Revisiting Federalism: Core and Basic Characteristics

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REVISITING FEDERALISM: CORE V. BASIC CHARACTERISTICS

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“Federalism ranks among the most important issues on the planet today.”¹ However, its meaning is not entirely clear as some scholars have claimed,² and the definitions of “federal” are extremely diverse.³ This article explores core and basic federal legal characteristics: legally shared sovereignty, constitutional specific division of powers and a court arbiter role.

1: LEGALLY SHARED SOVEREIGNTY—THE ESSENCE OF FEDERALISM

1.1: SOVEREIGNTY AND THE STATE THEORY

Sovereignty is the essence of a state. As a matter of fact, based on the concept of modern state, state and sovereignty are indivisible and it is sovereignty that differentiates a state from other social groups.⁴ For example, Webster’s Ninth New Collegiate Dictionary defines “state” as “a politically organized body of people usu[ally] occupying a definite territory; esp. one that is sovereign.”⁵ Black’s Law Dictionary also equates sovereignty with the state itself.⁶

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² See RICHARD H. LEACH, AMERICAN FEDERALISM 9 (W.W.Norton &Company, INC. 1969). (“[P]recisely what “federalism” means is not now and never has been clear . . . .”)
³ See JEFFREY KAHN, FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA 20 (Oxford University Press 2002). (“There are almost as many definitions of federalism and federal governments as there are theorists to theorize about them.”)
⁶ BLACK’S LAW DICTIONARY, 1401 (7th ed. 1999).
The allocation of sovereignty in a state, therefore, arguably determines the fundamental nature of its political system. Differences in vertical allocation of sovereignty within a state thus classify the countries of the world as either unitary or federal systems.

1.2: “FROM THE LEGAL POINT OF VIEW”: LEGAL SOVEREIGNTY V. POLITICAL SOVEREIGNTY

1.2. (1): Differentiating Legal Sovereignty from Political Sovereignty: Dicey’s Idea

Dicey expressly stressed the difference between legal sovereignty and political sovereignty when he talked about the nature of the English Parliament. He wrote, “The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions . . . . Any Act of Parliament . . . which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts.”7 He also emphasized that: “[I]t should, however, be carefully noted that the term ‘sovereignty,’ . . . is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit.”8 Thus, legally speaking, the Parliament can do “everything but make a woman a man, and a man a woman,”9 and as a result, it can legislate to forbid smoking on the street of Paris, and can abolish the independence of Canada, and so forth.10

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8 Id. at 27.
9 Id. at 5. (“It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.” Today, even this traditionally described exception falls in the Parliament’s legal authority as modern legislatures can and do pass laws related to sex changes.)
10 Although not practically the case, the difference does not mean that legal sovereignty is meaningless or that the court will not accept the act as law. A man who smokes on a Paris street will still be subject to adverse judgment when he travels to London under the applicable Act of Parliament.
It was also recognized that “sovereignty” was sometimes employed in a political rather than in a strictly legal sense.\textsuperscript{11} Dicey defined a politically sovereign entity as one whose “will . . . is ultimately obeyed by the citizens of the state.”\textsuperscript{12} He further explained, “[T]he political sense of the word ‘sovereignty’ is . . . fully as important [as] the legal sense or more so. But the two significations though intimately connected together, are essentially different . . . .”\textsuperscript{13}

1.2. (2): The Practical Inconsistency between Legal Sovereignty and Political Sovereignty

Political sovereignty and legal sovereignty usually, if not always, do not reside in the same place. English Parliamentary Sovereignty is a good example.

While even today the English Parliament is legally sovereign, it is hardly politically so.\textsuperscript{14} In reality, European law is now superior to English Parliamentary acts;\textsuperscript{15} the United Kingdom is obligated to abide by the European Court of Justice and the European Court of Human Rights Convention decisions; and accordingly, these courts could invalidate English Parliament acts.\textsuperscript{16} Arguably it is the Parliament’s will to put European law above the English law and the Parliament is still free to withdraw from the European Union as it

\textsuperscript{11} See A.V. DICEY, supra note 7, at 27-28.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{15} The European Communities Act 1972 section 2(4) provides “any enactment passed or to be passed other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section . . . .” Section 2(4) of the Act thus consequently gives supremacy to Community Law. See The European Communities Act, 1972, c. 68, § 2 (4) (Eng.)
\textsuperscript{16} The European Court of Justice can declare laws of the member states null and void when it finds them illegal and conflict with the treaties of the European Union. Under the European Convention on Human Rights, “[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.” See the European Convention on Human Rights, art. 53, 1950 (European Union).
pleases. Under this argument, the legal sovereignty ultimately remains in the English Parliament; however, the political sovereignty is under dramatic transformation. It is hard to imagine how England could realistically stay away from Europe.

2.2. (3): Legal Sovereignty and the Natures of Federal System and Unitary System

Keeping in mind the inconsistency between legal sovereignty and political sovereignty, studying federalism from a legal point of view requires determining where legal sovereignty resides. The location of political power is frequently an arguable issue, especially when different persons have different ideas, different points of view, and stress different aspects. More often than not, only from the legal point of view can one clearly differentiate federal and unitary states, as few modern political elements can help to tell a unitary from a federal system, and few political characteristics can be said to belong to one system and be excluded in the other. As Philip M. Blair argued, “it is in virtue of the legal structures, whose influence on the empirical pattern of political power is in any case substantial, that one can claim to be talking about a federal form of government at all.”

Therefore the pattern of legal sovereignty allocation should be the key element in classifying a system as federal or unitary. From a court’s perspective, the legal standard is exactly what the court tries to follow in making a judgment. Judges are claimed to be doing law, not politics. In addition, legal studies on federalism focus on the borderline of the division of powers, stressing what is allowed and what is forbidden by law; while

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17 COLIN R. MUNRO, STUDIES IN CONSTITUTIONAL LAW 128 (Butterworths 1987).
19 Justice Frankfurter remarked, “Judicial doctrine must be sufficiently coherent and determinate to convince other actors—including not only the political branches but the People at large—that the judges are doing law, not politics.” See Ernest A. Young, The Rehnquist Court’s Two Federalisms, 83 Tex. L. Rev. 1, 102 (2004); see also Lawrence Lessig, Understanding Federalism’s Text, 66 Geo. Wash. L. Rev. 1218, 1224 (1998).
political studies focus on how to make federalism operate more effectively by studying
and designing the political and administrative operations of the system.\(^{20}\)

As mentioned above, legal sovereignty and political sovereignty sometimes conjoin
and sometimes do not. The inconsistency always exists. Due to the complicated pictures
of political powers, there always exists certain kind of politically shared sovereignty in a
state; however, the same is not true with legally shared sovereignty. Federalism does
have legally shared sovereignty; this is the essence of the system.

### 1.3: Legally Shared Sovereignty—The Essence of Federalism

#### 1.3(1): Legally Sole Sovereignty—the Nature of English Parliamentary Sovereignty

In order to illustrate the nature of English Parliamentary Sovereignty to his readers
more clearly, Dicey directly contrasted unitary Parliamentary Sovereignty with the U.S.
federalism:

> The Constitution of the United States, . . . holds a very peculiar relation
towards the institutions of England. In the principle of the distribution
of powers which determines its form, the Constitution of the United
States *is the exact opposite* of the English constitution, the very essence
of which is, as I hope I have now made clear, the unlimited authority of
Parliament.\(^{21}\)

Thus, the “best” approach to understand the nature of federalism is to contrast a
federal polity with Parliamentary Sovereignty.\(^{22}\) England has long been regarded as a
typical traditional unitary state, while America, a classic federal system, on the opposite
side of the Atlantic. This makes comparison between the two highly informative.

\(^{20}\) Cited from the class note of the Constitutional Law lectured by Professor Xiao Weiyun at Peking
University School of Law in 1999.

\(^{21}\) See A.V. Dicey, *supra* note 7, at 74 (emphasis added).

\(^{22}\) “We shall best understand the nature of federalism and the points in which a federal constitution stands in
contrast with the Parliamentary constitution of England . . . or contrast, between a federal polity and a
system of Parliamentary sovereignty.” *Id.*
Parliamentary Sovereignty means:

[Neither] more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament . . . . There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.23

Clearly, this is legal sovereignty residing solely in the Parliament or the “King in Parliament.”24 The Parliament can make laws on any subjects it chooses; no Parliament can bind its successors; and no body (including the courts) can question the validity of parliament’s enactments.25 Parliamentary Sovereignty is indivisible: “[w]hat the parliament doth, no authority upon earth can undo.”26

The centralized legal sovereignty under a unitary system does not exclude local governments from enjoying certain, sometimes substantial, powers. However, a unitary system such as England’s always stresses granting powers to local governments rather than shared sovereignty and “from the strict legal point of view, all the powers belong to the central government.”27 Summarizing, under the English unitary system, Parliament has sole legal sovereignty and American federalism, “the exact opposite of the English

23See id. at 3-4.
24 Id.

Since the 1997 devolution reforms initiated by the Labor Party, Scotland, Wales and the Northern Ireland in the U.K. enjoyed numerous legislative or administrative devolution powers. However, legally speaking, all these reforms did not change the nature and tradition of the British Parliamentary Sovereignty. This point will be further explored in Chapter VII in the part of a case study of the U.K.
constitution,” logically must be classified as legally shared sovereignty.

1.3(2): “Legally Shared Sovereignty”—the Essence of Federalism

A: “Split the Atom of Sovereignty”: Indivisible v. Divisible Theory

In his concurring opinion in U.S. Term Limits v. Thornton, Justice Kennedy reasoned:

“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”

Traditional sovereignty theory stresses that sovereignty is ultimate, supreme and indivisible; under this tradition, every government should be an absolute, unlimited authority. According to Blackstone, “There is and must be in all [governments], a supreme irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside.” Thus, it seems that traditional sovereignty precludes for the development of federalism. As Joseph Reisert commented, “We too easily forget that the very idea of sovereignty implies the impossibility of federalism: either there is a source of ultimate authority in a polity or

28 See A.V. Dicey, supra note 7, at 74.
30 Id. at 838, (Kennedy, J., concurring).
31 Akhil Reed Amar acknowledged: “The conventional . . . understood ‘sovereignty’ as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself voluntarily chose to observe. To try to divide or limit sovereignty in any way was to create the ‘political monster’ or ‘hydra’ of ‘imperium in imperio’—‘the greatest of all political solecisms.’” See Akhil Reed Amar, Sovereignty and Federalism, 96 Yale L.J. 1425, 1430 (1987).
32 See W. Blackstone, supra note 26, at 49.
there is no such source. Hobbes had argued that sovereignty cannot be divided without sowing the seeds of civil war . . . .”  

However, this sovereignty tradition was seriously challenged and overturned during the search for a modern federalism by America’s founding fathers. As Professor Jeffrey Kahn observed, “Federalism turns traditional conceptions of sovereignty upside down. The federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty. Federalism struck the deathblow to Bodin’s assertion of the indivisibility of sovereign power.”

A unitary arrangement was rejected right after the American Revolution, as partly because of the history of the English rule, the American people feared a strong central government. Further, the drawbacks and crises caused by the then existing Confederation (which vested sole sovereignty in states) led directly to the calling of the Constitutional Convention, because “[u]nder the Articles, the national government was so weak as to be almost nonexistent; the states exercised virtually all power.” With these experiences, as Akhil Amar commented:

The Philadelphia delegates thus had the benefit of two previous efforts to achieve a theoretically acceptable and practically workable federalism. The imperial model had proved unacceptable because it centralized all power, denying individual state governments any role as

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34 See JEFFREY KAHN, supra note 3, at 27.
35 “After the Revolutionary War most people in America were glad that they were no long British. Still they were not ready to call themselves Americans. The last thing they wanted was to become a nation. They were citizens of their own separate states . . . .” See Jean Fritz, Shh! We’re Writing the Constitution 7 (G.P, Putnam’s Sons Publisher 1987.)
38 Id.
independent centers of authority . . . . It was too national . . . . The Articles of Confederation, on the other hand, had failed because there was insufficient gravitational pull from the center to counter the centrifugal tendencies of each state. The system was too “federal.”

The “atom” would have to be split to accommodate the historic theoretical and political challenges.

B: American Experience: Rejecting the Existing Theories

The early American experience with federalism was regarded as the most important catalyst for the split view of sovereignty. Without reference to successful precedents, the Framers of the American Constitution also rejected the existing theories. Walter H. Bennett wrote: “The basic conflict of the arguments over the framing and ratification of the United States Constitution was a conflict between considerations of practical necessity on the one hand and predominant political and legal conceptions on the other.”

During the Convention, with respect to sovereignty and supremacy, some like Gouvereur Morris asserted that “in all communities there must be one supreme power and one only.” Hamilton once also agreed “two sovereignties cannot co-exist with the same limits.” Ellsworth claimed that there was “no middle way between a perfect

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39 See Akhil Reed Amar, supra note 31, at 1448-1449.
40 See JEFFREY KAHN, supra note 3, at 27.
41 James Madison, responding to Patrick Henry's concerns about the power of the federal government to directly tax the people, argued: “it is in a manner unprecedented; we cannot find one express example in the experience of the world. It stands by itself.” See Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution. 2nd ed., 5 vols. (Philadelphia: J.
42 See WALTER HARTWELL BENNETT, AMERICAN THEORIES OF FEDERALISM 88 (University of Alabama Press 1964).
43 Id.
44 Hamilton had to change his mind later. In the New York ratifying convention, he declared that it was curious sophistry to hold that where there was “one supreme” there could be “concurrent authority.” It was
consolidation and a mere confederacy of the states.”\footnote{See \textit{Walter Hartwell Bennett}, \textit{supra} note 42, at 62.} However, the intense attachment of the delegates to the sovereignty and independence of their own states compelled theory to bend to political necessity because had the people believed that the Constitution would reduce the states to little more than geographical subdivisions of the national domain, it would never have been ratified.\footnote{Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936).} Theory had to yield to political needs; as Hamilton recognized:

\begin{quotation}
To argue upon abstract principle that this coordinate authority (over revenue) cannot exist, is to set up supposition and theory against fact and reality. However proper such reasoning might be to show that a thing \textit{ought not to exist}, they are wholly to be rejected when they are made use of to prove that it does not exist contrary to the evidence of the fact itself.\footnote{\textit{The Federalist} No. 34 (Alexander Hamilton).}
\end{quotation}

Accepting Hamilton’s acknowledgment of the practical realities of governance, “if the concept of sovereignty is not abandoned altogether, it must either be accepted that sovereignty can be divided or that sovereignty resides in some rather unilluminating [sic] way in the constitution-making power of ‘the people.’”\footnote{See Philip M. Blair, \textit{supra} note 18, at 7.}

In addition to challenging the entrenched theories of traditional sovereignty, the Framers did not highly value direct democracy or other features now thought essential for a successful modern state. State legislatures selected national senators;\footnote{“Until the promulgation of the 17th amendment in 1913, the Senate was elected by the various state legislatures rather than the people.” See John B. Attanasio, \textit{supra} note 36, at 125. This arrangement reflected the framers’ understanding of federalism. Some have argued that allowing the people choose senators directly has weakened U.S. federalism. This point will be further explored in relation to the bicameral legislature and the role of the state later in this chapter.} and many...
compromises facilitated continued slavery and prevented international slave trade from terminating before 1808.\textsuperscript{50} The Bill of Rights did not exist and many Framers thought it unnecessary.\textsuperscript{51}

C: “We the People . . .”: People’s Sovereignty and the Constitution

The people’s sovereignty played a vital role in the development of a new constitutional arrangement under federalism. The very first sentence of the American Constitution declares: “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”\textsuperscript{52} This phrase encapsulates the philosophical cornerstone and logic starting point of the whole Constitution;\textsuperscript{53} which allows the combination of traditional sovereignty with a written constitution and a federal system.

Based on the people’s sovereignty, the Framers developed the agency theory and created a limited government. As Madison reasoned, “the federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”\textsuperscript{54} Solely vesting the people with true sovereignty necessitates a limited government.\textsuperscript{55} Thus, restricting the agent powers through the people’s sovereignty both accommodates the indivisible nature of traditional sovereignty and allows for meaningful division of powers.

\textsuperscript{50} U.S. CONST. art. I s. 9. The slavery issue was one of the main leading causes of the Civil War. 
\textsuperscript{51} Alexander Hamilton argued that “bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous.” See THE FEDERALIST No. 84 (Alexander Hamilton). 
\textsuperscript{52} U.S. CONST. prml. 
\textsuperscript{54} THE FEDERALIST No. 46 (James Madison). 
\textsuperscript{55} See Akhil Reed Amar, \textit{supra} note 31, at 1427 (1987).
D: Legally Shared Sovereignty: the Essence of Federalism

Although many different models of dividing powers exist, a federal system always has some degree of shared sovereignty. Arguably, all countries employ shared political sovereignty; legally speaking, however, unitary and federal systems are clearly differentiated by the notion of legally shared sovereignty (LShS). Federalism is characterized by some form of legally shared sovereignty, while a unitary system has legally sole sovereignty (LSoS) in essence.

(i): Constitutional Scholars’ Comments on Federal Legally Shared Sovereignty

Contrary to English unitary legally sole sovereignty:

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of “state rights.” The end aimed at fixes the essential character of federalism. For the method by which federalism attempts to reconcile the apparently inconsistent claims by national sovereignty and of state sovereignty, powers of sovereignty are elaborately divided between the common or national government and the separate states.\(^56\)

Dicey tried to layer the characteristics of federalism in his federal definition,\(^57\) and argued that the Preamble and the Tenth Amendment to the United States Constitution\(^58\) “point out the aim and lay down the fundamental idea of federalism.”\(^59\) He considered the fundamental idea of reconciling national unity with state independence the origin of other federal characteristics.\(^60\)

\(^{56}\) See A.V. DICEY, supra note 7, at 76-77 (emphasis added).

\(^{57}\) Id.

\(^{58}\) “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

\(^{59}\) See A.V. DICEY, supra note 7, at 76-77 (emphasis added).

\(^{60}\) Id. at 77.
Although they may have phrased the idea differently, some other scholars also have identified shared sovereignty as the essence of federalism. Professor Tong Ziwei characterizes federalism simply with the division of sovereign powers in a country. Professor Attanasio notes that, in describing the American federal system, the original Constitution “created two sovereigns, or two spheres of sovereignty. The federal government reigned only in its limited sphere of sovereignty; the states enjoyed sovereignty over everything else.”

(ii): American Case Law Confirmation

American case law has extensively affirmed the essential role of Legal shared sovereignty in the American federal system. In *New York v. United States*, the Supreme Court ruled that although Congress has substantial power under the Constitution to

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61 *See Tong Zwei Fa Quan Yu Xiang Zheng [Legal Power and the Constitutionalism] (Shandong People’s Press 2001).* Philip M. Blair also wrote, “The interdependence of Federal and State governments presupposes, and is interesting precisely in the light of, the presence of the classical ‘legalistic’ characteristics of federalism. These characteristics include a constitutional division of powers on a territorial basis between two levels of government such that each level has an autonomous right of decision in some areas of government, neither derives its authority from the other and neither can change the legal relationship between them unilaterally” (emphasis added). *See Philip M. Blair, supra* note 18, at 2-3.

62 *See John B. Attanasio, supra* note 36, at 127.

63 *New York v. United States*, 505 U.S. 144 (1992). Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 intending to deal with the looming and serious shortages of disposal sites for low-level radioactive waste by obligating states to provide for the disposal of waste generated within their borders. It provided three incentives for states to comply. The monetary incentive allowed states to collect gradually increasing surcharges for waste received from other states. The Secretary of Energy would collect and escrow a portion of this surcharge, and states achieving disposal milestones would receive payment. The access incentive authorized sited states to reprimand states that missed certain deadlines by raising surcharges or eventually denying access to disposal at those state's facilities. The third incentive required states to take title and assume liability for waste generated within their borders if they failed to comply. This case concerned the circumstances under which Congress may use the states to implement regulation, specifically whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. The monetary incentive was held to be within Congress's power under the Spending Clause. The access incentive was held to be a permitted exercise of Congress's power under the Commerce Clause. However, the take title provision was held to be impermissibly coercive and a threat to state sovereignty, violating the Tenth Amendment. Justice O'Connor characterized it as an attempt to “commandeer” the state governments by directly compelling them to participate in the federal regulatory program. She argued that the federal government “crossed the line distinguishing encouragement from coercion.” *See New York v. United States*, 505 U.S. 144, 149 (1992).
encourage the States or make policy that restricts the States, the Constitution does not
confer upon Congress the ability to compel the States to legislate or regulate. Justice O’Connor delivered the opinion of the Court:

The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. . . . While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions. . . . [T]he Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan.

*Printz v. United States* involved whether certain interim provisions of the Brady Handgun Violence Prevention Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and perform certain related tasks violated the Constitution. The Court reasoned that “residual state sovereignty” was rooted “in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete enumerated ones,” an implication “rendered express by the Tenth Amendment.” Justice Scalia, writing for the majority, also stressed that

Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved,

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64 *Id.* at 149.
65 *Id.* at 165.
67 *Id.* at 898.
68 *Id.* at 919. (Justice Scalia asserted that the “system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly.” *Id.* at 924).
and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.\footnote{Id. at 935.}

Obviously, as some scholars have argued, “[t]he Tenth Amendment may be a ‘truism,’ but it remains a compelling reminder of America’s search for union without unity.”\footnote{See VALERIE EARLE ED. FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 40 (F.E. Peacock Publishers, INC. 1968).} As the related cases illustrate, the Eleventh Amendment, further affirms the shared sovereignty principle by trying to safeguard state sovereignty. It reads: “The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any foreign state.”\footnote{U.S. CONST. amend. XI.} The Supreme Court has “consistently held that an unconsenting [sic] State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”\footnote{See Edelman v. Jordan, 415 U.S. 651, 663 (1974).} Immunity from lawsuits has been regarded as “an essential attribute of the state sovereignty.”\footnote{See John B. Attanasio, \textit{supra} note 1, at 492.} In \textit{Hans v. State of Louisiana},\footnote{Hans v. State of Louisiana, 134 U.S. 1 (1890).} Justice Bradley reasoned: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . . [T]he exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.”\footnote{Id. at 13.}

The creation of Amendment XI highlighted the entrenched understanding of state sovereign immunity and shared sovereignty. The proposal of the Eleventh Amendment came only two days after the Supreme Court’s ruling in \textit{Chisholm v. Georgia}.\footnote{Chisholm v. Georgia, 2 Dall. 419 (1793).} In
*Chisholm*, the Court depended on the “clear language of Article III” and the idea that the ‘feudal’ doctrine of sovereign immunity was incompatible with popular sovereignty, rejecting . . . Georgia’s protest that an unconsenting [sic] state was immune from suit; . . . [and] upheld its jurisdiction as consistent with Article III.”

According to the Court in *Hans*, the decision in *Chisholm* “created such a shock of surprise throughout the country that at the first meeting of Congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by . . . the states.” To overrule a specific decision of the Supreme Court through a constitutional amendment has been very rare in the United States.

Congress has overruled a Court decision by way of constitutional amendment only four times since the Constitution’s ratification in 1788.

The case of *Seminole Tribe v. Florida* further enlarged state immunity from suit under the Eleventh Amendment. The Court held that “the Indian Commerce Clause does not grant Congress power to abrogate the states’ sovereignty immunity.”

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77 U.S. CONST. art. III, §1, §2. (Article III regulates the federal judiciary’s power and jurisdiction. It vests federal judicial power in the Supreme Court, and other federal courts as established by the Congress.)


79 Hans v. State of Louisiana, 134 U.S. 1, 11 (1890).

80 See John J. Gibbons, The Eleventh Amendment and State Sovereignty Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889 (1983), n. 23. (“Chisholm v. Georgia was the first. . . . The other three are Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (holding the slavery prohibition of the Northwest Territories Ordinance unconstitutional; overruled by the thirteenth amendment); Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895) (holding a federal income tax law unconstitutional; overruled by the sixteenth amendment); Oregon v. Mitchell, 400 U.S. 112 (1970) (holding unconstitutional a provision of the Voting Rights Act Amendment of 1970 lowering the voting age to eighteen for state and local elections; overruled by the twenty-sixth amendment).”)


83 Id. It is worth noting that: “Ex parte Young (209 U.S. 123 (1908)) had held that a suit against a state employee to enjoin official actions violating federal law was not a suit against the state Eleventh Amendment barred. Under Young, the state may be ‘free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers’ in violation of law.” See id. at 68.
(iii): American Founding Fathers’ Intent

The original intent of the authors of the U.S. Constitution sheds further light on the legally shared sovereignty core of federalism. American federalism is in fact the result of the Great Compromise, a bargain between competing national (“Virginia”) and federal (“New Jersey”) plans for the structure of the new government.\textsuperscript{84} The Virginia plan set up a national government, implicitly making the states subordinate.\textsuperscript{85} The New Jersey plan retained many elements of the Articles of Confederation and only slightly strengthened the central government.\textsuperscript{86} The Great Compromise represented a hybridized approach, borrowing elements from both.

A consolidated unitary system is a central government legally sole sovereignty arrangement, while in a confederation only states retain sole sovereignty. The Articles of Confederation reflected the understanding of an 18th century confederation system: merely a close alliance among sovereign states, acting together as to matters of common concern. Articles II and III of the Articles of Confederation exemplify this. Article II recognized the sovereignty, independence, rights, freedom, and jurisdiction of each state and limited the powers of Congress only to those expressly delegated.\textsuperscript{87} Article III declares that the states “severally enter[ed] into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and

\begin{footnotesize}
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  \item \textsuperscript{84} “Federal” was used to describe the Confederation before the introduction of the U.S. Constitution; this reflected its traditional meaning. With the introduction of the United States Constitution and the use of “federal” to refer to the modern system, the term definition experienced a vast transformation to reflect the dramatic changes of the political reality.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} The Articles of Confederation (written 1777, ratified 1781), art. II.
\end{itemize}
\end{footnotesize}
general welfare . . .”\textsuperscript{88}

Modern American federalism borrows from both the traditional unitary system and confederation. Madison identified the characteristics of the Constitution that were “federal\textsuperscript{89} and not national” and those that were “national and not federal.”\textsuperscript{90} He explicitly called attention to its hybrid nature in the Virginia Convention, noting that the Constitution was “not completely consolidated, nor . . . entirely federal” but “of a mixed nature.”\textsuperscript{91}

Thus, modern federalism is completely incompatible with legally sole sovereignty. Sovereignty stays neither only with the national government, nor only with the states, but is rather shared between them. Figure 1 illustrates the different patterns of legal sovereignty allocation.

Figure 1: Comparison of the Legal Sovereignty

<table>
<thead>
<tr>
<th>Confederation</th>
<th>Federation</th>
<th>Unitary</th>
</tr>
</thead>
<tbody>
<tr>
<td>(LSoS in states)</td>
<td>(LShS)</td>
<td>(LSoS in central government)</td>
</tr>
</tbody>
</table>

Note:

LSoS: Legally Sole Sovereignty
LShS: Legally Shared Sovereignty

Legally shared sovereignty is not just legally or theoretically meaningful; the doctrine, as shown in American case law, decisively influences the practical operation of federalism. Furthermore, the essence of legally shared sovereignty implicates the other

\textsuperscript{88} Id. art. III (emphasis added).
\textsuperscript{89} “Federal” was used to describe the then Confederation.
\textsuperscript{90} The Federalist No.39 (James Madison).
\textsuperscript{91} Id.
two basic characteristics of federalism: the specific division of powers under a constitution and the court’s arbiter role.

2: SPECIFIC DIVISION OF POWERS UNDER A CONSTITUTION

A federal system based on LShS requires a specific division of powers between the central government and the states according to a written constitution. This is not to say that there is no division of powers between the central and local governments in a unitary state. However, division of powers under a unitary arrangement tends to be less specific and more variable because it is usually regulated by a statute that lacks constitutional authority and is subject to easy modification. Critically, the central government can usually take powers back without amending the constitution.

2.1: “AN ESSENTIAL FEATURE OF FEDERALISM”—THE DIVISION OF POWERS AND THE MODELS

The division of powers constitutes “an essential feature of federalism.”92 K.C. Wheare also agreed it was “an essential part of any federal government.”93 Although they might be associated with different specific models, all federal countries have vertically separated power arrangements under their constitutions.94 And generally, “[w]hatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in

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92 See A.V. Dicey, supra note 7, at 83.
94 Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 790 (New York, Foundation Press 1999). (“All federal governments involve some allocation of power between a national (or central) level government and governments of sub-national units (states, länder, provinces).”)
the hands of the several States.”\textsuperscript{95}

Federal division of power models can be categorized multiple ways. In terms of where the residual power is located, two general models exist among current federal countries. One model lists the powers of the national government while leaving residuary powers to the states. Examples include the United States, Australia and Switzerland. Alternatively, a constitution will list the powers of the constituent governments while leaving the rest of powers to the national government. Canada uses the second model by clearly defining the powers vested to its provinces.

Forming a clearer picture of the specific division of powers under federalism requires a further look into the specific arrangements of some typical federal countries. The United States, Canada, and Germany have been chosen for illustrative purposes.

James Madison, actively pushing for the ratification of the U.S. Constitution, authoritatively illustrated the style of division of powers in the United States when he explained that “[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”\textsuperscript{96} The Tenth Amendment gives this proposition force of supreme law, by declaring that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{97} Article I, section 8 of the United States Constitution exclusively lists the powers of Congress.\textsuperscript{98} It includes the power to regulate interstate and foreign commerce, to create and support a military and declare wars, to control the postal and monetary

\textsuperscript{95} See A.V. Dicey, supra note 7, at 77.
\textsuperscript{96} THE FEDERALIST No. 45 (James Madison).
\textsuperscript{97} U.S. CONST. amend. X.
\textsuperscript{98} U.S. CONST. art. I, § 8.
systems, to control naturalization, and the implied power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” 99 All other powers on most domestic affairs are left to the states. Under this system, “the states have remained very powerful because they still fashion many important legal regimes. For example, most of criminal law, tort law, family law, contract law, corporate law, trust and estate law, property law, education law, and health law are generated at the state or local level.” 100

The Constitution Act 1867 largely governs the distribution of powers between the federal and provincial governments of Canada. 101 The legislative powers of the local assemblies are limited and confined to specifically assigned subjects, while all other legislative powers are conferred on the Dominion Parliament. 102 The Constitution Act thus differs entirely from the Constitution of the United States of America (and most other federal countries), under which state legislatures retain all the legislative powers not expressly taken away. 103

According to Section 91 of the Constitution Act, the Canadian Parliament has the authority to “make laws for the peace, order, and good government of Canada, in relation

99 U.S. CONST. art. I, § 8, cl. 18. This is the final clause of Article I, section 8, generally referred to as the Necessary and Proper Clause. This clause “does not vest regulatory or supervisory authority over any particular subject matter; rather, it guarantees latitude of discretion in the exercise of all other granted powers.” See CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 193 (3rd edition, Aspen Publishers 2004).
100 See John B. Attanasio, supra note 1, at 487-488.
101 The exclusive powers of Parliament, enumerated in s. 91 and s. 92 (10) of the Constitution Act, concern matters of national interest. The exclusive powers of Provincial Legislatures, enumerated in s. 92, s. 92(A) and s. 93 of the Act, concern matters of a local nature. Concurrent powers are specified in s. 94A and s. 95. See Constitution Act, 1967, s. 91-93 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).
103 See VICKI C. JACKSON & MARK TUSHNET, supra note 94, at 795-796.
to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.”

Canadian constitutional law labels this as the “Peace, Order and Good Government Clause”; it specifically allocates all residuary powers to the federal government. As professor Peter W. Hogg commented, “This power to make laws for the ‘peace, order, and good government of Canada’ is residuary in its relationship to the provincial heads of powers. . . . It is clear from this language that any matter which does not come within a provincial head of power must be within the power of the federal Parliament.”

In Germany, the federal government has broad legislative powers, while the länder have residuary legislative authority in areas not delegated to the federal government. The federation is thus given exclusive jurisdiction over a number of areas outside länder jurisdiction. However, the länder are entrusted with the authority of administering and enforcing the law. In comparison, Switzerland and Australia basically follow the American model, expressly listing the legislative powers of the national governments and leaving the rest to the states (cantons).

Although most federal countries generally follow the two basic models, the specific

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104 Constitution Act, 1867, s. 91 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).
105 Id.
107 Grundgesetz für die Bundesrepublik Deutschland [federal constitution], art. 30 (promulgated by the Parliamentary Council on 23 May 1949; as amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990). (“Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.”)
108 See VICKI C. JACKSON & MARK TUSHNET, supra note 94, at 825.
109 Article 3 of the Switzerland Constitution establishes that “[t]he Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution and, as such, exercise all rights which are not entrusted to the federal power.” See Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution], April 8, 1999, SR 101, RO101, art. 3 (Switz.). Part V section 51 of the Australia Constitution also lists specifically the Parliament’s legislative competencies. See Commonwealth Of Australia Constitution Act, 1900, c. 1, part V. § 51 (Austl.).
arrangements for power division tend to be very diverse. Comparing the United States and Canada, for example, as Martha Field observed:

On one level, there are noticeable differences in where particular powers are lodged. Marriage and divorce and criminal law, for example, are governed by the central government in Canada but the state governments in the United States, while labor law, nationalized in the governments in the United States, is an area jealously guarded by Canada’s provincial governments.

2.2: “NEITHER CAN CHANGE THE LEGAL RELATIONSHIP BETWEEN THEM UNILATERALLY”: THE ENTRENCHED DIVISION OF POWERS BY THE CONSTITUTION

2.2. (1): Theory of the Rigid Constitution under Federalism

Black’s Law Dictionary defines a rigid constitution as, “[a] constitution embodied in a special and distinct enactment, the terms of which cannot be altered by ordinary forms of legislation. The U.S. Constitution, which cannot be changed without the consent of three-fourths of the state legislatures or through a constitutional convention, is of this type.”

A written constitution, unlike an unwritten constitution, is generally more rigid and less flexible. It always includes a special amending procedure and requirements, usually more difficult than altering a statute. As a living document, the courts can arguably interpret the Constitution in light of modern society. However, any formal or

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110 Vicki C. Jackson and Mark Tushnet argued: “Typically, the national or central government has substantial powers in foreign affairs and military matters, but in other areas distribution of power can vary widely.” See VICKI C. JACKSON & MARK TUSHNET, supra note 94, at 790.
111 See id. at 795.
114 Id.
115 In McCulloch v. Maryland, 17 U.S. 316 (1819), Chief Justice Marshall argued to use a flexible way in interpreting the Constitution. “We must never forget that it is a constitution we are expounding,” he
substantial changes still have to go through the cumbersome amendment procedure. As
Chief Justice Marshall stressed in *Marbury v. Madison*, the “principles” of the
Constitution “are deemed fundamental and permanent” and, except by formal
amendment, “unchangeable.”116

Federalism is associated with written constitutions, especially important in
entrenching the division of powers and making alteration difficult. Professor Jeffrey
Kahn summarized: “Federalism abolishes the principle of the supreme sovereignty of
parliament, subordinated in a federal system by specially protected laws that are difficult
to change. . . . The processes for constitutional amendment are purposefully designed to
be lengthy and cumbersome: the opposite of efficient government.”117

2.2. (2): State Role in the Constitutional Amendment

The state role in constitutional amendment, and the fact that neither side can change
the constitution unilaterally, is an integral part of the division of powers under federalism.
In discussing American federalism, Dicey reasoned:

If Congress could legally change the Constitution, New York and
Massachusetts would have no legal guarantee for the amount of
independence reserved to them under the Constitution, and would be as
subject to this sovereign power of Congress as is Scotland to the
sovereignty of Parliament; the Union would cease to be a federal state,
and would become a Unitarian republic. If, on the other hand, the
legislature of South Carolina could of its own will amend the

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116 “Between these alternatives there is no middle ground. The constitution is either a superior, paramount
law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is
alterable when the legislature shall please to alter it.” 5 U.S. 137, 177 (1803).
117 See JEFFREY KAHN, supra note 3, at 22. See also A. V. Dicey, supra note 7, at 141.
Constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance.\textsuperscript{118}

By implication, legally shared sovereignty thus requires that neither the central nor state governments can alter the Constitution unilaterally, especially the provisions relating to the federal-state relations and the division of powers.

The differences between division of powers under unitary and a federal arrangement are critical. The key differentials are the need for constitutional change to alter the division and state participation in the constitutional amendment process. Political scientist Daniel J. Elazar describes the two arrangements as a decentralized system and a non-centralized system, respectively.\textsuperscript{119} In his definition, “decentralization implies the existence of a central authority, a central government that can decentralize or recentralize as it desires. In decentralized systems, the diffusion of power is actually a matter of grace, not right.”\textsuperscript{120} By contrast, “in a non-centralized political system, power is so diffused that it cannot be legitimately centralized or concentrated without breaking the structure and spirit of the constitution.”\textsuperscript{121} Vernon Bogdanor agreed that the sharing of constitutional amendment powers between the federal government and sub-units “is one important distinction between federalism and the mere decentralization or devolution of power, under which a parliament granting greater authority to lower levels of government retains the legal right (though not always the political ability) to revoke those powers at a

\textsuperscript{118} See A.V. Dicey, \textit{supra} note 7, at 80-81.
\textsuperscript{120} Id.
\textsuperscript{121} Id, at 34-35.
later date."\(^{122}\)

There must be certain state or provincial participation in the constitutional amending processes under federalism, whatever its form. It is clear that, a nation will not be federal if any constituent part has absolute veto power over constitutional amendments; such power in the states would create a confederation.\(^{123}\) Nor will a nation be federal if states play no role during the amendment process. A federal system is located somewhere between these two extreme points.

Nevertheless, there is no universal, clear-cut requirement controlling the degree of the participation. Article V of the United States Constitution requires three quarters of the states to ratify an amendment before it becomes law.\(^{124}\) Ratification has become substantially more difficult since 1787 due to the larger number of states, and only twenty-six amendments -- including the first ten amendments forming the Bill of Rights (added in 1791) -- have passed.\(^{125}\) Stephen Tierney recognizes “[t]he amendment process which found its way into the U.S. Constitution was carefully constructed so as to deny either the federal government or the states the unilateral power to alter the Constitution

\(^{122}\) VERNON BOGDANOR, DEVOLUTION IN THE UNITED KINGDOM ch. 8 (Oxford University Press 1999). See also JEFFREY KAHN, supra note 3, at 22.

\(^{123}\) For example, The Articles of Confederation specified that the Articles could only be altered by approval of Congress with ratification by every state legislature. Article XIII of the document reads: “Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.” See THE ARTICLES OF CONFEDERATION (written 1777, ratified 1781), art. XIII.

\(^{124}\) “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .” U.S. CONST. art. V.

\(^{125}\) At the time the Constitution was drafted ratification only required acceptance by ten of the thirteen states and now thirty-eight states are needed. See Stephen Tierney, The Changing Constitution: American Constitutional Amendment and the Limits of Article V in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 367 (Edited by Mads Andenas and through the British Institute of International and Comparative Law 2000).
by way of a simple majority.”126 Most other federal constitutions also have quantitative requirements for state participation in constitutional amendment,127 with only Canada uniquely not requiring provincial participation.

In Canada, there is no specific requirement for the provinces’ participation in the constitutional amendment process.128 Nonetheless, the Canadian Supreme Court has stressed the role of provinces during formal constitutional changes. In Re: Resolution to Amend the Constitution,129 the Canadian Supreme Court declared that “at least a substantial measure of provincial consent is required” to make any constitutional changes affecting the provincial powers.130 “The reason for the rule,” according to the Court, “is the federal principle. Canada is a federal union.”131 The Court argued: “The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. . . . This is an essential requirement of the federal principle.”132 Further, “at the instance of a majority in the Houses of the federal Parliament acting alone, it is this process itself which offends the federal principle.”133 The Court’s reasoning in this case confirms this article’s understanding of the federal requirement of the constituents’ participation in the constitutional amending process.

126 See id. at 367.
127 The Swiss Constitution also stipulates that only a combined majority of the Swiss people and of the Swiss Cantons can revise the Federal Constitution. No amendment of the Constitution can be put into effect that is not approved by a majority of the Cantons. See Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution], April 8, 1999, SR 101, RO101, art. 139 (Switz.). Amending the Commonwealth of Australia’s constitution requires approval by an absolute majority of each House of Commonwealth Parliament, a majority of the voting electors of the Commonwealth, and a majority of the States. See Commonwealth Of Australia Constitution Act, 1900, c. VIII, (Austl).
128 See THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 398 (Edited by Mads Andenas and through the British Institute of International and Comparative Law 2000).
130 Id. at 905.
131 Id.
132 Id. at 905-906.
133 Id. at 909.
2.2. (3): Content Limitation to the Amendment

Besides state participation in the amending process, there usually exist certain content limits on constitutional amendments, meant to further protect the division of powers. For example, in the United States Constitution, amendment cannot change the states’ right to equal votes in the Senate.  

The German Basic Law also sets some limits on amendments. It lists (in the so-called “eternity clause”) the non-amendable clauses, including those relating to the federal structure and the participation of the länder in the legislative process, fundamental rights, democracy, and the rule of law. Brazil takes a similar approach to Germany, declaring that a constitutional amendment may not be proposed which aims to abolish the federal form of state, the separation of governmental powers, universal and periodic elections, or individual rights. Such content limitations, especially those making federal principles non-amendable, further entrench federal division of powers.

2.2. (4): The Bicameral Arrangement and the Role of the State

The senate plays an important role in the states’ participation in federal government and constitutional amendment. This chamber, representing the states, thus, serves as a separate device for maintaining federalism. The bicameral design itself is associated with the origin of federalism: the Framers of the American Constitution chose it as a way

134 U.S. CONST. art. V. (“No State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”)  
135 Grundgesetz für die Bundesrepublik Deutschland [federal constitution], art. 79, § 3. (“Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”)  
136 Constituição Federal [the Constitution], art. 60, ¶ 4. (Brazil).  
137 See DANIEL J. ELAZAR, supra note 119, at 183-184.
to accommodate the states’ demands to participate equally in the national government.\textsuperscript{138}

In the United States, the Senate was originally created as the agent of the states, whereas the House would be the agent of the people.\textsuperscript{139} Madison argued that power to appoint senators provided state governments power in the formation of the federal government and might form an easy connection between the state and national systems.\textsuperscript{140} In addition to the agent role, the original state-assigned Senate also guarded “against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States.”\textsuperscript{141}

The equal representation of states in the Senate and method of selection of the senators are critical to the states’ role under federalism in the United States. The method of selecting Senators before the ratification of the 17\textsuperscript{th} amendment enabled the states to directly participate in the national government.\textsuperscript{142} Professor Attanasio observed:

> Until the promulgation of the 17\textsuperscript{th} amendment in 1913, the Senate was elected by the various state legislatures rather than the people. This electoral prerogative afforded state governments a voice in the national government. This voice was particularly important because the Constitution affords the Senate considerable authority in structuring the federal government. Specifically, the Constitution gives the Senate power to give its advice and consent to treaties by a two-thirds vote, and to confirm the appointments of all cabinet members and federal judges. Indirectly, then, state governments had the power to participate through the Senate in these structural decisions involving treaties. They also could participate in the appointments of key members of the bureaucracy and of the judges of the national government. Moreover, the power of the Senate to confirm all federal judges, including Justices

\textsuperscript{138} THE FEDERALIST No. 62 (James Madison).
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.” U.S. CONST. art. I, § 3 (amended 1913). Contrast the 17\textsuperscript{th} amendment: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.” U.S. CONST. amend. XVII, cl. 1.
of the Supreme Court, afforded states a constitutional role in selecting those who ultimately define the structure of federalism under the Constitution.\textsuperscript{143}

The reaction to the introduction of the 17\textsuperscript{th} amendment to the United States Constitution clearly demonstrated that the Senate selection method had been closely tied to the federal arrangement. Some scholars regarded the change as the death of the Framers’ design of structurally safeguarded federalism.\textsuperscript{144} As Ralph A. Rossum argued, the introduction of “the Seventeenth Amendment eliminated that crucial structural protection and thereby altered the very meaning of federalism itself. . . . As a consequence, the original federal design has been amended out of existence and is no longer controlling—in the post-Seventeen Amendment era.”\textsuperscript{145}

The election of Senate representatives thus reflects, to some extent, the degree of the government’s federal character.\textsuperscript{146} Generally, government is more federal when the constituent states have more direct control over the selection of the senators; conversely, it is less federal when the constituents have less direct control over senator election. In this respect, “perhaps the most effective second chamber . . . is the German Bundesrat.”\textsuperscript{147}

One of the most significant differences between German federalism and other federal

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\textsuperscript{143} See John B. Attanasio, \textit{supra} note 36, at 125.
\textsuperscript{144} See Ralph A. Rossum, Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of the Constitutional Democracy 3-4 (Lexington Books 2001) (“Federalism as it was understood by the framers—i.e., the ‘original federal design’—effectively died as a result of the social and political forces that resulted in the adoption and ratification of the Seventeenth Amendment.”)
\textsuperscript{145} See id. at 1-2.
\textsuperscript{146} It was argued that the 17\textsuperscript{th} amendment left the U.S. Senate the least effective second chamber in maintaining federalism among federal countries, partly due to senators’ selection by popular vote. As Daniel J. Elazar commented, “[T]he United States Senate is one of the least effective federal chambers because its members are elected \textit{ad personam} and are not required to represent their states per se.” See \textbf{Daniel J. Elazar, supra} note 119, at 184.
\textsuperscript{147} See \textbf{Daniel J. Elazar, supra} note 119, at 184.
\end{flushright}
systems is that individual state governments in Germany participate directly, through the Bundesrat, in the operation of the Federation. Unlike the U.S. Senate, the members of the Bundesrat are elected neither by popular vote nor by the state parliaments. They are members of the Länder governments they represent, which may appoint and recall them freely. Further, Länder must cast their votes in a block. Moreover, although the Bundesrat’s legislative authority is subordinate to the Bundestag’s, the Bundesrat plays a vital role under the German constitution. The government must present all legislative initiatives to the Bundesrat first; only with its approval can a proposal be passed to the Bundestag. The Bundesrat has the right to initiate legislation and an absolute veto over both legislation that affects vital interests of the Länders and any constitutional changes.

Based on the nature of the Länder’s direct representation, the Bundesrat was labeled to be more, rather than less, federal. As Philip M. Blair explained,

> Whereas the “Senate Principle” envisages a Federal second chamber directly elected by the population of each constituent state, the ‘Bundesrat principle’ provides for a legislative body composed of members of the governments of the Länder. But it seems clear that such a system, even if it might be claimed to be less, or less directly,

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148 Grundgesetz für die Bundesrepublik Deutschland [federal constitution], art. 50. (“The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.”)
149 Id. art. 51, § 1.
150 Id., art. 51, § 3. (“Each Land may appoint as many members as it has votes. The votes of each Land may be cast only as a unit and only by Members present or their alternates.”)
151 “Because the Bundesrat is so much smaller than the Bundestag, it does not require the extensive organizational structure of the lower house. The Bundesrat typically schedules plenary sessions once a month for the purpose of voting on legislation prepared in committee. In comparison, the Bundestag conducts about fifty plenary sessions a year.” See Bundesrat of Germany, http://www.germanculture.com.ua/library/facts/bl_bundesrat.htm (last visited July 11, 2009).
152 Grundgesetz für die Bundesrepublik Deutschland [federal constitution], art. 76 (2). (“Federal Government bills shall first be submitted to the Bundesrat.”)
democratic, is in reality not less federal in character but more so.\textsuperscript{154}

3: THE COURT ROLE AS AN ARBITER

The court’s role as an arbiter is another basic federal characteristic that does not necessarily exist in a unitary state. In a federal system the national government always has supreme authority in certain areas, and the constituent parts retain certain supreme authority in others. As determined by legally shared sovereignty, and in connection with the specific division of powers under a given constitution, a third party arbiter (i.e.: an independent court system) necessarily acts as an umpire when disputes occur between the two layers of government. The courts thus play a vital and essential role in the operation of federalism. Historically, there have been federal countries lacking a judicial arbiter role,\textsuperscript{155} such as Switzerland, where the court system does not review the constitutionality of federal legislations. Democracy plays a vital role in the Swiss arrangement (as further explored below in “4.2. (4): Court Arbiter Role in Main Federal Countries’”). Generally speaking, however, without an arbiter a federal system cannot run smoothly or successfully.

3.1: THE FEDERAL ARRANGEMENT ENTAILS A COURT ARBITER ROLE

The shared sovereignty nature of federalism and its power division characteristic give rise to potential jurisdictional conflicts. Problems arise because “[i]n any federal system, a number of different governments operate on the same land mass. This can be very dangerous, as each has a certain amount of overlapping power to tax, spend money,

\textsuperscript{154}See Philip M. Blair, supra note 18, at 6.
\textsuperscript{155}As Robert Dahl noted, “judicial review does not necessarily have to be universal.” (See Robert A. Dahl, Democracy and Its Critics 189 (New Haven: Yale University Press 1989).
convict criminals, and perform other essential functions."\textsuperscript{156} These potential conflicts naturally demand an arbiter.

An impartial body, independent of both national and constituent governments, to demarcate the divided spheres of powers and resolve any disputes, is essential for a federal system.\textsuperscript{157} In another word, every federal system requires an institution or mechanism to referee conflicts of authority between the national government and constituent states.\textsuperscript{158} Within most modern federal states, such as the United States, Australia, Canada, and Germany, such authority has been entrusted to a judicial body.\textsuperscript{159}

The courts have played a key arbitration role in the continual power division disputes throughout American history.\textsuperscript{160} The American Supreme Court is determinative on such questions, and it serves as "a prototype for application of the judicial arbiter principle" in many other federal countries.\textsuperscript{161} Indeed, the Framers originally intended to establish the Supreme Court as a final court of appeal and as the arbiter of the division of powers. On January 7\textsuperscript{th}, 1788, at the Connecticut Ratifying Convention, Oliver Ellsworth argued that:

This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the united states go beyond their power, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. In the other hand, if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void; and upright independent judges will

\textsuperscript{156} See John B. Attanasio, \textit{supra} note 36, at 123.
\textsuperscript{157} See K.C. Wheare, \textit{supra} note 93, at 66.
\textsuperscript{158} See John R. Schmidhauser, \textit{The Supreme Court as Final Arbiter in Federal-State Relations 1789-1957} 1 (The University of North Carolina Press 1958).
\textsuperscript{159} See Table 1.2: Court Role as Arbiter in Main Federal Countries.
\textsuperscript{160} See John B. Attanasio, \textit{supra} note 36, at 129-130.
\textsuperscript{161} The Supreme Court of the United States, "in many respects served as a prototype for application of the judicial arbiter principle in the federal systems of Australia, Canada, and West Germany. Within the United States itself, the influence of Supreme Court decisions upon the American federal system is generally recognized as determinative." See John R. Schmidhauser, \textit{supra} note 158, at 1.
declare it to be so.\textsuperscript{162}

The courts’ arbiter role is so crucial to American federalism that in the past even a slight hesitation or intention to refrain from resolving federalism-related disputes on the part of the Court has led to severe academic responses. The reaction among academics to \textit{Garcia v. San Antonio Metropolitan Transit Authority}, 469 U.S. 528 (1985), reflects the deep sensitivity. \textit{Garcia} holds that Congress has the power under the Commerce Clause to extend the Fair Labor Standards Act, which requires employers to provide minimum wage and overtime pay to their employees, to state and local governments.\textsuperscript{163} It overruled a previous Supreme Court decision, \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976), which held that such regulation of activities of state and local governments “in areas of traditional governmental functions” would violate the Tenth Amendment.\textsuperscript{164} The two cases were decided only nine years apart but give sharply opposed answers.\textsuperscript{165} The majority opinion reasoned in \textit{Garcia},

\begin{quote}
Our examination of this ‘function’ standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism. . . . It is for Congress, not the Court, to measure the scope of the commerce power and the countervailing weight of the tenth amendment.\textsuperscript{166}
\end{quote}

Some scholars felt the \textit{Garcia} Court “had announced that it would no longer exercise judicial review to police the boundaries between the federal and state governments.”\textsuperscript{167}

\textsuperscript{162} \textsc{The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787} (Elliot, Jonathan, ed., 5 vols. 2d ed.. Reprint. New York: Burt Franklin, n.d. 1888).
\textsuperscript{163} 469 U.S. 528, 528 (1985).
\textsuperscript{164} 426 U.S. 833, 852 (1976).
\textsuperscript{165} \textit{See} Norman Redlich, John Attanasio & Joel K. Goldstein, \textit{supra} note 82, at 67.
\textsuperscript{166} 469 U.S. 528, 531 (1985).
Others proclaimed the death and end of federalism. However, the Court’s post-Garcia opinions (including *New York v. United States*, *United States v. Lopez*, *Seminole Tribe of Florida v. Florida*, *City of Boerne v. Flores*, and *Printz v. United States*) renewed the confidence of scholars, as the Court actively tried to draw a line between the national government’s power and the states’ authority. One observer proclaimed that “[f]ederalism is back, with a vengeance.”

Garcia’s dissent confirmed the Court’s own understanding of its critical role in American federalism. Justice Powell wrote: “Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.” He noted, “it does not seem to have occurred to the Court that it -- an unelected majority of five Justices--today rejects almost 200 years of the understanding of the constitutional status of federalism.” He further wrote, “[f]ar from being ‘unsound in principle,’

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168 See William W. Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985). (“The Supreme Court seems to have declared that judicial enforcement of the constitutional position on federalism is at an end.”)
174 See John C. Yoo, supra note 167, at 27. In 2005, the United States Supreme Court seemed to return to a stance favoring the federal government cases regarding Congress’ legislative powers. *Gonzales v. Raich*, 545 U.S. 1 (2005), involved the Compassionate Use Act passed by California voters in 1996 legalizing marijuana for medical use. California’s law conflicted with the federal Controlled Substances Act (CSA), which banned marijuana possession. In a 6-3 opinion delivered by Justice Stevens, the Court held that the commerce clause gave Congress authority to prohibit the local cultivation and use of marijuana, despite contrary state law. (545 U.S. 1 (2005)). Dissenting, Justice Thomas wrote, “[i]f the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison’s assurance to the people of New York that the ‘powers delegated’ to the Federal Government are ‘few and defined’, while those of the States are ‘numerous and indefinite’” 545 U.S. 1, 67 (2005) (Thomas, J. dissenting). *Granholm v. Heald* 544 U.S. 460 (2005), involved Michigan and New York laws allowing in-state wineries to directly ship alcohol to consumers but barring out-of-state wineries from doing so. In a 5-4 opinion delivered by Justice Kennedy, the Court held that both states’ laws violated the commerce clause by favoring in-state wineries at the expense of out-of-state wineries. (544 U.S. 460 (2005)).
175 Chief Justice Rehnquist and Justice O’Connor joined Justice Powell’s dissent.
177 *Id.*
judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution.”

3.2: THE REASONING BEHIND THE COURT ROLE AS AN ARBITER UNDER FEDERALISM

3.2. (1): Federalism as Legalism and the Court Arbiter Role

Federalism as legalism contributes partly to the court role as an arbiter. Richard Funston observed, “[f]ederalism implies a need for legalism, some agency must determine where the powers of one jurisdiction end and those of another begin.” The bench thus should have the authority to decide the limits of powers and be the guardian of the constitution.

As noted earlier, many scholars consider a written constitution an essential element of federalism. Provided the constitution is being treated as a legal document, judicial review or guardianship of the constitution is naturally demanded to ensure the integrity of such a document. For a federal constitution, which establishes the division of powers between national and state governments, a certain degree of authority becomes necessary to solve the disputes between the two; this authority “must necessarily be judicial if the provisions of the Constitution which effect the division of powers between the federation and the units of the federation are to constitute legal limitations upon the respective parties to the federation.”

178 Id. at 570 (1985) (emphasis added).
180 See A.V. DICEY, supra note 7, at 100.
181 See DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 481-482 (Prentice-Hall of India Private Limited, New Delhi 1984).
182 Id. at 482-483 (emphasis added).
3.2. (2): American Legal Culture and the Court Arbiter Role under Federalism

American legal culture has a special connection to the formation of modern federalism. According to Dicey,

[t]hat a federal system again can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation.183

In the American system, “[s]carcely any political question arises . . . that is not resolved, sooner or later, into a judicial question.”184 That laws, not men, should govern is the fundamental principle of American constitutional jurisprudence.185 With a higher law tradition that presupposes a final arbiter,186 America also has a culture of reverence for the law, and this makes a judicial arbiter role quite natural. Richard Funston wrote:

Americans have shown a traditional, peculiar, and largely irrational reverence for the legal profession. They particularly venerate judges, who seem to represent the ultimate achievers in that profession. Almost a century and a half ago, that sharp-eyed critic of American manners, Alexis de Tocqueville, noted that Americans had an “aristocracy of the bar” and a “cult of the robe,” and neither of these customs appears to have diminished over time.187

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183 See A.V. DICEY, supra note 7, at 103.
184 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 123 (translated and annotated by Stephen D. Grant, Hackett Publishing Company, Inc. Indianapolis/Cambridge, 2000); also available in public domain at http://xroads.virginia.edu/~Hyper/DETOC/1_ch16.htm (last visited May 20, 2010). Elazar echoed this sentiment when he wrote, “[i]t has been said that in the American system, every political question eventually becomes a judicial one. Constitutional courts, then, are permanent institutions in many federal systems, serving as devices for maintaining both union and noncentralization.” See DANIEL J. ELAZAR, supra note 119, at 183.
185 See DURGA DAS BASU, supra note 181, at 483.
186 See RICHARD FUNSTON, supra note 179, at 13.
187 Id.
It is thus unsurprising for Chief Justice Marshall to have declared in *Marbury v. Madison*, 188 “It is emphatically the province and duty of the judicial department to say what the law is.” 189 Judicial review is the cornerstone of American legal system and the basis for the Supreme Court’s federal arbiter role, as confirmed in *Hammer v. Dagenhart*. 190 “This Court has no more important function than . . . the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.” 191

3.2. (3): The Least Dangerous Branch

Some classical writers regarded the judiciary as “the least dangerous” branch; this constitutes part of the reason choosing it as arbiter. Alexander Hamilton argued:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for efficacy fits judgments. 192

The least dangerous branch rationale and the arbiter role also find support from

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189 *Id.* at 177.
191 *Id.* at 275.
192 THE FEDERALIST No. 78 (Alexander Hamilton).
the assumption that judges follow the law, and law only. The Court therefore
becomes a rational and less harmful choice for people to adjudicate disputes
between national and state governments regarding the division of powers. There
are some arguments against employing judicial review, especially from a pro-
democracy point of view. Sometimes by only a bare majority of one, unelected
judges can thwart the will of the people as embodied by laws passed out of the
elected legislature. However, this can be seen as a necessary lesser evil. As
Steven Anzovin and Janet Podell have argued, “[m]uch of this criticism is sound.
There is a great deal of inconvenience in the operation of the system of judicial
review in the United States, Canada and Australia. In my opinion, however, no
alternative scheme with less inconvenience seems possible, consistently with
maintaining the federal principle.”

3.2. (4): Court Arbiter Role in Main Federal Countries

Obviously, most federal countries have chosen a court to serve as the arbiter.

Although under a common law system, a local or lower court also has jurisdiction to
adjudicate the disputes related to federalism, almost always, the final umpire authority is

193 In Osborne v. Bank, Chief Justice Marshall elaborated on his view of the relationship between judges
and the law. “Judicial Power, as contradistinguished from the power of the laws, has no existence. Courts
are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is
a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when
that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of
giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature;
or, in other words, to the will of the law.” See Osborne v. Bank, 22 U.S. 738, 866 (1824).
194 According to Jeremy Waldron, for example, “judicial review of legislation is inappropriate as a mode of
final decisionmaking.” See Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale, L.J.
1346, 1348 (2006).
195 In the case of the U.S. Supreme Court, only a simple majority is required to reach a decision and many
controversial cases, such as Stenberg v. Carhart 530 U.S. 914 (2000) (on abortion), Vieth v. Jubelirer 541
U.S. 267 (2004) (on gerrymandering), have been decided by a 5-4 vote.
196 See K.C. Wheare, supra note 93, at 67.
located in a supreme or constitutional court. Table 2 illustrates the court arbiter role in some main federal countries.

Table 2: Court Role as Arbiter in Main Federal Countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Name of the Court</th>
<th>Status and Authority of the Court</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>The United States</td>
<td>The Supreme Court</td>
<td>Final appeal court in both the federal and state court systems.</td>
<td>“The most prominent of the great constitutional courts. Its influence on the shape of American federalism had been decisive.”197</td>
</tr>
<tr>
<td>Canada</td>
<td>Canadian Supreme Court (previously the British Privy Council)</td>
<td>Final appeal court</td>
<td>“The Judiciary assumed the power to enforce limitations to the powers of both the Dominion and Provincial Legislatures, applying the general principle of ultra vires.”198</td>
</tr>
<tr>
<td>Germany</td>
<td>Federal Constitutional Court</td>
<td>Determine constitutionality of laws.</td>
<td>A separate constitutional court is an important model of the court arbiter role.</td>
</tr>
<tr>
<td>Australia</td>
<td>Australian Supreme Court</td>
<td>Final appeal court in both the federal and state court systems.</td>
<td>“[H]as been instrumental in shaping Australian federalism.”199</td>
</tr>
<tr>
<td>Switzerland</td>
<td>The Federal Supreme Court of Switzerland</td>
<td>The Supreme Court of Switzerland. The Constitution generally precludes the court from reviewing acts of the Federal Parliament.200</td>
<td>The only federal system not to place great emphasis on an arbiter role for the supreme or constitutional courts.</td>
</tr>
<tr>
<td>Russia</td>
<td>Constitution Court of the Russian</td>
<td>A high court that is empowered to rule on</td>
<td>The Constitution Court serves as arbiter</td>
</tr>
</tbody>
</table>

197 See Daniel J. Elazar, supra note 119, at 183.
198 See Durga Das Basu, supra note 181, at 489.
199 See Daniel J. Elazar, supra note 119, at 183.
200 Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution], April 8, 1999, SR 101, art. 190, (Switz.). (“The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law.”)

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Federation whether or not certain laws or presidential decrees are contrary to the Constitution of Russia. The Court resolves disputes on jurisdiction matters: (a) between the federal bodies of state authority; (b) between the bodies of state authority of the Russian Federation and the bodies of state authority of the subjects of the Russian Federation; (c) between the higher bodies of state authority of the subjects of the Russian Federation.

| 201 Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art.125, § 3. |
| 202 Id. art. 126. |

Table 2 allows the inference that almost all federal countries make their Supreme Courts or constitutional courts the final arbiter of federal disputes, and their decisions are determinative to the development of each country’s federal system. It is worth noting that Switzerland provides the only variation and partial exception to the courts’ role as constitutional guardians under federalism. However, the Swiss system does not contradict this general principle. The Federal Supreme Court can still invalidate the cantons’ legislations. According to the Swiss Constitution, the people themselves may determine the validity of federal laws by vote. If demanded by 30,000 voters or eight cantons, a federal law must be submitted to a popular vote to determine whether it shall
As a result, “the Swiss Supreme Court has no power of judicial review against acts of the federal executive or legislature on the ground of the unconstitutionality [of legislation].”\textsuperscript{205} The emphasis on direct democracy through referendum offers a good reason for this special arrangement, which cannot be easily found elsewhere.\textsuperscript{206} In Switzerland, “the referendum has taken the place of litigation in dealing with most federal questions.”\textsuperscript{207}

3.3: Other Inter-mediate Adjusting Mechanisms under Federalism

Besides the court’s role as arbiter under federalism, there often exist certain other legislative or executive intermediating mechanisms or legal arrangements to promote smooth operation of government and solve division of power disputes. These include executive intergovernmental organizations, such as the First Minister Conferences in Canada,\textsuperscript{208} and certain legal mechanisms (e.g.: the dormant commerce clause and the preemption principle under the U.S. Constitution).\textsuperscript{209} Under the dormant commerce clause, the U.S. Congress, by action or inaction on a subject of commerce can either retain or cede power over that subject to the states, adjusting the delicate, living relationship between federal and state authorities. As noted by Professor Attanasio, “Theoretically, Congress could preempt the overwhelming scope of state authority if it

\textsuperscript{204} Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution], April 8, 1999, SR 101, art. 89, (Switz.).
\textsuperscript{205} See DURGA DAS BASU, supra note 181, at 489.
\textsuperscript{206} See Gustavo Femandes de Andrade, supra note 203, n. 6. (“This view reflects Switzerland's democratic tradition and its skepticism towards the judiciary and the rule of law concept, as it is expressed in the famous reasoning of Marbury v. Madison.”)
\textsuperscript{207} See DANIEL J. ELAZAR, supra note 119, at 183.
\textsuperscript{208} This is a meeting between the Prime Minister of Canada and provincial Premiers. Although it has no reference in the Canada Constitution and is not mandatory, the mechanism provides for a forum between the federal and provincials governments to consult on issues with impact on both federal and provincial governances. See The Patriation of the Constitution, http://www.histori.ca/peace/page.do?pageID=258#glossary11 (last visited on September 10, 2010).
\textsuperscript{209} U.S. CONST. art. I, § 8.
chose, but this option would not be feasible; therefore, the states are left many powers simply by default, \textit{viz}, by the failure of the federal government to step into a field of regulation.”

American case law’s intergovernmental immunity doctrine also serves as the federal and state self-refraining or court enforced legal adjustment mechanism in the operation of modern federalism. In \textit{McCulloch v. Maryland}, Chief Justice John Marshall and his fellows ruled that “[t]he States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government.” According to the Court, “the power to tax involves the power to destroy,” and therefore, “state power to tax federal agencies would confer the power to nullify federal operations.” This principle has been frequently invoked by the U.S. Supreme Court in taxation cases. In \textit{Davis v. Michigan Department of Treasury}, for example, the Court concludes that “the Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees.”

\textbf{CONCLUSION}

The essence of a state is sovereignty; the allocation of sovereignty within a state thus determines its nature. Because of the inconsistency between legal sovereignty and

\begin{footnotes}
\item See John B. Attanasio, \textit{supra} note 36, at 130.
\item 17 U.S. (4 Wheat.) 316, 316 (1819).
\item \textit{Id.} at 431.
\item See NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLSTEIN, \textit{supra} note 82, at 55.
\item 489 U.S. 803 (1989).
\item \textit{Id.} at 817.
\end{footnotes}
political sovereignty, to study federalism from a legal point of view requires determining where legal sovereignty resides. The traditional sovereignty atom was split in accommodation of the dramatic theoretical and political revolution early in America’s history; the theory of popular sovereignty largely contributed to the transformation. In contrast to legally sole sovereignty system employed by the English, the modern American federal system is built around legally shared sovereignty; American case law clearly recognizes the distinction when deciding cases dealing with division of powers.

The essence of legally shared sovereignty mandates a specific division of powers by constitution between the national government and constituent parts. While general principles controlling the division of powers within a federal system exist, the details of power division vary among federal countries. Further, a written, rigid constitution forms the basis of the federal division of powers. It cannot be changed unilaterally and the constituent states play a vital and necessary role in the amending process. As a symbol of the states’ existence in the national government, an upper (senatorial) chamber is usually included as an important mechanism for the states’ participation in preserving the federal structure.

Under a federal system, the disputes between the national government and the constituent states are inevitable. A court as an arbiter plays a vital and essential role in the operation of federalism. The shared sovereignty nature and the division of powers demand an independent arbiter. Federalism as legalism and the court’s “the least dangerous branch” rationale make a court’s arbiter role a default choice.

Legally shared sovereignty, specific division of powers under a constitution, and the court’s arbiter role are the three essential characteristics of federalism. Legally shared
sovereignty, the core characteristic, determines the nature of the entire system. The other two basic characteristics derive from and reflect the core characteristic. By contrast, unitary systems cannot support any form of legally shared sovereignty. Legally sole sovereignty, which is irrelevant to federal systems, is the core determinative characteristic of unitary states.

The determinative factor between federal and unitary systems is the core characteristic, namely the pattern of legal sovereignty allocation. There exists no clear-cut demarcation between federal and unitary systems with respect to either division of powers or the existence of the court as an arbiter, as shown in the following figure.

Figure 2: Characteristic Analysis of Federal and Unitary Systems
Within the figure, the two systems are not divided in the middle of the line, but divided by their core characteristics, as indicated. Although the two systems can be differentiated in nature, as the overlap shows, they do not exclude each other on the basic characteristics.