REVIEW ARTICLE: THE FORMS AND LIMITS OF FEDERALISM DOCTRINE

Hoi Kong*

Professor Gerald Baier's *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada*[1] is an ambitious and original work that engages debates about the relationship between law and politics and about the possibility and utility of comparative federalism. In entering these debates, Baier summarizes doctrinal developments in, and academic writing on, American, Australian, and Canadian federalism and he puts forward two central arguments. First, he argues that doctrine is a variable in judicial decision making that is independent of political preferences, that this variable distinguishes judicial from political reasoning, and that it renders legal reasoning normatively desirable but that it is an error to believe any particular doctrine can be the object of normative evaluation. Second, he argues that courts in different countries should strive for balance when interpreting federalism provisions and he assumes that such crossjurisdictional prescriptions are possible and desirable.

In this review article, I argue that Baier's specific arguments about the purposes and forms of federalism doctrine are flawed, as are his general justifications for federalism doctrine and his descriptive and prescriptive comparative law claims. In Part I of this article, I argue that Baier does not answer legal realism's strongest arguments about the political purposes of doctrine

* Assistant Professor of Law, Cross-appointed with the School of Urban and Regional Planning, Queen's University, Kingston, Ontario. Previous versions of this article were presented at a Law and Politics workshop at Queen's University in 2007, at the 2007 Canadian Law and Society Conference in Saskatoon, and at the 2008 McGill-Queen's Junior Scholar's Conference in Montreal. I am grateful for the generous comments of participants at those events; the comments of Cherie Metcalf, Dwight Newman, Malcolm Thorburn, and Mark Walters were particularly helpful. I thank Benjamin Berger and Robert Leckey for providing perceptive written comments on a previous draft and Taylor Ransom for his excellent research assistance. All errors are my own.

1 (Vancouver: U.B.C. Press, 2006).

and that his arguments in favour of a particular form of doctrinal rule are unresponsive to well-established critiques. In Part I, I also argue that Baier's general attempt to justify the practice of doctrine does not succeed because his argument against the possibility of normatively assessing particular federalism doctrines and decisions is self-defeating. In Part II, I argue that Baier does not provide a convincing account of the relationship between federalism doctrine and the on-the-ground operation of federalism and he is insufficiently precise when he makes normative claims that apply to a variety of jurisdictions.

But the purpose of this review article is not merely to critique Baier's work. It is, rather, to build a constructive account out of the lessons that can be drawn from his valuable and, indeed, groundbreaking text. In Part III, I argue that in bringing the tools of political science to bear on federalism doctrine, Baier has pointed us towards promising avenues of research on comparative federalism. Scholarship that carefully attends to normative and institutional design principles, as well as the social, political, economic, and legal conditions of a given jurisdiction, can facilitate reasoned debate and decision making about federalism, and can provide opportunities for meaningful crossjurisdictional comparisons and borrowing.

I. LAW, POLITICS, AND JUDGING

Baier argues against those legal academics and political scientists whom he describes as claiming that judicial decision making exclusively involves the expression of pre-existing policy preferences.[2] He places himself within the new institutionalist school of political science, whose adherents argue that

2 Baier *supra* note 1 at 3-5. There are several kinds of preferences that can come into play in federalism cases. Most narrowly, a judge might have a preference with respect to the outcome of a particular dispute but her preferences may not be grounded in a larger set of preferences. She might simply favour the federal or provincial government's position in a particular case. Alternatively, a judge in a federalism dispute might have preferences that are defined more broadly. She might have a preference with respect to an interpretive methodology. She might, for instance, be an originalist or textualist and resolve all federalism cases in light of that methodology. Alternatively, a judge might prefer a particular political ideology and will seek to resolve all federalism disputes in ways that advance that ideology. She might, for instance, be a staunch libertarian and therefore decide all federalism cases with the aim of reducing the amount of governmental regulation in a federation. Finally, a judge might have preferences with respect to how a federation is configured. For instance, she might prefer that regulatory power in a given federation (or in federations generally) reside primarily at the federal level. She might, as a result, craft doctrinal rules or decide particular cases in ways that seek to achieve this result. For the claim that there are a variety of preferences, see Richard A. Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at chapter 1. I take Baier to be using the idea of a preference to express any one of these kinds of preferences.

decision making, and in particular judicial decision making, is shaped and constrained by institutional norms.[3] Baier claims that the norms of judicial reasoning limit judges' ability to express their preferences through their judgments. Before I critically engage his text, I will highlight what I believe to be his most significant contribution.

Judicial Interpretation and the Value of Legality

Baier has bridged explanatory and normative literatures on judicial review. In addition to the above explanatory account of courts' decision-making processes, he offers a normative defence of such decision making. He claims that judicial reasoning about federalism safeguards the value of legality.[4] Reason-giving has particular significance in this account of legality. A panel of judges that decided every case by flipping coins would be unresponsive to political pressures but would in no sense be protecting the value of legality. For judicial decisions to safeguard this value, judicial reasoning must have particular features. Baier identifies these features when he argues that judicial reasoning ensures a degree of consistency in the development of federalism policy that would not exist if the political branches alone determined the content of that policy. Moreover, he argues that doctrinal reasoning safeguards constitutional interests that would be compromised if relations among the orders of government were left to the political branches.[5] His claims are significant and in what follows, I will offer a tentative argument that fleshes them out.

Professor Ronald Dworkin in *Law's Empire* famously argues that consti-tutional interpretation entails the requirements of "fit" and "justification." In hard cases, he says, courts should aim to interpret existing constitutional materials in the best possible political or moral light, keeping in view the purposes of those materials.[6] Such a process of interpretation contributes to a "genuine political community" in which "people are governed by common

3 Baier, *supra* note 1 at 25-28. According to Baier, "The discipline of thinking required to make a legal argument and to render a legal decision is a critical degree removed from plain political decision making." *Ibid.* at 28. See generally, Cornell W. Clayton & Howard Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999). The debate about the role of preferences in judicial decision making is a live one in Canadian writing on federalism. For an overview see, Donna Greschner, "The Supreme Court, Federalism, and Metaphors of Moderation" (2000) 79 Canadian Bar Rev. 47.

4 Baier, *supra* note 1 at 28.

5 This is how I interpret his claim that "The continuity of law is a staple of federalism, not because the law in itself is good, but because the rule of law protects elements of the federal system that would otherwise quickly be lost to regularizing pressures . . . Doctrine is what helps the law stay consistent without losing its formality, without descending into politics itself." *Ibid.*

6 Ronald Dworkin, *Law's Empire* (Cambridge Mass.: Belknap Press, 1986) at 90 and chapter 6 generally.

principles, not just by rules hammered out in political compromise."[7] On this account of constitutional interpretation, citizens are participants in a society-wide process of responsive reason-giving and are part of a community characterized by the mutual regard of its members.[8] In *Justice in Robes*, Dworkin frames these claims in terms of legality. He argues that legality requires that "governments govern under a set of principles applicable in principle to all"[9] and notes that the process of identifying what these principles require in particular cases involves publicly defending and articulating conceptions of these principles.[10] I understand Dworkin to be arguing that government action is grounded in legality when a constitutional concern for government by common principles is instantiated in the *substance* of constitutional law and the *process* of articulating to citizens the reasons for judicial decisions.

I suggest that this account of legality, or something like it, enables Baier to bring together his explanatory and normative projects. In the federalism context, he might argue, generally applicable legal principles, and not particular pragmatic compromises or mere convergences of political preferences, should govern the relationship between the orders of government in a federation.[11] The value that he ascribes to consistency can also be understood in light

7 *Ibid.* at 211.

8 For the role of principled reason giving in constituting such a community, see *ibid.* at 189-90, 211-15. For the characteristics of a "true community" see *ibid* at 199-201.

9 Ronald Dworkin, *Justice in Robes* (Cambridge Mass.: Belknap Press, 2006) at 176. Professor Frederick Schauer has noted that because of the generality of reasons, the act of reason-giving implies a commitment to making future decisions that fall within the scope of those reasons' application. Frederick Schauer, "Giving Reasons" (1995) 47 Stanford Law Rev. 633 at 644. This feature of reason-giving sees intrinsic value in consistency and further restricts the capacity of those who participate in a reason-giving enterprise to act in self-serving ways. *Ibid.* at 653. These qualities of reason-giving are consistent with Dworkin's statement of the requirements of legality and Baier's claims about the value of consistency in doctrinal reasoning.

10 Dworkin writes: "Arguing and deciding about these concrete requirements (of legality) in a particular community is the quotidian work of that community's practicing lawyers, at one level, and of its academic lawyers at another." *Ibid.* at 184. I also understand the very nature of Dworkinian judicial interpretation to be characterized by reason giving. See Dworkin, *Law's Empire, supra* note 6 at 226. Professor Matthew Adler has recently argued that Dworkin is a kind of popular constitutionalist. He writes: "Dworkin's recognitional community presumably must be the collectivity of all citizens, not merely lawyers, judges, legislators, or officials, for otherwise it is very hard to see how 'a general commitment to integrity,' as such, 'expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations.'" Matthew D. Adler, "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?" (2006) 100 Northwestern Univ. Law Rev. 719 at 741.

11 Dworkin makes this point about federalism in *Law's Empire, supra* note 6 at 186. Baier expressly argues against the idea of principled reason giving. Baier, *supra* note 1 at 163. Nonetheless, I note that the *generality* of legal principles is a key value of legality and that Baier seems to appeal to this value when he argues that "[d]octrine provides judges with the analytical tools to approach federal problems in a legal manner," even as he disavows the significance of "particular prin-

of Dworkin's arguments about legality. Baier can be understood to be arguing that because judicial reasoning about federalism principles involves articulating public reasons that are responsive to previous courts, and are public and available to citizens,[12] it instantiates the norms of "a genuine political community" and as such satisfies the demands of legality.[13]

Having set out what I understand to be Baier's significant contribution to the law and politics literature, I turn now to a critical engagement with his text. In what follows, I argue that Baier does not respond to the most serious arguments about unfettered judicial discretion in cases of federalism review, and that while he advocates for greater use of balancing tests, he does not respond to well-known critiques of such tests. These critiques, I argue, pose difficulties for his understanding of the function of federalism review and the scope of judicial discretion.

Legal Realism and Hard Cases

Courts and Federalism makes the descriptive claim that in cases of federalism review, doctrine acts as a variable in judicial decision making that is independent of political preferences, and the book traces how various federalism doctrines have developed over time. Baier argues that because judges decide cases in accordance with legal conventions, they arrive at outcomes that are different from those at which they would arrive absent those conventions. He buttresses this conclusion with an appeal to Professor Emeritus Peter Hogg's

ciples." *Ibid.*

12 This process of reason giving exhibits features of a Rawlsian *duty of civility*. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 217: "[S]ince the exercise of political power must be legitimate, the ideal of citizenship imposes a moral, and not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."

13 This interpretation of legality excludes an interpretation of Baier's text in which consistency and the safeguarding of vulnerable interests are sufficient to support the claim that judicial reasoning safeguards the value of legality. I concede that the above-cited passage (*supra* note 5) avails itself of this reading, but such a reading must be mistaken. Baier suggests that provincial or state interests are particularly vulnerable in federations and require judicial intervention to be vindicated ("Economic logic and universalizing social forces can make quick work of federal diversity," Baier, *supra* note 1 at 28); ("The result of *New York* was to rescue some status for the states," *ibid.* at 75); ("Redressing the federal imbalance, particularly as states continue to demonstrate their relevance to the political life of Australians, has become something of a challenge for the court," *ibid.* at 120). A rule that stated, without justification, that "states or provinces shall win in all federalism disputes" would ensure consistent outcomes and safeguard the vulnerable constitutional interest that Baier has identified, but such a rule does not constitute reason-giving in a way that has obvious implications for legality. It may be that Baier has in mind a version of legality whose requirements such reasons would satisfy, but I am not able to identify that version in the text.

claim that although judicial decisions may have political consequences, this does not mean that the decisions themselves are politically motivated.[14]

Baier's argument and Hogg's claim play off an ambiguity in the notion of legal indeterminacy that Professor Brian Leiter has recently identified.[15] Legal indeterminacy can be understood to manifest at the level of a generalized skepticism about the capacity of rules to constrain decision making, or at the level of particular hard cases. Writers who argue that law is indeterminate sometimes claim that legal rules do not constrain decision making at all.[16] Leiter notes that H.L.A. Hart's criticism of this rule-skepticism has been decisive and he further argues that American legal realists did not typically espouse it. According to Leiter, American legal realists typically argued that law underdetermines a set of outcomes and that optimistic claims about "judicial science" could not account for the outcomes of these hard cases.[17] Baier argues against rule-skepticism when he claims that judicial recourse to legal conventions and judicial immersion in legal professional culture distinguishes judicial reasoning from decision making that simply satisfies political preferences.[18] But this argument does not respond to claims by Canadian legal realists such as Professors Paul Weiler and Patrick Monahan, whose arguments Baier specifically claims to refute, that in some cases, legal conventions do not rule out opposite outcomes. These Canadian legal realists, like their American counterparts, argue that when law underdetermines outcomes, political preferences drive judicial decision making.

Weiler has famously supported his claim that judicial doctrine is indeterminate by arguing that the *Carnation Co. Ltd. Milk v. Quebec Agricultural Marketing Board*[19] and *A.G. Manitoba v. Manitoba Egg and Poultry Association*[20] are inconsistent, and Monahan has similarly argued, through an exhaustive analysis of tensions in federalism doctrine, that political commitments motivate judicial decision making in federalism disputes.[21] More generally, legal

14 Baier, *supra* note 1 at 28.

15 Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007) at 9-12.

16 Brian Langille and Allan Hutchinson have debated this strong meaning of legal indeterminacy. See Brian Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill Law J. 451, and Allan C. Hutchinson, "That's Just the Way It Is: Langille on Law" (1989) 34 McGill Law J. 145.

17 Leiter, *supra* note 15 at 19-20, 64.

18 Baier, *supra* note 1 at 28, 162.

19 [1968] S.C.R. 238.

20 [1971] S.C.R. 689.

21 Paul Weiler, "The Supreme Court of Canada and Canadian Federalism" in J.S. Ziegel, ed., *Law and Social Change* (Scarborough, ON: Carswell, 1973) 39 at 46, 57-58; and Patrick J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 Univ. Toronto Law

realists have argued that in a wide range of areas of substantive law, open-ended judicial doctrines do not rule out opposing outcomes.[22] As Leiter has noted, such arguments do not deny the existence or significance of legal conventions. Indeed, they rest on a positivist account of law.[23] Instead, at their most convincing, legal realists like Weiler and Monahan argue that in some set of cases, it is false to claim that the internal logic of law, rather than the policy preferences of judges, determines how cases are decided.[24]

In the end, one might accept Baier's claim that in a wide range of cases,

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J. 47 at 96. Professor Wayne MacKay labels his own position, as well as that of Weiler and Monahan, "neo-realism." A. Wayne MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001) 80 Canadian Bar Rev. 241 at 259.

22 See *e.g.*, Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 88 Harvard Law Rev. 1685; and Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes are to be Construed" (1950) 3 Vanderbilt Law Rev. 395.

23 Leiter, *supra* note 15 at 72. Professor Rod Macdonald has similarly argued that legal realism rests on the same assumptions about the nature of law as legal positivism. Roderick A. Macdonald, "Here, There ... and Everywhere–Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden," in Nicholas Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain – Études offertes à Jacques Vanderlinden* (Montreal: Éditions Yvon Blais, 2006) 381. It is worth noting that Baier's usage of "positivism" is idiosyncratic. He writes: "Doctrine, in [the] positivist way of thinking, enables 'fair and impartial' differentiation between constitutional and unconstitutional laws. In other words, doctrine not only structures the options for resolution of legal disputes but also holds within it the objective and value-free (or non-political) protection of constitutional values — a.k.a. the 'right' answer." Baier, *supra* note 1 at 14-15; and again: "Positivists advocate the law as something universal in its truths." *Ibid.* at 160.

The "right answer" thesis has been advanced by the most famous contemporary antipositivist and rejected by a range of positivists. For a statement of the thesis, see Ronald M. Dworkin, "Is There Really No Right Answer in Hard Cases" in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) 119. There is a sophisticated literature on the separation thesis, to which Baier seems to allude, but that literature does not obviously resemble his rendering of positivism. For an exclusive legal positivist argument on this point, see Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 46; for an inclusive legal positivist argument, see Jules Coleman, *The Practice of Principle* (New York: Oxford University Press, 2001) at 108, 116-19.

24 At certain points in his argument, Baier seems to accept this version of legal realism. He writes: "Doctrine narrows the compass of political or policy decision." Baier, *supra* note 1 at 163. He also claims that "judges have predispositions, but that does not mean that we ought to conflate doctrine with political discourse. Predispositions are one variable, doctrine another." *Ibid.* at 26. Taken together, these claims come close to the legal realist position described in the main text: law underdetermines outcomes and when it does so, political preferences play a decisive role in judicial decision making.

There is recent empirical support for this claim. Studies have shown that judicial political preferences enter into decision making where arguments about the "fit" of a case with precedent are inconclusive. See Stefanie A. Lindquist & Frank B. Cross, "Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent" (2005) 80 New York Univ. Law Rev. 1150. A recent empirical study in Canada has found that in a limited set of cases, political preferences significantly influence decision making on the Ontario Court of Appeal: James Stribopolous & Moin Yahya, "Does A Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall Law J. 315.

judging is different from political reasoning. Accepting this claim does not preclude one from arguing that in some set of cases legal conventions can be pressed into the service of opposing outcomes and that judges' political predispositions account for why a court chooses one outcome over another. *The Courts and Federalism* would have been more convincing if it had disproved specific realist claims about: 1) the internal inconsistency of federalism doctrines, 2) the capacity of federalism doctrine to support inconsistent conclusions, and 3) the influence of judges' political beliefs when they are faced with hard cases.

To this point, this review article has focused on the question of what motivates judges and I have challenged Baier's analysis of this question. Although he purports to refute legal realism, he answers only its least plausible version. In the next section, we will see that Baier argues for a specific form of judicial doctrine that has been criticized for undermining the rule-of-law virtues of rule-following. *Courts and Federalism* prizes these virtues and is unresponsive to this well-established critique.

Judicial Balancing and the Virtues of Rule-Following

Baier opens *Courts and Federalism* with an aphorism: "federalism is legalism."[25] Professor Judith Shklar has offered perhaps the most influential definition of legalism. For Shklar, legalism is "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[26] This definition immediately raises the question as to what rule-following entails. Some authors argue that rule-following requires that those subject to a rule respond to its express, clearly articulated and closely circumscribed meaning.[27] Professor Thomas Grey has noted that this formalist understanding of rule-following implies a commitment to "objectivism."[28] He writes: "[a]t the most general level, formalists want law to be determinate — to take the form of rules rather than open-ended standards."[29]

25 Baier, *supra* note 1 at 9.

26 Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964) at 1.

27 See generally, Lawrence B. Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism and the Future of Unenumerated Rights" (2006) 9 Univ. Pennsylvania J. Constitutional Law 155; Larry Alexander, "With Me It's All er Nuthin': Formalism in Law and Morality" (1999) 66 Univ. Chicago Law Rev. 530.

28 Thomas C. Grey, "The New Formalism," online: Stanford Law School, Public Law and Legal Theory Working Paper No. 4 <http://papers.ssrn.com/paper.taf?abstract_id=200732> at 2. Professor Shklar labels a version of this understanding of rule-following "formalism" and subsumes it under the general definition of legalism.

29 *Ibid.*

Baier builds his account of federalism doctrine around the formalist virtues of legalism. For Baier, as for formalists, legalism safeguards the independence and neutrality of the judiciary and enables law to function effectively as a normative influence independent of the exigencies of political power.[30] The difficulty for Baier's analysis is that the doctrinal tests he selects as exemplars of legalism have been criticized for undermining the virtues of rule-following.

The Formalist Critique

Baier praises the Supreme Court of Canada's adoption of balancing tests and in this section, I argue that his endorsement of balancing tests in Canadian federalism doctrine is open to critique. Such tests increase the number of cases in which judicial discretion is relatively unfettered and susceptible to the influence of political preferences. To understand this critique, we should assess Baier's praise of the Supreme Court of Canada's peace, order, and good government jurisprudence, in light of his critiques of what came before. Baier rejects the bright-line tests of the Judicial Committee of the Privy Council, and in so doing he rejects a standard formalist tool for constraining the discretion of the courts.

Baier approvingly writes of the Supreme Court's adoption of the provincial inability test in *General Motors of Canada Ltd. v. City National Leasing*: "What Dickson did with trade and commerce jurisprudence was to reintroduce some degree of federalism analysis."[31] The contrast Baier draws in this sentence is that between Chief Justice Dickson's reasons, and reasoning that excluded, with a bright-line rule, recourse to the general trade and commerce power. Similarly, in Baier's analysis of the peace, order, and good government jurisprudence, he writes that "the court after [*Reference Re: Anti-Inflation Act*] looked as if it could contribute only an uncreative and confined legalism to the dialogue of Canadian federalism."[32] He then contrasts the reasoning in *Anti-Inflation* with the scholarly articulation of the provincial inability test, and

30 Baier writes: "Doctrine is what helps the law to stay consistent without losing its formality, without descending into politics itself. It is only upon those grounds that judicial review can be considered legitimate." Baier, *supra* note 1 at 28. For a recently drawn contrast between formalism and more contextually sensitive approaches to judging, see Martha Nussbaum, "Foreword: Constitutions and Capabilities: 'Perception' Against Lofty Formalism" (2007) 121 Harvard Law Rev. 4. Professor Nussbaum offers a moral argument for rejecting formalism. For rule of law arguments in favor of formalism in federalism jurisprudence, see Thomas W. Merrill, "Towards a Principled Interpretation of the Commerce Clause" (1998) 22 Harvard J. of Law & Public Policy 31.

31 Baier, *supra* note 1 at 145. *General Motors of Canada Ltd. v. City National Leasing*, 1989 SCC 133, [1989] 1 S.C.R. 641 [*General Motors*].

32 *Ibid.* at 128. *Reference Re: Anti-Inflation Act*, 1976 SCC 16, [1976] 2 S.C.R. 373 [*Anti-Inflation*].

suggests that this version of the test, which he claims was implicitly adopted by the Court between *Anti-Inflation* and *R. v. Crown Zellerbach Canada Ltd.*, achieves an appropriate balance between the federal and provincial governments. He writes: "In its academic, pre-Supreme Court formulation, provincial inability was proffered as a means to determine national concern without unduly infringing upon the jurisdiction and autonomy. Indeed in the first few cases, this is how it was used."[33]

Baier's embrace of these standards opens his analysis to a strong formalist critique. The formalist critique of balancing tests evinces an appreciation for degrees of constraint. The formalist argues that rules constrain judges more than do standards. No reasonable formalist claims that rules eliminate discretion, since even under a bright-line rule judges will need to characterize facts and determine whether they fall within the scope of the rule. But this exercise in characterization is different from the exercise of applying standards. When applying standards, a decision maker is required to exercise considerable discretion in balancing interests and articulating justifications for the standard, as well as in determining whether a set of facts fall within the standard's reach.[34] A constitutional rule which states that the peace, order, and good government power only applies in cases of emergency is more determinate than a constitutional rule that states that the power includes a national concern branch that contains within itself a provincial inability test. Baier praises the latter kind of doctrinal test, which the formalist argues is susceptible to a degree of influence from the judges' political preferences that renders judicial reasoning indistinguishable from pure political decision making.[35]

33 *Ibid.* at 133. *R. v. Crown Zellerbach Canada Ltd.*, 1988 SCC 63, [1988] 1 S.C.R. 401 [*Crown Zellerbach*].

34 William R. Lederman famously argued that the very act of characterization in Canadian federalism analysis entails an implicit judgment about which level of government can more competently and legitimately regulate a specific subject matter. See William R. Lederman, "The Classification of Laws and the British North America Act" in William R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClellan & Stewart, 1964) at 177. But this exercise of discretion is of a different order than that which is implicated in the application of provincial inability tests. For a discussion of the degree of indeterminacy that these tests entail, see Henri Brun & Gerald Tremblay, *Droit constitutionnel* 3d ed. (Cowansville: Yvon Blais, 1997) at 559-62. The distinction between standards and rules is well-established in the jurisprudence literature. See *e.g.*, Larry Alexander, *supra* note 27. When enshrined in law, general standards, unlike specific rules, undermine the settlement function of law. Standards require those subject to them always to weigh interests and to consider the background justifications for the law. By contrast, determinate rules aim to limit the extent to which those subject to them have to engage in these evaluative exercises. Rules aim to settle these questions *ex ante*, rather than at the point of application and solve problems of coordination, expertise, and efficiency more effectively than do standards.

35 The objection has been advanced on the grounds of relative institutional legitimacy. The judiciary's claim to legitimacy rests in part on its claim to engage in decision making that is

This formalist critique need not, of course, be accepted uncritically. It is, however, well-established and warrants a response, given the challenge it poses to Baier's central claim about the constraining force of doctrine. Baier claims that the processes of judicial decision making, including the requirements of stare decisis, distinguish judicial from political reasoning by narrowing the scope of judicial discretion.[36] The formalist critique of balancing tests directly challenges this claim. Indeed, the problems with Baier's analysis are deeper than this instance of unresponsiveness. He makes larger claims about whether it is possible to normatively evaluate federalism doctrine and in so doing undermines his own claims about the normative value of federalism review.

The Normative Value of Doctrine

To introduce the self-defeating aspects of Baier's account of doctrine, I will first summarize the criticism in *Courts and Federalism* of Professor David Beatty's work on federalism and then argue that this criticism gives rise to contradictions in Baier's own work. According to Beatty, some judicial interpretations of the Constitution's federalism provisions violate the principled structure of federalism that is implicit in the constitutional text, and that represents the correct, moral understanding of federalism in general. *Courts and Federalism* challenges Beatty's arguments. Baier writes of Beatty's work: "On these lines, not only do judicial principles help to decide cases but they also help to decide them correctly or objectively . . . Beatty's description of the judicial process suffers from an unexamined presumption that objectivity and certainty are inherent in law . . . Beatty's description of the process of adjudication is inaccurate in presuming that judges, when properly applying the law and applying doctrine, are always deciding objectively."[37]

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distinct from that of the political branches. If the judiciary reproduces the balancing of interests done by the political branches, as formalist critics claim judges do when applying balancing tests, the judiciary forgoes an important part of its claim to legitimacy. It no longer exercises a unique function and instead takes on one that it is relatively less competent to do. For an overview of these critiques and a response see, Robert Alexy, "Balancing, Constitutional Review and Representation" (2005) 3 International J. Constitutional Law 572; for a strong statement of the critique, see Antonin Scalia, "The Rule of Law as the Law of Rules,"" (1989) 56 University of Chicago Law Rev. 1175.

36 Baier, *supra* note 1 at 26 and 163.

37 *Ibid.* at 14 and 18. Elsewhere, Baier writes: "Criticizing the court for departing from the 'proper' interpretation commanded by doctrine risks a slide to a positivist quest for (an elusive) certainty." *Ibid.* at 28. For Beatty's general approach to constitutional interpretation, see David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 16-19, and for its application to federalism, *ibid.* at 25-29.

If Baier is right in claiming that we cannot evaluate the correctness or incorrectness of particular doctrines, then it is difficult to see why he believes doctrine is valuable at all. Indeed, one of the reasons for doubting that doctrine has value is that judicial recourse to legal conventions such as appeal to precedent and distinguishing and analogizing cases, often obscures the substantive policy and moral issues that are alive in a case and which are the true subject matter of disagreement.[38] I have already noted Baier's claim that doctrinal reasoning safeguards the value of legality and I constructed what I took to be the most convincing arguments for this claim. I will now build on that argument by arguing that the normative desirability of doctrine lies in at least two of its features, both of which open up specific doctrines to normative evaluation.

Doctrine is a form of reason-giving that has democratic value, and any particular doctrine is necessarily subject to normative assessment. The executive and legislative branches may justify their actions, but typically are not required to do so, and no voter is obliged to provide reasons for her vote.[39] Executive or legislative action that can reasonably be characterized as violating a set of constitutional requirements may be the result of interpretation or indifference. Administrative actors or legislators may have understood that they were transgressing those requirements, but were nonetheless indifferent to that violation, or they may have interpreted those requirements and determined that their actions did not violate them. The political branches are typically under no obligation to clear up this ambiguity. Similarly, because voters are not required to give reasons for their decisions, it is often unclear whether they support specific government policies that overstep constitutional limits or whether they are indifferent to those policies, and support a government

38 See *e.g.*, Roderick M. Hills, "Are Judges Really More Principled than Voters?" (2002) 37 Univ. San Francisco Law Rev. 37 at 50-51.

39 For this contrast between political and judicial decision making see, Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, Mass.: Harvard University Press, 2001) at 59-62; and for a claim that courts are "exemplars of public reason," see John Rawls, *Political Liberalism*, *supra* note 12 at chapter six, section 6. Dean Larry Kramer has recently argued that the political branches do give reasons, and typically give better reasons that are unconstrained by the requirements of legal convention, through institutions such as senate committees. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004) at 238. Of course, the importance of committees varies by jurisdiction. In Canada, legislative committees can have relatively little influence on the executive-dominated legislative process. See Aaron Freeman & Craig Frocese, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005) at 311. Moreover, it is unclear whether deliberation sufficient to safeguard important constitutional interests occurs when interests of greater salience to constituents and interest groups are at stake in a piece of legislation, see Note, "The Lessons of Lopez: The Political Dynamics of Federalism's Political Safeguards" (2005) 119 Harvard Law Rev 609.

for other reasons.

By contrast, courts deciding controversial cases involving constitutional provisions give reasons for their decisions.[40] Under a conception of democracy that stresses the value of impartial representation rather than majoritarian rule, this kind of reason-giving is an essential feature of democracy.[41] This is particularly the case where the polity values and accepts a distinction between matters pertaining to moral principle and matters pertaining to preference or interest satisfaction.[42] Articulation of the former requires supporting reasons and institutions that are well positioned to engage in reason-giving. The judiciary is just such an institution and judicial reasoning is by its very nature a normative practice in which participants make claims about a given doctrine's correctness and the correctness of decisions.[43] Each set of reasons is the object

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40 This is a statement about what is generally expected of courts within constitutional democracies that have judicial review. It represents a convention, shared among legal officials, and this convention is part of the criteria for the validity of legal rules within such democracies. See on this point, Kenneth Einar Himma, "Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States" (2002-03) 4 J. Law & Society 149 at 186, 188-89. Professor Himma frames the rule of recognition for constitutional democracies in this way: "A duly enacted norm is legally valid if and only if it conforms to what the Supreme Court takes to be the morally best interpretation of the substantive protections of the Constitution." *Ibid.* I should introduce two caveats here. It is true that the Supreme Court often dismisses cases, typically as of right criminal appeals, from the bench. But the Court in such cases refers to reasons of the courts below; it does not issue the judgment as ukase. In addition, it is true that courts in some civil law jurisdictions offer terse reasons. But those courts do offer some reasons and the assumption is that these are good reasons, even if from the perspective of common law reasoning, they are insufficiently robust. Moreover, in the civilian tradition judicial reasoning is supplemented by doctrinal writing. Both have a recognized place in the legal order and both give reasoned content to the law. For an influential discussion of the role of judicial and academic writing in one civilian jurisdiction see, Marcel Planiol, "L'inutilité d'une révision générale du Code civil" in *Le Code civil, 1804-1904: livre du centenaire*, vol. 2 (Paris: Rousseau, 1904) at 959.

41 For the distinction see Eisgruber, *supra* note 39 at 18-20.

42 *Ibid.* at 54-6.

43 See *e.g.*, Lawrence G. Sager, *Justice in Plainclothes* (New Haven: Yale University Press, 2004) at 72-6. It is in this sense that one might consider doctrine to be "objective." Professor Gerald Postema describes three attributes of objectivity: 1) independence: "If a judgment is objective its claim on our regard transcends the judging subject," 2) correctness or validity of judgments: "the independence secured by objectivity must secure the basis for a distinction between something's *seeming* to be so (someone's *thinking, believing, taking* it to be so) and its *being so*," 3) invariance across judging subjects: "objectivity is the possibility in principle of other subjects taking up the position and confirming them (positional judgments). Where such confirmation (or disconfirmation) is ruled out, so too is objectivity." Gerald J. Postema, "Objectivity Fit for Law" in Brian Leiter, ed., *Objectivity in Law and Morals* (New York: Cambridge University Press, 2001) 99 at 105, 107, 108-9.

Hogg's understanding of judicial decision making—which Baier specifically endorses (*supra*, note 1 at 28)—bears these attributes of objectivity. Hogg argues that the conventions of judicial reasoning include: 1) independence, insofar as subjective judgment is cabined by stare

of contestation by judges who are internal to the practice, and by competent observers (such as Beatty) who are external to it. If the claims made in constitutional cases were not subject to normative evaluation, it is difficult to see how they would have the constraining force that Baier understands to be their source of value. If all courts issued assertions that did not occasion reasoned agreement or dissent, it is difficult to see how any court would be constrained by the reasons of previous courts.[44] His wholesale-level arguments about the normative value of judicial doctrine seem to contradict his retail-level claims about the possibility of normatively assessing constitutional doctrines.

In addition, constitutional doctrine can have social effects and these are, again, subject to normative evaluation. Judicial reasons that justify or enable government action that undermines our constitutional structures and commitments are clearly harmful and plausibly described as incorrect. More generally, constitutional doctrine can alter the expectations and behaviours of governments and citizens. Doctrine can yield real-world consequences and, as with any action that has consequences, doctrine can be measured against any set of standards applicable to those consequences. Just as we may find a statute's consequences inefficient or morally objectionable, so too may we assess the consequences of a judicial decision. A decision whose consequences fall short when measured against an economic or moral standard can plausibly be characterized as incorrect.

Baier might respond to this critique by repeating his claim in *Courts and Federalism* that although judges and legal commentators speak as if certain

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decisis; 2) validity of judgments, insofar as *stare decisis* commits courts to claiming what the law *is*, rather than what the law *seems* to be; and 3) invariance, insofar as within the boundaries set by stare decisis, judges (and all informed observers) can confirm and disconfirm (much of) the reasoning of their colleagues.

Baier draws a distinction between "normative" and "objective" reasons (Baier, *supra* note 1) but does not provide a fully worked out definition of either term. I take his claim that judicial reasons cannot be characterized as "correct" or "incorrect" to be an argument against the possibility of normative assessment, and I understand acts of normative assessment to be objective, in Postema's sense. An assessment of Baier's arguments on this point is complicated by his tendency to qualify some statements and not others. Sometimes he criticizes authors for believing in the "inherent objectivity" of doctrine or for claiming that judges "always decide objectively." At other times in his work, he refers simply to authors' belief in "objectivity." And at one point he writes: "To dismiss doctrine because it does not definitively force outcomes misses its ultimate relevance." *Ibid.* at 62. This statement is ambiguous. It can mean either that doctrine does not determine *all* outcomes, or that it does not determine *some* outcomes. The qualified formulations of his claims about objectivity suggest that he believes law is objective in some set of cases, but not others; the unqualified formulation denies the existence of objectivity in all cases.

44 For an account of how the moral quality of judicial reasons exerts this constraining influence, see Gerald Postema, "On the Moral Presence of Our Past" (1991) 36 McGill Law J. 1154.

decisions are correct or incorrect, such claims are not to be taken seriously. He may acknowledge that judges deciding hard cases write as if they are offering the correct legal resolution of the problem at hand, and if other judges on an appellate bench disagree with that resolution, those judges claim in dissenting opinions that it is incorrect. Judges, and the legal community more generally, may believe talk about the correctness of law but, Baier claims, the political scientist who has seen that there is a variety of practices of, and opinions about federalism knows better.[45] This argument is too fast and rests on two non-sequiturs.

It does not necessarily follow from the fact that political scientists observe diversity in opinions and practices that none of these opinions and practices is incorrect. Imagine that I observe a group of tennis players who hold the opinion and practice the belief that to win a set one must always win eight games. The simple fact that there is divergence between their practice and opinion, and that of all other tennis players, does not demonstrate that it is impossible to assess the correctness or incorrectness of the practice and opinion of the group I observe. Some authors argue that federalism is characterized by norms that are similar to the rules of tennis. They argue that these norms constitute the internal morality of federalism.[46] Practices within federal systems that depart from these norms are, from the point of view of this morality, incorrect. The political scientist might challenge the claim that there is an internal morality to federalism, but such a criticism requires supporting normative arguments. It is insufficient for the political scientist to simply observe and describe diversity among federal states.[47]

45 Baier writes: "Empirical evidence from different federations shows that different sorts of values can be emphasized in federal systems depending on the preferences of governments and electors." Baier, *supra* note 1 at 18. This claim seems to contradict a later claim about "the inherent tension between unity and diversity that all federations share." *Ibid.* at 165. This is an assertion that there are some features of federalism that are invariable. This assertion is not easily reconcilable with his critique of Beatty's universalist arguments. In that critique, Baier claims that "[o]ne might as easily suggest that the constitutional commitment to federalism implies a preference for national over provincial power." *Ibid.* at 18.

46 See *e.g.*, Jean François Gaudreault-Desbiens, "The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy" in Sujit Choudhry *et al.* eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006) 185, Jacob T. Levy, "Federalism, Liberalism and the Separation of Loyalties" (2007) 101 American Political Science Rev. 459, and Daniel Weinstock, "Towards a Normative Theory of Federalism" (2001) 53 International Social Science J. 75.

47 Dworkin has made this point in arguing for the existence of "moral facts." *Law's Empire, supra* note 6 at 137-45. Baier seems to deny the existence of such facts when he writes of federalism disputes: "That both sides are remarkably confident of the truth of their positions further proves the futility of seeking a principle-based approach to doctrine. Those principles are ultimately normative and not objective; they will always be what their creators make of them." Baier, *supra* note

In addition, each of the contexts of practice that the political scientist observes may have its own criteria for determining whether a practice or opinion is correct or incorrect. The fact that there are no shared standards across a set of contexts does not undercut the fact that for each context there is such a standard.[48] Criminal law is a matter of federal jurisdiction in Canada and predominantly state jurisdiction in the United States. There is no shared standard between the two jurisdictions about where the jurisdiction over the criminal power lies, but within each jurisdiction there is a norm that guides political and judicial actors, and provides a standard against which to measure decisions. Consequently, contrasting judgments upholding a law by the federal legislature on a criminal matter in one jurisdiction, and invalidating one in the other, could both be constitutionally correct.

Baier does not, in the end, simply write about federalism doctrine as if it were not susceptible to normative evaluation. As we shall see below, Baier claims that federalism doctrine in three jurisdictions should be "balanced."[49] This evaluative claim, like Beatty's, is grounded in some set of considerations independent of the case law which enables Baier to criticize it. Baier's claim for particular interpretive outcomes belies any claim that he is engaged in a simple description of judicial practices. Baier is engaged in an evaluative exercise, while seeming to deny the possibility of that exercise.[50]

II. THE POSSIBILITY AND DESIRABILITY OF COMPARATIVE FEDERALISM

To this point in this review article, I have focused on Baier's arguments about the relationships among law, politics, and judging but these arguments do not exhaust the ambitions of his text. He draws examples from three jurisdictions to illustrate these arguments and in this Part I argue that the comparative law of *Courts and Federalism* is open to two critiques. First, Baier does not address serious concerns about commensurability. Because federalism

1 at 158. It is the move from the description of disagreement to the conclusion about relativism that is, I suggest, insufficiently defended in Baier's text.

48 This claim about context-specific objectivity is similar to Postema's arguments about the domain specific nature of objectivity. Postema, *supra* note 44 at 115, 136-37. Baier seems to assume that arguments about objectivity entail claims about universality. This is evident in his critique of Beatty's work. Baier, *supra* note 1 at 18-19. The point in the main text is that one can make a legal argument that is objectively, but not universally, valid.

49 *Infra* notes 57-60 and accompanying text.

50 Perhaps the most striking example of the evaluative nature of his arguments is a subheading that reads: *New York: Federalism Salvaged.* Baier, *supra* note 1 at 72.

provisions are deeply embedded in their historical and institutional contexts and in specific bargains, the commensurability critic argues, it can be difficult to draw crossjurisdictional comparisons. Second, Baier does not address serious concerns about the possibility of making prescriptions that apply across jurisdictions. The problems with such prescriptions are related to, but distinct from, the commensurability difficulty. Given the differences among jurisdictions, it is often difficult to determine how a prescription that may be sound in one jurisdiction will work out in others. This difficulty raises complex questions about the relationships among legal prescription, institutional design, and political analysis.

The Challenges of Comparative Federalism

Professor Vicki Jackson has noticed that constitutional borrowing of federalism jurisprudence among courts is relatively rare and she takes as an example the Supreme Court of Canada's use of American case law.[51] She notes that in federalism cases, the Court cites the United States Supreme Court much less frequently than it does in *Charter*[52] cases. The reason for this, she suggests, is that federalism provisions are the result of specific political bargains made in particular historical contexts. The compromises that federalism provisions represent are evident in their text and in the relationships among constitutional provisions.[53] Such provisions, and the jurisprudence that arises from them, are less easily borrowed than are rights provisions and related jurisprudence.[54]

If Jackson is correct, and the fact that federalism provisions are deeply embedded in their historical contexts prevents courts from usefully drawing on the experiences of courts in other jurisdictions, there may be lessons to be learned for scholars engaging in comparative federalism analysis. In what follows, I take up some of Baier's analyses to illustrate the perils of crossjurisdictional comparison.

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51 Vicki C. Jackson, "Comparative Federalism: Its Strengths and Limits" in Jean-François Gaudreault-DesBiens & Fabien Gelinas eds., *The States and Moods of Federalism* (Cowansville, Quebec: Editions Yvon Blais, 2005) 135 at 146.

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

53 Jackson, *supra* note 51 at 146-60. Of course, she recognizes that rights provisions can also result from particular compromises, but she argues that federalism provisions and provisions related to them more obviously bear the traces of their original compromises.

54 Jackson argues that the primary benefit of comparative federalism lies in its capacity to help courts think about questions of basic structure. *Ibid.* at 160-61.

Baier asserts that it is the proper role of courts in the three jurisdictions he examines to articulate doctrine that yields a federalism in which power is balanced between federal and state or provincial governments. After an overview of federalism doctrine in the United States, Australia, and Canada, he writes: "doctrines often led to courts operating in an unbalanced fashion, promoting the interests of one level of government over another."[55] This evaluative language recurs in Baier's statements about the "radical centralist" position of the *Garcia* Court,[56] the Australian High Court's embrace of literalism which led to "an almost absurd but logical endpoint [that] threaten[ed] in the process the very idea of division of powers,"[57] and the Supreme Court of Canada's avoidance of either "a 'states' rights' style of provincialism or an excessively centralized position."[58] Baier repeats this normative language about balance throughout his text, and the main thrust of the argument in *Courts and Federalism* is that it is the place of the judiciary in all of these jurisdictions to protect, through doctrinal development, a state of balance between a federation's levels of government.[59]

In his doctrinal analyses, Baier argues that a particular statement of a doctrine or a string of cases developing a doctrine achieves or fails to achieve balance. But a given doctrine may have very little effect on how a federation actually functions. Baier argues that the political institutions of cooperative or executive federalism do not guarantee a balance of power between orders of government within a federation.[60] This observation does not establish that

55 Baier, *supra* note 1 at 61.

56 *Ibid.* at 98.

57 *Ibid.*

58 *Ibid.* at 124.

59 Baier writes: "One of the dominant themes put forward in this book is that a doctrinally-centred judicial review helps to support a more formally legal federalism. In turn, such legalism keeps the wolves at bay for those in a federation who would suffer were raw power to be the only means of determining outcomes." *Ibid.* at 146.

60 *Ibid.* at 146-52. Baier's argument against Monahan's claim that in Canadian federalism "it is *always* possible to do indirectly what you cannot do directly" (quoted in *ibid.* at 162) is similarly unresponsive. The core of Baier's argument is: "Executive federalism suffers from the temptation to put pragmatism first. Working with a different kind of reasoning, the calculus of courts is never wholly political—judges must deal with constraints alien to political decision makers. Those constraints, doctrine among them, matter." *Ibid.* The final sentence of this quotation is ambiguous: it can mean either that doctrine matters to how judges reason or that doctrine matters to how governments within a federation interact with one another. The general context of the quotation suggests the latter meaning, but Baier provides no evidence to counter Monahan's claim that the executive branches can always find a way around the division of powers, and in particular, the division of powers as it is articulated by the courts. This unresponsiveness remains even if one accepts Baier's qualification that "doctrine is not even close to being a prescription for all that ails a federal system or the task of judicial review." *Ibid.* at 29. One can advance Monahan's argument without claiming that the function of federalism review is to resolve all the problems of a federal

federalism doctrines which *aim* to achieve such a balance in fact *result* in such a balance. Baier's observation only demonstrates that cooperative or executive federalism is not an effective means of achieving such balance. He does not provide a convincing picture of how and when doctrine has real-world effects.[61] In the next section we will consider the various ways in which courts can influence the relationship between the orders of government within a federation, and we will see why it is important to be closely attentive to the particularities of a given context.

The Particularities of Federalisms

There are at least three ways in which doctrine can aim to influence the shape of a federation, and each of these requires sensitivity to the normative and empirical particularities of a given jurisdiction. First, doctrinal rules may aim to set the *constitutional baselines* around which governments interact.[62] In Canadian federalism, this conception of doctrinal rules underwrites the *Parsons* doctrine of mutual modification. The reasoning in *Citizens Insurance Co. of Canada v. Parsons*[63] aims to preclude either the broadly phrased federal trade and commerce power or the broadly phrased provincial property and civil rights power from being interpreted so expansively that the other power has no meaningful content.[64] The goal is to articulate background standards against which to measure infringements upon the sphere of autonomy within which each level of government regulates its economic affairs. But even if courts aim to set such baselines, they can be circumvented under particular sets of factual and legal conditions. According to some authors, federal exercises of the spending power enable the federal government to regulate unfettered in areas of provincial jurisdiction, and thereby severely undermine the

system.

61 Baier seems to accept that there can be a significant gap between judicial and political practices of federalism when he notes that "[s]o much of what actually affects the character of the federal system goes on outside the purview of the judiciary that the decisions of the court seem to be a poor guide to the state of intergovernmental relations at any given time." Baier, *supra* note 1 at 3. He nonetheless makes claims about the instrumental value of federalism cases when he writes that doctrine "is clearly a useful tool for ensuring that the baseline guarantees of a federal structure are maintained . . . Judges keep the tilting train of political evolution on the constitutional track." *Ibid.* at 164-65.

62 For the idea of constitutional baselines, see Cass Sunstein, "Lochner's Legacy" (1987) 87 Columbia Law Rev. 873. Baier alludes to this notion of baselines when he writes: "the legal structure of federalism provides a baseline that political maneuvering cannot waylay." Baier, *supra* note 1 at 159.

63 (1881), 7 App. Cas. 96.

64 On this point, see William R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 274.

ability of provinces to autonomously regulate their economic affairs.[65] Even if all federalism doctrine regulating economic affairs exhibited the hallmarks of balance for which Baier advocates, such doctrine would have little bearing on the balance of power between the orders of government if, in a given jurisdiction, coercive spending is the dominant form of federal regulation and the spending power is unconstrained by federalism doctrine.

Second, doctrinal rules may provide *incentives* for political actors to structure relationships between the levels of government. For instance, some commentators have argued that the doctrinal limits set out in *United States v. Lopez*[66] and *United States v. Morrison*[67] primarily signal to Congress that there are some judicially-imposed federalism limits on what it can do.[68] If one accepts even a weak version of the political safeguards argument, these doctrinal limits guard against process failures within Congress that enable it to disregard those safeguards.[69] But to accept or reject such a claim, and to assess whether courts can effectively draw the relevant doctrinal distinctions, one must present arguments that are sensitive to the particularities of American federalism. Baier repeats the standard observation that between *N.L.R.B. v. Jones & Laughlin Steel Corp*[70] and *Lopez*, the United States Supreme Court did not engage in meaningful federalism review.[71] From this fact, it does not necessarily follow, as Baier asserts, that American federalism was "radically centralized."[72] That claim requires an argument about whether the political safeguards effectively preserve states' interests, as well as a normative baseline against which to measure degrees of centralization.[73]

65 See *e.g.*, Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 Canadian Bar Rev. 448.

66 514 U.S. 549 (1995) [*Lopez*].

67 529 U.S. 598 (2000) [*Morrison*].

68 On this signaling function, see Deborah Jones Merritt, "Commerce!" (1995) 94 Michigan Law Rev. 674 at 691-92, 712; and Jenna Bednar & William N. Eskridge, Jr., "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism" (1995) 68 California Law Rev. 1447 at 1484; for a comment on the limited effects of *Lopez* and *Morrison*, Jesse H. Choper & John C. Yoo, "The Scope of the Commerce Clause After Morrison" (2000) 25 Oklahoma City University Law Rev. 843 at 854.

69 See for this argument, Ernest A. Young, "Dual Federalism, Concurrent Jurisdiction and Foreign Affairs" (2001) 69 George Washington Law Rev. 139 at 165-6.

70 301 U.S. 1 (1937).

71 Baier, supra note 1 at 43-44.

72 *Ibid.* at 72, 94-95.

73 Baier offers three responses to the political safeguards argument. The first is: "Senators, not state politicians or the court, were the last protectors of states' rights and they seem to be a weak set of sentries." The second is: "This so-called functionalist or 'political safeguards' approach claimed that American federalism would operate better without the artificial restraints and false certainties of judicial review." The third is: "Justice Antonin Scalia argues that the change wrought by the Seventeenth Amendment (which provided for the direct election of senators by the residents

Third, federalism doctrine can *counter inefficient regulation.* It can aim to reduce the negative externalities generated by provinces or states, or provide incentives to the federal government to engage in national economic coordination only when it can generate sufficient political support to do so.[74] To permit provinces or states to generate such externalities, or a federal government to engage in nationalizing policies without the check of political cost, would yield inefficient regulation. The Supreme Court of Canada's reasoning in *Crown Zellerbach*[75] can be understood to aim to reduce the costs to other provinces and to the nation as a whole, of pollution created within a given province that crosses provincial borders. And the reasoning in *General Motors*,[76] through the requirement of federal regulatory institutions, imposes a cost on the federal government when it regulates general trade. Federal regulatory institutions function as a signal that the government is legislating under

of states rather than the senators being chosen by state governments) has neutered the effective representation of the states in the institutions of the federal government." Baier, *supra* note 1 at 72, 94, 71. Only the last response provides any supporting evidence for his objections to the political safeguards rationale. He does not demonstrate why his or Justice Scalia's assertion that Senators are weak guardians of states' interests defeats the arguments of Professor Choper and Hebert Wechsler about Senators' dependence on, and intimate relations with, state political parties, and the effects of equal representation of the states in the Senate on the capacity of national majorities to overwhelm state interests. Baier also does not address Choper's arguments about the capacity of Senate procedures, such as the filibuster or committee protocols, to safeguard state interests. See Jesse Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980) at chapter 4; and Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government" (1954) 54 Columbia L. Rev. 543.

For examples of analyses and critiques of the political safeguards of federalism that are grounded in empirical evidence and theories of American constitutional interpretation, see *e.g.*, Saikrishna B. Prakash & John C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories" (2001) 79 Texas Law Rev. 1459; and Steve G. Calabresi, "'A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez*" (1995-96) 94 Michigan Law Rev. 752. For a recent revival of the theory that looks to political parties for the safeguards, and critiques the Wechsler-version that the Supreme Court adopted in *Garcia*, see Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism" (2000) 100 Columbia Law Rev. 215.

74 For the classic application of public choice theory to American federalism, see Jonathan R. Macey, "Federal Deference to Local Regulators and the Economic Theory of Regulation: Towards a Public Choice Explanation of Federalism" (1990) 76 Virginia Law Rev. 265; for considerations of public choice theory's application in Canada, see Robin Boadway, "Recent Developments in the Economics of Federalism" in Harvey Lazar ed., *Toward a New Mission Statement for Canadian Fiscal Federalism* (Montreal: McGill-Queen's University Press, 2000); Robin Boadway, "The Vertical Fiscal Gap: Conceptions and Misconceptions" in Harvey Lazar ed., *Canadian Fiscal Arrangements: What Works, What Might Work Better* (Montreal: McGill-Queen's University Press, 2005); and Michel Maher, "Le Défi du fédéralisme fiscal dans l'exercice du pouvoir de dépenser" (1996) 75 Canadian Bar Rev. 403 at 405-7.

75 *Supra* note 33.

76 *Supra* note 31.

its potentially expansive general trade and commerce power, and the establishment of such institutions provides incentives to the federal government only to legislate under this power when it can demonstrate to political constituencies that a failure to coordinate will frustrate necessary national economic activity.[77] Similarly, the United States Supreme Court's dormant commerce clause jurisprudence rests on a set of assumptions about efficient regulation within a federation and the primacy of the federal government in regulating interstate commerce.[78]

Legal rules that aim to set normative baselines, provide incentives, or counter inefficient regulation are deeply embedded in their historical, political, economic, and institutional contexts, and any evaluation of their efficacy requires a deep sensitivity to these contexts. Balance can mean very different things in different contexts and it is therefore important to be precise if one prescribes balance as a goal for a judiciary charged with federalism review. Whether a particular doctrine yields balance among orders of government within a federation is a matter that can be evaluated and debated on the basis of normative arguments and empirical evidence. This is the point at which law professors and political scientists can have fruitful conversations. Law professors typically know the contours of doctrine and legal institutions intimately, and craft their arguments about the law out of materials that are commonplace in the legal academy. To invoke a canonical typology, law professors deploy textual, historical, structural, prudential, doctrinal, and ethical arguments.[79] Social scientists can bring to the table their own understandings of, and contributions to, each of these kinds of arguments and others. Law professors and social scientists can have productive exchanges about federalism in various jurisdictions.[80] In the final part of this review article, I suggest some lines of

77 For an overview of political-economic rationales for Canadian federalism doctrines, see George Vegh, "The Characterization of Barriers to Interprovincial Trade Under the Canadian Constitution" (1997) 34 Osgoode Hall Law J. 356; and Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52 Univ. Toronto Law J. 163 at 174-75.

78 *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) and *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) at 423-24. See for a nuanced efficiency-driven explanation of the case law, Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1986) 84 Michigan Law Rev. 1091 at 1110-122; and see for a critique of that case law on efficiency grounds, Lisa Heinzerling, "The Commercial Constitution" (1995) Supreme Court Rev. 217 at 234-51; for an alternative lens for viewing the doctrine, grounded in concerns about national harmony, see Richard B. Collins, "Economic Union as a Constitutional Value" (1988) 63 New York Univ. Law Rev. 43.

79 Phillip C. Bobbitt, *Constitutional Interpretation* (Oxford: Oxford University Press, 1991) at 11-12.

80 A general point about doctrinal analysis: political scientists and lawyers alike should be cautious about drawing conclusions about law and practice in a given jurisdiction, based on analyses of judicial decisions. Political actors make strategic decisions about whether to bring cases to Court

argument that cut across disciplinary and geographical boundaries , which, I hope, will enrich the field of comparative federalism.

III. HOW TO CROSS NATIONAL AND DISCIPLINARY BORDERS

The prescriptive task of this Part is two-fold. First, I will argue for a decision-rules approach to constitutional doctrine. Under such an approach, courts and commentators assess the advantages and disadvantages of choices on a menu of doctrinal rules. Second, I will state the conditions under which scholars or courts within one jurisdiction can most productively borrow doctrines from, or offer prescriptions to, another jurisdiction.

Judicial Minimalism and Federalism Decision-Rules

Much legal academic writing on Canadian federalism has rested on the assumption that doctrinal rules should yield some set of substantive outcomes or vindicate a particular vision of federalism. Supporters of the Judicial Committee of the Privy Council's jurisprudence typically argue that its bright-line rules safeguarded the autonomy of the provinces, while critics of those decisions typically argue that those rules stifled national economic development. Similarly, critics of contemporary federalism doctrine are concerned that multifactor balancing tests insufficiently constrain the federal government, while proponents of those tests argue that they facilitate the flexible development of the federation.[81] But federalism, especially in Canada, is an essentially contested concept.[82] There is no consensus on the optimum balance between the

and so constitutional silences may be as significant as constitutional utterances. See for this point in the spending power context, Sujit Choudhry, "Bill 11, The Canadian Health Act and the Social Union: The Need for Institutions" (2000) 38 Osgood Hall Law J. 38 at footnote 17.

81 For analyses of these perennial debates, see Roderick A. Macdonald, "Meech Lake to the Contrary Notwithstanding (Part I)" (1991) 29 Osgoode Hall Law J. 253 at Part III; Gerald La Forest, *Pour la liberté d'une société distincte* (Québec: Les Presses de l'Université Laval, 2004) chapter 11; and Peter W. Hogg & Wayne K. Wright, "Canadian Federalism, The Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) U.B.C. Law Rev. 329.

82 Professor Richard Simeon has expressed this insight into the plurality of federalism norms in Richard A. Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 Queen's Law J. 131 at 133. Professor Barry Friedman has undertaken a similar analysis in the American context: Barry Friedman, "Valuing Federalism" (1997-98) 82 Minnesota Law Rev. 317 at 386. For the claim that federalism is fundamentally misunderstood in, and irrelevant to, contemporary American constitutional discourse, see Edward L. Rubin & Malcolm Feeley, "Federalism: Some Notes on a National Neurosis" (1993-94) 41 U.C.L.A. Law Rev. 903; Edward L. Rubin, "The Fundamentality and Irrelevance of Federalism" (1996-97) 13 Georgia State Univ. Law Rev. 1009;

federal and provincial governments and in any given case, the proper scope of federal or provincial regulation is contested. Given this degree of uncertainty, it seems unwise to pre-empt deliberation and debate by enshrining one vision of federalism in doctrinal tests or by precluding *ex ante* some set of outcomes. But if we reject an outcome-driven conception of federalism, we need to present a reasonable alternative. Let us consider one that the Supreme Court of Canada has recently offered.

Justice Deschamps, writing for the Court in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, has offered a strikingly frank assessment of the difficulties inherent in judicial policing of federalism's boundaries. She writes:

> To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments. If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern day realities, in a manner that is consistent with the separation of powers of the executive, legislative and judicial branches.[83]

Professor Cass Sunstein, whom Baier cites with approval,[84] has argued for the value of reasons like the Court's in *Employment Insurance* that do not seek to resolve persistent normative debates, but rather resolve particular disputes on grounds that those who hold positions across a normative spectrum can accept. Sunstein has labeled this approach "judicial minimalism" and has argued that a minimalist court reaches for "incompletely theorized agreements."[85] In these, interested parties in a conflict can agree on outcomes without necessarily agreeing on the reasons for arriving at those outcomes. Minimalist decisions aim to be shallow, in that they do not resolve persistent normative debates, and narrow, in that their precedential value is typically limited.[86]

Sunstein gives as an example of minimalism, the Court's reasoning in

and Richard Cross, "The Folly of Federalism" (2002) 24 Cardozo Law Rev. 1.

83 2005 SCC 56, [2005] 2 S.C.R. 669 [*Employment Insurance*] at para. 10.

84 Baier, *supra* note 1 at 161-62.

85 Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999) at 11.

86 *Ibid.*

Lopez. There, he argues, the Court did not provide a comprehensive theory of federalism or a bright-line rule; rather, it introduced a set of factors and applied them to a specific case.[87] The shallowness of the decision, Sunstein argues, permits people with widely divergent views on federalism to accept its plausible outcome, and the shallowness of the decision, combined with its narrowness, ensures that there are not persistent losers in debates about federalism. By contrast, a ruling that enshrined a particular substantive and contested view of federalism, and was framed as a bright-line rule, would have broad application. A particular position in the federalism debate would win the day, as well as many following days. The same might be said for the above-quoted passage from *Employment Insurance*. It expressly avoids deep normative ("political rather than legal") debates about the nature of federalism and seeks instead to apply a range of interpretive tools and precedent in typical common law fashion. The Court in *Employment Insurance* avoids sweeping statements of principle, as well as bright-line rules with broad application, preferring instead to resolve specific cases using particularizing analytical tools.

The proponents of judicial minimalism claim that it has several virtues. First, it is said that minimalism facilitates liberal discourse as it enables disputants to deliberate within the terms of an overlapping consensus.[88] Second, it is said that judicial minimalism reduces the error costs of constitutional judgment. By reducing the breadth and depth of judicial decision making, judicial minimalism limits the possibility that a court will err in its decisions. There are two kinds of errors that can arise from constitutional decision making. The first is normative, the second empirical.

The normative arguments for leaving constitutional judgments to the political branches are well known. Perhaps the strongest normative case against judicial review has been articulated by Professor Jeremy Waldron.[89] According to Waldron, the outputs of legislative bodies represent the considered moral judgments of constituents. The process of democratic deliberation, followed by a vote, allows all viewpoints to be expressed, considered, and then accepted or rejected. By contrast, judicial review truncates this deliberative process, and entrusts it to a small unrepresentative body that is often constrained by legal conventions from openly debating the relevant moral issues. Proponents of minimalism claim that it reduces the scope of a judgment's effects and thereby expands the reach of democratic bodies' deliberative domain.

87 *Ibid.* at 16-17.

88 *Ibid.* at 50.

89 Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

The empirical arguments for deference to elected or delegated decision-making bodies are similarly well established. Adjudication is best suited to bilateral disputes over private claims of rights; it is least well-suited to resolving disputes that implicate polycentric issues and require a weighing of interests and the capacity to seek out and evaluate complex data.[90] Minimalism, by limiting the reach of a constitutional decision's concrete effects, entrusts most empirical assessments to the legislative and executive branches. These normative and empirical dimensions of minimalism can be seen in the *Employment Insurance* Court's claim that "[t]he task of maintaining the balance between federal and provincial powers falls primarily to governments,"[91] and in its express concern for the separation of powers.

Is the Court correct in *Employment Insurance*? Is minimalism the right approach to resolving federalism disputes? We should begin by noting that the relative-institutional-competence arguments in favour of minimalism have greatest traction in cases involving constitutional rights claims and administrative decisions. In such cases, a minimalist court is faced with a choice between assigning primary responsibility for a decision to the judiciary or to a body that typically has a stronger claim to democratic pedigree and expertise. But in federalism cases, this choice is much more complicated. There is no single democratic or expert body to which a court can defer. Courts engaged in federalism review must decide between orders of government and structure the relationships between them. Each order of government, and each of its agencies, has a greater claim to democratic pedigree and expertise than does a court. Absent some convincing argument that one order of government effectively incorporates the interests of the other, simple arguments about democratic pedigree and institutional capacity cannot be determinative in the federalism context.[92] These arguments might counsel a high degree of tolerance for overlapping jurisdictions but they cannot by themselves justify a general strategy of promulgating narrow and shallow rules.

90 See Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Rev. 353. For recent arguments that the relative institutional competence arguments in Fuller's work, and of legal process scholars more generally, should be supplemented by empirical analysis, see Cass R. Sunstein & Adrian Vermeule, "Interpretations and Institutions" (2003) 101 Michigan Law Rev. 885 at 900-02, and Richard H. Fallon, Jr., "Reflections on the Hart and Wechsler Paradigm" (1994) 47 Vanderbilt Law Rev. 953 at 977-78.

91 *Employment Insurance, supra* note 83.

92 Professor Adrienne Stone argues that the strongest arguments for federalism review point to the settlement function of courts in federalism disputes, but she further notes that even this settlement function can be fulfilled by bodies with greater democratic pedigree. See Adrienne Stone, "Judicial Review Without Rights" (2008) 28 Oxford J. of Legal Studies 1 at 27-30.

It seems, then, that the argument for minimalism in cases of federalism review finds its principal grounding in the fact that minimalism creates an area of overlapping consensus, where those who hold deeply divergent views of federalism can meet and agree on some set of outcomes and some modes of argument. But even here, as we have seen, there is disagreement in both the United States and Canada about whether a minimalist posture is itself normatively defensible. American commentators who are skeptical about the capacity of courts to engage in principled line-drawing, and who are proponents of the political safeguards rationale, argue that *Lopez*-style minimalism represents unprincipled judicial overreaching.[93] Canadian commentators concerned to ensure a sphere of regulatory autonomy for the provinces argue that *Employment Insurance*-style minimalism is under-protective.[94] Minimalism, like any other approach to judicial interpretation, must be justified with reasons that are sensitive to context, and a minimalist court must weigh the benefits (normative and other) of constructing an overlapping consensus against the costs of marginalizing some set of interests that are protected by a less minimalist stance.[95]

The question of whether minimalism is an appropriate interpretive strategy for courts engaged in federalism review cannot be answered in the abstract. It requires a careful analysis of facts on the ground, of normative theory, and of law. This is the approach taken to doctrine by those who understand doctrinal tests and approaches to be constitutional decision rules.[96] According to the proponents of this approach, commentators and courts cannot know whether an instance of doctrinal interpretation is appropriate unless they have an idea about the relative capacity of institutions to assess and accumulate informa-

93 See Justice Stevens' reasons in *Lopez*, supra note 66.

94 See *e.g.*, Eugénie Brouillet, "The Federal Principle, the Balance of Power and the 2005 Decisions of the Supreme Court of Canada" (2006) 34 Supreme Court Law Rev. (2d) 307.

95 For the claim that minimalism requires a fully worked out normative theory that chooses from among substantive alternatives, see Neil S. Siegel, "A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar" (2005) 103 Michigan Law Rev. 1951 at part III; for the claim that the Rawlsian defense of minimalism is a justificatory theory like any other, see Michael C. Dorf, "The Coherentism of Democracy and Distrust" 2005 (144) Yale Law J. 1237 at 1262; and for the argument that because courts operate under institutional limits that themselves yield minimalist outcomes, judges should incorporate normative justifications in their reasons, see Jonathan T. Molot, "Principled Minimalism: Restriking the Balance Between Judicial Minimalism and the Neutral Principles" (2004) 90 Univ. Virginia Law Rev. 1753.

There is the additional issue which Sunstein has recognized: that of minimalist judgments exporting costs to inferior courts and litigants, which are left without firm guidance. Sunstein, *supra* note 85 at 48.

96 See Richard H. Fallon Jr., "The Supreme Court, 1996—Foreword: Implementing the Constitution" (1997) 111 Harvard Law Rev. 56.

tion and make normative judgments.[97] Courts and commentators also cannot reasonably express an opinion about the best kind of doctrinal test to apply to a given subject matter unless they have a sense of how each kind shapes, weighs, and responds to its normative and economic context, and unless they offer normative arguments for accepting or rejecting particular approaches.[98] One cannot, finally, reasonably assess a doctrinal rule or body of rules unless one has a sense of how they fit and interact within the general universe of legal institutions and inherited practices and beliefs.[99]

The point can be generalized to all forms of federalism doctrine and all particular federalism doctrines. One can adequately evaluate neither unless one engages in empirical assessment, and normative and legal argument. This is the valuable intuition that can be drawn out of Baier's work: constitutional interpretation and doctrinal tests are among the mechanisms that give constitutional text and constitutional commitments effect in the world. Any given set of constitutional decision rules in a specific national context will have particular empirical and normative effects. The political scientist and the legal scholar both have much to say about federalism doctrines when we understand them to be constitutional decision rules, deeply embedded within, and acting upon, their thickly complex contexts.

Comparative Federalism or Constitutional Decision-Rules Across Borders

Given this complexity, one might think it wise to eschew crossjurisdictional comparisons and borrowing in the federalism context. Not only are federalism provisions rooted in their historical compromises, as Jackson argues, they and their judicial interpretations are deeply embedded in their path-dependent historical moment, with all the normative and factual complexity that this implies. It would seem that to attempt to borrow or even to compare one country's federalism with another's is to ensure that much will be lost in translation. And this would seem to be the case, even if one seeks from comparative federalism nothing more than a deeper knowledge of one's own federal system. Comparing and contrasting, even for the purpose of self-understanding, requires a baseline of commonality that seems foolhardy to seek,

97 See *e.g.*, Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason" (2007) 107 Columbia Law Rev. 1482.

98 See *e.g.*, Kermit Roosevelt III, *The Myth of Judicial Activism* (New Haven: Yale University Press, 2006) at chapter 2; and Richard H. Fallon Jr., *Implementing the Constitution* (Cambridge, Mass.: Harvard University Press, 2001) at chapter 1.

99 *Ibid.*

given the normative and factual divides that separate any two federations.[100]

But recognition of federalism's complexity only results in ruling out facile forms of comparative federalism. One can draw from the above critique of Baier's arguments, the objectives and means of a productive comparative federalism: when courts engage in comparative federalism analysis, they should take into consideration the complexity of regulation within a federation and clearly delimit the purposes for which they are looking to another jurisdiction. Let us consider two general objections to constitutional borrowing. Responses to concerns raised about this intensive form of comparative federalism will answer critiques of less intensive forms of comparison, including the kinds of comparisons that Baier draws.

One objection states that we ought not borrow constitutional doctrines from other jurisdictions because we cannot know in advance the consequences of transplanting a set of legal norms and institutions from one jurisdiction to another. This objection states that the recipient jurisdiction of a transplant may reject it, and assumes that the risks and costs of such a rejection outweigh any potential benefits.[101] But this objection is more about legal reform generally than it is about constitutional borrowing in particular. For instance, a vast literature has examined the consequences of *Brown v. Board of Education*[102] and *Roe v. Wade*[103] on American political and legal culture. Critics of these cases argue that they have set in motion vast and unintended negative consequences. These criticisms, and the wisdom of Thayerian deference as a response, are open to debate,[104] but the terms of this debate do not change when we consider the issue of constitutional borrowing. Indeed, all law reform efforts, including legal transplants, should exhibit the kind of attentiveness to the institutional, cultural, and economic features of a given legal system to

100 For this conception of liberal self-understanding through encounter with other legal cultures, see generally Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. of Legal Education 29.

101 For a summary of this argument, see Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale Law J. 1225 at Part III.

102 347 U.S. 483 (1954). For the leading example of this literature, see Michael J. Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis" (1994) 81 J. American Hist. 81.

103 410 U.S. 113 (1973). For an overview of the literature, see Robert Post & Reva Segal, "Roe Rage: Democratic Constitutionalism and Backlash" (2007) 42 Harvard Civil Rights-Civil Liberties Law Rev. 373 at Part III.

104 See for the classic statement of these reasons for deference, James Bradley Thayer, "The Origin and Scope of the American Doctrine of Judicial Review" (1893) 7 Harvard L. Rev. 129; for a recent argument for them, see Mark Tushnet, "Policy Distortion and Democratic Deliberation: "Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Michigan Law Rev. 245 at 300-01.

which I have alluded above.[105]

A second objection is concerned not with the consequences of constitutional borrowing but with its legitimacy. According to this objection, appeal to foreign sources is illegitimate because these sources lack constitutional pedigree.[106] Courts interpreting and applying a nation's constitution are not authorized to invoke a foreign system's sources because such sources have not been passed by the nation's legislatures, nor have they been developed in the constitutional common law by its courts, nor do they reflect the common consensus of its people. The response to this critique draws together the various threads of this review article's arguments and we can begin by recalling the notion of a hard case.

As we have seen above, in a hard case existing law does not determine the outcome of a dispute. In such a case, courts provide justifications for their decisions that appeal to some set of norms that are at least partially independent of existing law, as existing sources of law are inadequate to the task of resolving the dispute.[107] Relying upon foreign sources in this, or any, case is illegitimate if they are treated as authoritative but have not been authorized by the legal system, or have been expressly excluded by it. But such an invocation of foreign authority is, more importantly, misguided. In a hard case, no appeal to authority — domestic or foreign — can resolve the dispute. What role, then, can foreign law play in a court's resolution of a hard case? At this stage in the argument, it is helpful to draw the distinction often made in the decision-rules literature, between constitutional meaning, on one hand, and doctrinal tests that give that meaning effect, on the other.[108] This distinction suggests a variety of ways in which recourse to foreign law may be relevant and legitimate.

Foreign law may assist a court struggling to interpret a constitutional provision or evaluate a constitutional practice. Imagine a court faced with a hard case that raises the question of whether federalism permits conditional exercis-

105 For this kind of analysis in the legal transplant literature, see Daniel Berkowitz *et al.*, "The Transplant Effect," (2003) 51 American J. of Comparative Law 163; and Daniel Berkowitz *et al.*, "Economic Development, Legality, and the Transplant Effect" (2003) 47 European Economic Rev. 165.

106 See *e.g.*, arguments about the "expressive" quality of constitutional law in Tushnet, *supra* note 101 at Part IV.

107 I do not address the question of whether such justifications form part of the law or not. See for an overview of this debate, H.L.A. Hart, *The Concept of Law* 2d ed., postscript, eds., Penelope A. Bulloch & Joseph Raz (New York: Oxford University Press, 1994) at 253-4.

108 For this distinction between constitutional meaning and constitutional doctrine, see Mitchell N. Bermann, "Constitutional Decision Rules" (2004) 90 Univ. Virginia L. Rev. 1 at 3.

es of the spending power. No source of authority determines the issue, and the court is required to engage in what Dworkin has called "justificatory ascent" to resolve the question, or what Hart has called appeal to general principles.[109] Now imagine, further, that another jurisdiction has a well-developed normative theory about the significance of the spending power in a federal system, and that that theory is not expressly excluded by the recognized sources of authority in our hypothetical court's legal system. The resources of the foreign system serve not as a source of legal authority but as a model for normative argument. In such a case, foreign authority stands in much the same relation to a borrowing court's federalism reasons as does J.S. Mill's *On Liberty* to the Supreme Court of Canada's freedom of expression jurisprudence. They are both nonbinding examples of practical reasoning.[110] A court can draw on a foreign example as it constructs its own normative argument, and the relevance of the example, if adopted, must be defended with reasons that are convincing within its own legal order.

If a court concludes from this contextualized and normative reasoning that conditional exercises of the spending power are consistent with how federalism is, and should be, understood within its jurisdiction, it would want to further determine how courts should assist in structuring the exercise of such a power. The court might look again to the model jurisdiction for possible forms of doctrinal rules. Do courts in that jurisdiction regulate a subject matter through rules or standards; upon which level of government does the onus lie to justify or deny the constitutionality of legislation in a disputed case;[111] are the doctrinal rules prophylactic,[112] or penalty defaults?[113] These questions, like those surrounding our discussion of judicial minimalism, address the comparative error costs of adopting various doctrinal rules. In the federalism context the comparative-error-cost question might be framed as: what form of constitutional decision rule will most likely yield the constitutionally authorized relationship between the orders of government, and allocate most effectively decision-making authority among the orders of government so that

109 Ronald Dworkin, "In Praise of Theory" (1997) 29 Arizona State Law J. 353 at 356-57, and Hart, *supra* note 107 at 205.

110 For arguments about such a "dialogic" approach to comparative law, see Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1998-9) 74 Indiana Law J. 819.

111 For a survey of kinds of doctrinal rules, see Richard H. Fallon, "The Supreme Court, 1996 Term—Foreword: Implementing the Constitution," (1997) 111 Harvard Law Rev. 56 at 67-71.

112 See David A. Strauss, "The Ubiquity of Prophylactic Rules," (1988) 55 Univ. Chicago Law Rev. 190.

113 See John Frerejohn & Barry Friedman, "Toward a Political Theory of Constitutional Default Rules" (2005-6) 33 Florida State Univ. L. Rev. 825.

they may achieve this relationship? The question has process and outcome components.

A court contemplating a foreign decision rule will ask itself whether that rule will encourage deliberative processes by governments and their constituents about the empirical and normative stakes of a specific instance of regulation.[114] For instance, a conflict rule under which federal legislation pre-empts sub-federal law only with a clear statement of federal legislative intention to do so, has several deliberative effects.[115] First, it draws political attention to the federal legislation and potentially imposes future political costs on the federal government. These costs are particularly high where there is significant regional opposition that the federal government feels cannot be disregarded. Second, a clear statement rule can give rise to federal legislative debate about the wisdom of the federal legislation and its subfederal effects. Third, a clear statement rule focuses interest group attention on the legislation and the legislative process, and interest groups can pressure national governments to act or refrain from acting.

In addition, a decision rule will aim to structure the relationship between the orders of government and the outcome of government interactions in the shadow of that rule will likely give effect to a particular normative vision of federalism. For instance, Professors Eugénie Brouillet[116] and Jean Le Clair[117] have argued that bright-line tests that restrictively define interprovincial trade and commerce, and thereby closely guard provincial control over economic and social life, strike the appropriate balance between the powers of the federal and provincial governments. Both authors make the familiar argument that the value of community is protected when provinces, and the communities they represent, control significant areas of their social and economic lives.[118]

114 One can understand federalism as a system of governance aimed at providing forums for effective deliberation by the right polity about the right kinds of decisions. See *e.g.*, the post-Confederation debates about the proper scope of the powers of disallowance and reservation. Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991) at chapter 5. I assume without argument that this understanding of federalism is uncontroversial, as is the judiciary's role in facilitating this kind of deliberation.

115 See *e.g.*, Roderick M. Hills, (2007) 82 "Against Pre-emption: How Federalism Can Improve the National Political Process" New York Univ. Law Rev. 1

116 Eugénie Brouillet, *supra* note 94.

117 Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2002) 28 Queen's Law J. 411.

118 See for a summary and recent development of this position, Eugénie Brouillet, *La Négation de la nation:L'identité québecoise et le fédéralism canadien* (Sillery, Quebec: Les editions de Septentrion, 2005).

Such rules provide the federal government with incentives to bargain that another set of rules might not, and bright-line rules may be appropriate if, as supporters of such rules typically contend, the federal government possesses a regulatory capacity sufficient to enable it to dictate its will to the provinces.

It is important to note that a court should not adopt decision rules under the assumption that it has either ideal decision-making capacities or the precise decision-making capacities of another jurisdiction's judiciary. Professor Adrian Vermeule expresses this point when he argues that sometimes the first-best option, in a world of imperfect information, yields results that are worse than a second-best option.[119] For instance, a court that possessed unlimited fact-finding and data evaluating capacity, full wisdom about the normative content of federalism, and unlimited ability to ensure that that capacity and wisdom translated into practice, might regulate all federalism disputes using standards that require case-by-case and all-things-considered assessments.

But of course, no court possesses optimal capacity or unlimited resources, and any real court should assess its own capacities and resources relative to those of the political branches when constructing its decision rules. No real judge is Hercules and all real judges should have a clear sense of how far they fall from omniscience and omnipotence; of which among the branches of government can see most clearly and act most effectively; and of the error costs of implementing a first-best option, given the judiciary's limited institutional capacities. Similarly, although the experiences of other jurisdictions can provide lessons about how decision rules translate into practice,[120] it is important to understand the relevant differences that divide jurisdictions. Just as first-best options are sometimes unavailable, so too are the precise options available in other jurisdictions. Once again, these kinds of foreign rules are examples to consider, not sources of authority, and once again, constitutional borrowers should consult them while keeping in view the relevant features of the legal systems under consideration.

In this Part, I have attempted to fill a gap in Baier's analysis that I identified in the previous Part. There I claimed that *Courts and Federalism* does not convincingly establish the assertion that federalism doctrines influence how governments within a federation interact, and that this gap undermined

119 See Adrian Vermeule. "Interpretive Choice" (2000) 75 New York Univ. Law Rev. 74.

120 Some authors have understood this "empirical" dimension of comparative constitutional law to be the most productive use that courts can make of foreign decisions. See *e.g.*, Sanford Levinson, "Looking Abroad When Interpreting the U.S. Constitution: Some Reflections" (2003-4) 39 Texas International Law J. 353.

Baier's crossjurisdictional claim that federalism doctrine should be balanced. In this part, I have attempted to show how this influence can arise and have argued that any causal claims must be sensitive to a jurisdiction's institutional, legal, and socioeconomic context. I have, moreover, argued for a decision-rules approach to federalism doctrine and to comparative federalism. In the process of making these arguments, I have also set out to overcome the flaws in Baier's analysis identified in Part I.

Recall that in Part I, I claimed that Baier does not answer legal realism's strongest arguments about the political purposes of doctrine and that his arguments in favour of a particular form of doctrinal rule are unresponsive to well-established critiques. I also claimed that Baier's general attempt to justify doctrine does not succeed because his argument against the possibility of normatively assessing particular federalism doctrines is self-defeating. In this Part, I have argued that judges are required to give reasons for their decisions and I have defended a particular form of reason-giving.

The requirement to give reasons distinguishes judicial decision making from that of the political branches, and it is the expressly normative quality of such decision making that renders it valuable. Courts articulate their judgments in terms that open them up to normative critique and challenge. It may be true, as the legal realist argues, that some doctrines are self-contradictory and therefore render judicial decision making susceptible to the influence of political preferences. But unlike political actors who may or may not justify their choices, judges are required to defend their decisions and attempt to resolve these contradictions. Judges work under the assumption that reasoned, noncontradictory judgment is possible. If they fail to vindicate this assumption, their judgments can be publicly challenged and critiqued, and when these critiques overwhelm precedent, the law changes.[121] Far from being immune to normative evaluation or assessments of "correctness," it is the very fact that doctrine is subject to such evaluation that makes it an intelligible and democratically valuable practice.

Finally, I have argued that judges engaged in federalism review should undertake analyses that assess the relative capacities of the branches of government to give effect to federalism's values. If adopted, such a requirement to consider institutional capacity would introduce a second layer of protection against the undue influence of political preferences in judicial decision mak-

121 For considerations of stare decisis and the conditions under which a court may reverse precedent, see *Casey v. Planned Parenthood* 505 U.S. 833 (1992); *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; and *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

ing. A judge, choosing from among an array of possible decision rules and considering questions of institutional capacity, will under certain conditions come to a decision different from one at which she would arrive if she were to ask what outcome she preferred.[122] For instance, a judge may object for a variety of reasons to federal exercises of the spending power within areas of provincial jurisdiction, but may resist judicial enforcement of the constitutional norm because, in her assessment, courts do not have the capacity to enforce it effectively.[123] Not only is any choice among decisions rules open to reasoned normative evaluation; it is also, I have argued, open to empirical verification.

IV. CONCLUSION

This review article has aimed to trace both the limits and potential of Baier's truly original and significant project. The ambitions of *Courts and Federalism* are important and suggest productive lines of inquiry for academics in law schools and political science departments alike. In this article, I have begun to follow some of these lines of inquiry. The relationships between federalism in the courts and federalism in political and institutional practice are complex. Federalism scholarship, I have argued, should respond with sensitivity to this complexity. Federalism scholarship, whether it emanates from law schools or political science departments, should not aim simply to posit internally coherent sets of doctrinal rules that are indifferent to the actual workings of a federation; nor should it simply describe what political and judicial actors are doing and summarize what scholars are saying; nor should it simply offer *realpolitik* prescriptions, unmoored from constitutional principles. Federalism scholarship should aspire to the scholarly goals implicit in *Courts and Federalism*. Scholars should aim to offer accounts of federalism that bridge the normative and the empirical, the legal and the political. To do less is to deny the full complexity of that which we purport to study.

122 For a distinction between first-order and second-order judgments in constitutional law, see Rebecca L. Brown, "A Government *For* the People" (2002) 37 Univ. San Fransisco Law Rev. 5 at 17-19.

123 For arguments in favour of judicial underenforcement of constitutional norms, see Sager, *supra* note 43 at chapter 7.