugitive Slave Law. Chase rejected the authority of the central government to impose the obligation to protect slave interests on “free” states. These arguments were rejected by the Court in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), which upheld Congress’s authority to enact the Fugitive Slave Act. *See* Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 LAW & SOC. INQUIRY 466-67 (1997); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* 218-222 (1977).

autonomy to the States, through their union under the Constitution, but *it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.*<sup>43</sup>

The Court emphasized the duality of American federalism structure as one that takes seriously both the national Union and the preservation of the states in an enduring relationship. *White* articulated the dual nature of American federalism, perhaps most prominently displayed in its declaration that “the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>44</sup> While indestructible, the governments of the states, including those with appropriate governance procedures, are subordinate to the dictates of the Constitution. The sovereignty in which the states participate is conditioned upon its acting in accord with the Constitution; when the state’s actions are inconsistent with constitutional dictates, the Constitution requires that the government’s action’s be brought in line with the Constitution’s mandates.

*General Federalism and the Project of Comparative Constitutional Law*

In discussions of the limitations of the role that comparative constitutionalism might play in federalism enforcement scholars have offered conceptions of federalism as a set of particularized bargains, the normative character of which does not translate in the comparative constitutional exercise. Scholars such as Vicki Jackson and Mark Tushnet have described federalism in ways that call into question its normative character. To the extent that they are correct, there may be very little that federalism enforcement might contribute to a global constitutional canon, but the picture that I have painted about federalism enforcement in three different federal regimes raises the question of whether we might think of judicial federalism enforcement as involving more than merely enforcing a set a “deals,” whether expressed textually or not.

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43.*Id.* (emphasis added).

44.*Id.* at 725.

To the extent that the above descriptions above suggest that judicial federalism enforcement might involve the articulation of behavioral norms that inhere in the fact of embedded relationships and interactions of state and national actors, might we revise our skepticism about the possibility of a global constitutional canon regarding federalism enforcement. Thinking about the possibility of a “freestanding” federalism allows us to think beyond the specific constitutional texts, histories, provisions and deals that underwrite much (perhaps even most) of federalism enforcement. That is, understood in this way, a freestanding federalism might come to resemble democracy or the rule of law as principles that underwrite the capacity of scholars to think across national constitutional boundaries. This discussion clearly does not suggest that conceptions of freestanding federalism dominate either American federalism enforcement (despite Manning’s fear) or the judicial federalism enforcement in other federal regimes. Nevertheless, its practice suggests that this aspect of federalism enforcement might underwrite a reconsideration of the normative content (at least in minimal form – i.e., norms of inclusion and engagement) of federalism structures capable of enlarging the global constitutional canon.