

Federal Loyalty and the ‘Nature’ of Federalism

*Michael Da Silva**

Is the federal loyalty principle — viz., each level of government in a federal system must make non-trivial efforts to ensure non-interference with the jurisdiction of the other — inherent to federalism? Despite controversy about the meaning and scope of ‘federal loyalty,’ the claim that it is inherent to federalism has a transnational pedigree. If this ‘inherence claim’ is true, it could have substantial implications for global constitutionalism. Among other implications, it could help justify judicial recognition of federal loyalty in federal states that allow judicial review. Unfortunately for proponents of federal loyalty, however, any combination of plausible understandings of federalism and federal loyalty presents a similar kind of multi-lemma problem: One must deny the inherence claim, grant that it is trivial, deny that many paradigmatic federal systems are actually federal, or grant that federal loyalty relies on another underlying normative principle and somehow identify the principle despite no one being able to do so to date. In each case, denying the inherence claim is the best option. Federal states must decide whether to entrench federal loyalty requirements through regular amendment procedures.

Le principe de la loyauté fédérale — c.-à-d. chaque palier de gouvernement dans un régime fédéral doit faire des efforts non négligeables afin d’assurer la non-ingérence avec les juridictions des autres — est-il inhérent au fédéralisme? En dépit de la polémique entourant le sens et la portée de la « loyauté fédérale », l’affirmation selon laquelle elle est inhérente au fédéralisme a une généalogie transnationale. Si cette « affirmation d’inhérence » est vraie, elle pourrait avoir des répercussions considérables pour le constitutionalisme mondial. Parmi les répercussions, elle pourrait aider à justifier la reconnaissance judiciaire de la loyauté fédérale dans les états fédéraux qui permettent la révision judiciaire. Malheureusement pour les partisans de la loyauté fédérale, cependant, toute combinaison de compréhensions vraisemblables du fédéralisme et de la loyauté fédérale présente un problème « multi-lemme » semblable : on doit nier l’affirmation d’inhérence, reconnaître qu’elle est insignifiante, nier que de nombreux régimes fédéraux paradigmatiques sont en fait fédéraux ou admettre que la loyauté fédérale dépend d’un autre principe normatif sous-jacent et d’une manière ou une autre identifier le principe malgré le fait que personne n’y a encore réussi. Dans chaque cas, nier l’affirmation d’inhérence est la meilleure option. Les états fédéraux doivent décider s’ils doivent fixer les exigences de la loyauté fédérale par des procédures de modification régulières.

* Canadian Institutes of Health Research Banting Postdoctoral Fellow in the Faculty of Law and Institute for Health and Social Policy at McGill University. The author thanks Johanne Poirier and Daniel Weinstock for discussions on these issues and feedback on previous drafts and Christa Scholtz for guidance on comparative federalism research. Feedback from anonymous reviewers and editors at the Review of Constitutional Studies was most appreciated.

Table of Contents

Introduction	209
The Inherence Claim's Potential Value	211
On 'Federalism'	218
i. Ideological Federalism.....	218
ii. Institutional Federalism	219
On 'Federal Loyalty'	221
i. Trivial Federal Loyalty	221
ii. Demanding Federal Loyalty.....	222
iii. Median Federal Loyalty	223
Conceptually Dividing Federal Loyalty and Federalism: An Analytical Defense	224
i. 'Federalism' Does Not Entail Any Plausible Federal Loyalty Principle.....	224
ii. Federal Loyalty Is Inconsistent with Important Features of Federalism.....	226
iii. The Case for the Inherence Claim Is Lacking on Its Own Terms..	230
iv. The Inherence Claim Cannot Explain Plausibly Justified Constitutional Law	232
v. The Inherence Claim Cannot Permit Varied Relationships Between Constitutional Texts and Constitutional Principles in Existing Federations.....	234
vi. There Are Practical Reasons to Deny the Inherence Claim.....	235
The Practical Benefits of Conceptual Division	236
Implications for Legal 'Transplants'	238
Objections/Replies	238
i. The Argument Against Formalism	238
ii. The Strawman Charge.....	239
iii. The Anti-Dualism Objection	239
Conclusion	240

Introduction

The claim that the federal loyalty principle — viz., each level of government in a federal system must make non-trivial efforts to ensure non-interference with the jurisdiction of the other¹ — is inherent to federalism appears in scholarship from disparate states. For example, Austrian scholar Anna Gamper claims that features of her administrative constitutional order are inherent in all federal systems: “Constitutional loyalty is an intrinsic value principle of all constitutions. ... [In federal states, this requires] loyalty to the constitution ... [and] each other,” entailing federal loyalty.² For another example, Canadian scholar Jean-François Gaudreault-DesBiens’s dualist state does not recognize the principle, but Gaudreault-DesBiens says that it “is *inherent* to any federal regime” even absent recognition in constitutional texts.³ Call this posit that federalism entails a necessary commitment to some form of federal loyalty principle ‘the inherence claim.’

The interesting finding in comparative political theory that the inherence claim is asserted transnationally could have important consequences for global constitutionalism. If the federal loyalty principle — henceforth ‘federal loyalty,’ but also known as ‘comity,’ ‘fidelity,’ ‘mutual consideration,’ ‘Bundestreue,’ and ‘solidarity’⁴ — is inherent to federalism, courts can plausibly recognize the principle in any federalist state.⁵ This would help justify transnational constitutional practice. Federal loyalty originated in Germany, where it was judicially

1 See “On ‘Federal Loyalty,’” below.

2 “On Loyalty and the (Federal) Constitution” (2010) 4:2 Vienna Online J on Intl Constitutional L 157.

3 “The Ethos of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship between Aboriginal and Non-Aboriginal Governments: A Thought Experiment” in Ghislain Otis & Martin Papillon, eds, *Fédéralisme et gouvernance autochtone/ Federalism and Aboriginal Governance* (Laval, QC: Presses de l’Université Laval, 2013) 51 at 53 [Gaudreault-DesBiens, “Ethos”] [emphasis in original]. See also Jean-François Gaudreault-DesBiens, “The Canadian Federal Experiment, or Legalism without Federalism? Toward a Legal Theory of Federalism” in Manuel Calvo-García & William LF Felstiner, *Federalismo/Federalism* (Madrid: Dykinson, 2004) 81 at 112, 122 [Gaudreault-DesBiens, “Experiment”].

4 These terms may not be synonymous, but are treated as such in e.g., Gaudreault-DesBiens, “Ethos,” *supra* note 3; Gamper, *supra* note 2. See also Alberto Miglio, “Differentiated Integration and the Principle of Loyalty” (2018) 14:3 European Constitutional L Rev 475 at 476, n 2 on “sincere cooperation.” Erika Arban, “Exploring the Principle of (Federal) Solidarity” (2017) 22:2 Rev Const Stud 241 claims that solidarity is distinct from, yet inherent in, federal loyalty. Whether the claim that solidarity is inherent to federalism in Edmond Orban, “La Cour constitutionnelle fédérale et l’autonomie des Länder en République fédérale d’Allemagne” (1988) 22:1 RJT 37 at 42 adopts the distinction between federal solidarity and federal loyalty is debatable.

5 See “The Inherence Claim’s Potential Value,” below.

recognized as stemming from the nature of Germany's federal union.⁶ It has since migrated to other states, often as a 'legal transplant.'⁷ But an inherent principle need not be 'transplanted' to federal states. It can simply be recognized as part of the existing constitutional order of any such state.⁸

In this work, I adopt empirically-informed conceptual analysis and conceptual mapping methods to test the inherence claim. I first detail some reasons to conduct the present analysis, many of which relate to the reasons why one may be tempted to adopt the inherence claim. I then begin my analysis by presenting competing definitions of 'federalism' and 'federal loyalty.' These definitions reflect mainstream scholarly views on their meanings and the observed legal and political practices of characteristically 'federal' states. I next examine whether any plausible definition of 'federalism' that can capture even paradigmatic practices of federal law and politics entails — or is even consistent with — a non-trivial understanding of federal loyalty. I then examine theoretical and practical reasons why one would want to accept or deny the claim. I finally explain how my findings impact legal 'transplants' in federal states and the harmonization of global federalism.

Unfortunately for proponents of federal loyalty, I find that federal loyalty is not a necessary feature of federalism on the most plausible understandings of federalism. Any combination of plausible understandings of federalism and federal loyalty presents a similar problem. In each, one must choose between some mix of the following: deny the inherence claim; grant that it is trivial; deny that many paradigmatic federal systems are actually federal (thereby undermining the explanatory force and underlying motivations of each version of federalism); or grant that federal loyalty relies on another underlying normative

6 *Housing Funding Case*, 1 BVerFGE 299 (1952). See also Francesco Palermo & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford: Hart, 2017) at 250.

7 Gamper, *supra* note 2 at 160-61. On legal transplants, see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens: University of Georgia Press, 1993). Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4:2 MJECL 111 provides representative criticism. Federal loyalty has certainly 'migrated' in some form. On migration, see Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

8 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 53 claims that adoption of federal loyalty in Canada would not be a legal transplant because Canada already recognizes parts of international comity law and fiduciary obligations. But Canada has not recognized a federal loyalty principle on any of the plausible definitions discussed here. Gaudreault-DesBiens uses the inherence claim to deny that it would be a transplant in Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const 1 at 3 [Gaudreault-DesBiens, "Cooperative"]. This is more interesting for present purposes, especially given the transnational pedigree of the underlying claim.

principle and somehow identify the principle despite no one being able to do so to date.

In each case, denying the inherence claim is the best option. Yet this need not be a negative finding for global constitutionalism: ultimately, federal loyalty likely cannot be incorporated into some constitutional contexts and/or will not always fulfill the aims of federalism. Each federal state can and should decide whether it can and will incorporate federal loyalty requirements into its constitutional text. Any incorporation should use regular constitutional amendment procedures.

The Inherence Claim's Potential Value

The current transnational support for and potential value of the inherence claim justifies the present analysis.⁹ For another example of support beyond those listed above, Hugo Cyr appeals to the inherence claim as part of a “normative justification” for cooperative federalism. He argues that federalism’s inherent commitment to solidarity contradicts a cooperativist “internal logic” of federalism, at least in Canada. His solidarity-based ‘underlying logic’ would have required different outcomes in several cases in that traditionally dualist state.¹⁰ Despite this apparent endorsement, the definition of ‘federal loyalty’ and what it would mean for it to be ‘inherent’ to federalism nonetheless remains unclear.¹¹ This gap alone demands scrutiny of the claim.

9 See the literature cited in notes 2-4, 8, above. For a useful summary of related works brought to my attention after drafting this piece, see “Empowering Courts: Imposing a Duty to Act Loyally?” in Noura Karazivan, “Cooperative Federalism v Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments and Governments,” in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montreal/Kingston: McGill-Queen’s University Press, 2020) [forthcoming 18 June 2020]. That section highlights the role the inherence claims has played in modern Canadian constitutional scholarship. It also notes claims about the need to recognize a ‘loyalty’ principle by Paul Daly (in “L’abolition du registre des armes d’épaulé: le rôle potentiel des principes non écrits” (2014) 23:4 Const Forum Const 41) and Kate Glover (in “Structural Cooperative Federalism” (2016) 76 SCLR (2d) 45). Whether Daly and Glover view the principle as ‘inherent’ is, however, less clear than in other cases. Both Karazivan and I also discuss Johanne Poirier’s advocacy for federal loyalty.

10 “Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism” (2014) 23:4 Const Forum Const 20 (referring to loyalty as “solidarity”). Cyr cites Gamper for the inherence claim (*ibid* at 31). He also uses ‘internal logic’ language (*ibid* at 20). Per Cyr, the constitutional principles of autonomy and subsidiarity also independently support cooperative federalism. I discuss the relationship between loyalty, cooperation, and other principles below.

11 See “On ‘Federal Loyalty,’” below. Loyalty is also absent in leading introductions to federalism, see e.g., Dimitrios Karmis & Wayne Norman, eds, *Theories of Federalism: A Reader* (New York: Palgrave MacMillan, 2005); Andreas Føllesdal, “Federalism” (7 June 2018), online: *The Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/federalism/> [perma.cc/XWVG6-6JU5].

Yet the value of the present analysis need not rely on widespread transnational support for the inherence claim. Clarifying what 'federal loyalty' means and whether and how it could be 'inherent' should also clarify the 'nature' of federalism. The reasons why the inherence claim appears *prima facie* plausible and worthy of defense further motivate and contextualize my analysis. Analyzing their potential merits will prove valuable regardless of whether the inherence claim has widespread support. Theoretically, for instance, knowing whether federalism requires federal loyalty should provide insight into the normative logic of federalism. My analysis is an example of how one can test other purported principles. Practically, in turn, my analysis can clarify debates about whether federal loyalty should be recognized in federal states. If, for instance, claims about federal loyalty's relationship to other constitutional values that are used to construct a plausible inherence claim do not withstand scrutiny, this provides reason to question claims that federal states should, let alone must, recognize such a principle. I accordingly turn to putting the inherence claim in its best light before critiquing it.

The inherence claim is a theoretical claim about the nature of federalism, though it is often asserted, rather than argued for in detail. The idea appears to be an assertion that two entities cannot both possess distinct powers if there is no guarantee that one entity will not grossly interfere with the other's powers, and that each side needs some level of consideration for the other side to guarantee non-interference.¹² This relies on a conceptually and empirically contestable conception of sovereignty that is rarely argued for and that I challenge below.

The conceptual case for federal loyalty instead usually relies on the idea that any plausible account of 'federalism' requires recognition of the inherence claim. This argument asserts that 'loyalty' is characteristic of 'principled federalism.'¹³ 'Federalism' admits many distinctions. Recognizing federal loyalty as inherent to federalism purportedly allows one to overcome traditional distinctions by identifying an underlying normative core. Gaudreault-DesBiens helpfully characterizes this view when he notes that "recognition of federal loyalty as a dimension inherent in the principle of federalism is especially interest-

12 See e.g., Gamper, *supra* note 2; Gaudreault-DesBiens, "Cooperative," *supra* note 8; Jan Raeimon Nato, "Development of Duties of Federal Loyalty: Lessons Learned, Conversations to be Had" (Winner of Baxter Family Competition on Federalism, 2019), online (pdf): *McGill* <www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf> [perma.cc/GK4Q-QH23]. This tentative distillation of the idea in these texts will, however, be challenged by further examinations below.

13 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 71, 78.

ing for Canada because it ignores the traditional borders erected between common law and civil law federations, competitive and cooperative federations, ... [and] dual and integrated federations.”¹⁴ Loyalty is, apparently, a deeper principle underlying other distinctions. Such a principle is necessary for there to be a principled federalism. Recognizing the principle is what it *means* to be federalist. But, as seen below, even the forms of federalism most amenable to federal loyalty do not pick out ‘federal loyalty’ as a necessary feature, let alone the normative core, of federalism.

Other arguments accordingly posit ways that the truth of the inherence claim could make federalism more normatively compelling and/or otherwise provide fruitful legal or political tools. These speak to the reasons to adopt forms of federalism, not the *nature* of federalism, but could support the inherence claim. If the inherence claim is true, it can serve as a ‘harmonizing’ principle for federal states, providing a potentially valuable common ground for all such states.¹⁵ Harmonization is, of course, highly contentious, but some plausible arguments could favour it and an inherent constitutional principle would aid harmonization across federal states. The inherence claim could also have potential benefits *in* particular states.¹⁶ Theoretically, the inherence principle reflects and may support a reciprocity and/or formal parity between federal and sub-state governments federalism is designed to promote.¹⁷ Traditional ‘federalism’ meant to provide different levels of government with exclusive powers. Inherence claim proponents state that federal loyalty’s constraints on exercising those powers is necessary to protect them.¹⁸

While the necessity of federal loyalty for protecting different spheres of jurisdiction is partly what is at issue here and thus cannot justify the claim, one can identify reasons why proponents might think it is so. For instance, subjecting parties to the same constraints on their powers could ensure that powers are

14 Gaudreault-DesBiens, “Cooperative,” *supra* note 8 at 3.

15 On harmonization as a goal of comparative constitutional law, see Michel Rosenfeld & Andrés Sajó, “Introduction” in Michel Rosenfeld & Andrés Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1 at 12-13.

16 The inherence claim can thus benefit particular states even if harmonization is problematic or impossible (as suggested by e.g., Martin Boodman, “The Myth of Harmonization of Laws” (1991) 39:4 *Am J Comp L* 699).

17 Gamper, *supra* note 2 champions reciprocity. The formal equality argument builds on suggestions in texts above.

18 See the works in notes 2-4, 8-11, above. It also appears implicit in Jean-François Gaudreault-DesBiens & Johanne Poirier, “From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 391.

exercised 'reciprocally,' and that each level of government would take care to ensure the other party's powers are respected.¹⁹ At minimum, subjecting parties to the same formal constraints could make them formally equal in the scope of their powers. It could even equalize such powers. Where, for instance, a federal actor has powers that could be wielded to make it comparatively stronger than the other, requirements that the party exercise those powers with the other party's powers in mind could limit exercises that would produce substantive power differentials. Federal loyalty could accordingly minimize the dangers of a more powerful federal entity's 'overreaching' use of its formal or concurrent powers.²⁰ These results appear consistent with federalism's ends, however defined.²¹ They could also help resolve power differentials as multi-national federations incorporate actors who faced past injustices. For example, proponents suggest that federal loyalty could aid Canadian-Indigenous relationships.²²

The inherence claim may also be a valuable tool for constitutional theory-building. Federal loyalty shares affinities with other constitutional principles. Its inherence and affinities with those other principles could combine to form the normative framework for a cooperation-focused theory of federalism. This theory could provide building blocks for arguments that other constitutional principles should be considered part of the interpretative core of constitutional law in federal states. Most obviously, the cooperation required by non-trivial forms of federal loyalty fits well with 'cooperative federalism,' an increasingly popular conceptual posit whereby federal actors' powers are understood as overlapping in important ways and are to read in such a way as to allow their operational consistency where possible.²³ Constitutional courts in Canada and Switzerland thus appealed to federal loyalty when moving toward cooperative federalism,²⁴ potentially providing theoretical justification for deviations from past interpretative norms and, arguably, their respective constitutional

19 See e.g., note 17, above.

20 Note, however, that one of the best overviews of concurrent powers, Uwe Leonardy & Dirk Brand, "The Defect of the Constitution: Concurrent Powers Are Not Co-Operative or Competitive Powers" (2010) 4 J South African L 657, also argues that concurrent powers should not be understood as requiring cooperative powers.

21 See below for competing accounts of those ends.

22 Gaudreault-DesBiens, "Ethos," *supra* note 3.

23 This definition draws on overviews of the Canadian and transnational literatures in Arban *supra* note 4 at 249-50 and Gaudreault-DesBiens & Poirier, *supra* note 18 at 401-02. For the potentially strong fit between cooperative federalism and federal loyalty, see e.g., Gaudreault-DesBiens & Poirier as well as Gamper, *supra* note 2 and Nato, *supra* note 12. Cyr, *supra* note 10 argues that federal loyalty normatively justifies cooperative federalism. Gaudreault-DesBiens, "Cooperative," *supra* note 8 arguably provides a similar line of argumentation.

24 See e.g., Arban, *supra* note 4 at 249-51.

texts.²⁵ Some scholars also believe that autonomy, subsidiarity, and/or democracy support cooperative federalism and could combine with federal loyalty to form an underlying normative justification for cooperative understandings of federalism.²⁶ Federal loyalty may also fit well with ‘constitutional loyalty,’ the posit whereby all legal actors must do what the constitution stipulates.²⁷ At minimum, it can serve as a constraint on constitutional loyalty, suggesting that ‘what the constitution stipulates’ must be understood as inherently requiring cooperation, regardless of what the formal text of the constitution says.²⁸

The inherence claim also provides a way of identifying federal states and a tool for interpreting laws in such states. This is a borderline theoretical-functional reason to adopt the claim. Marcus Klamert’s statement on the inherence claim’s potential implications for European Union (EU) law highlights these possibilities, saying “[i]f federal loyalty is inherent with federal systems, and if the EU is a federal construct, federal loyalty would be inherent with EU law.”²⁹ This suggests that all federal constructs are consistent with federal loyalty. We can thus identify federal entities partly by looking at their potential consistency therewith. This could help resolve debates about what counts as a ‘federal’ state. We can then appeal to federal loyalty to interpret the constitutional rules of federal states absent explicit incorporation of the principle. This could contribute to interpretative debates by demonstrating that unwritten constitutional principles exist and can be used, and that federations can and should use the federal loyalty principle.³⁰

Functionally, in turn, the inherence claim could serve several salutary ends, though whether these ends are in fact salutary may depend on one’s conception of federalism in a way that will eventually undermine the claim that ‘federalism’ as such requires federal loyalty. As noted above, if the inherence claim is

25 Switzerland’s federal constitution includes a loyalty principle, see *Switzerland’s Constitution of 1999 with Amendments through 2014*, art 44, online (pdf): *Constitute Project* <www.constituteproject.org/constitution/Switzerland_2014.pdf?lang=en> [perma.cc/5QH3-2CF3] [*Swiss*]. The inherence claim is accordingly unnecessary there. Swiss use of loyalty still demonstrates the claim’s potential value.

26 Cyr, *supra* note 10 argues that autonomy, subsidiarity, and ‘solidarity’ each provide a normative justification for cooperative federalism and jointly form the “normative structure” of Canadian federalism that requires a cooperative understanding thereof. This clearly links the principles, though Cyr also suggests that they are severable. Daly, *supra* note 9 argues that democracy and federal loyalty both support cooperative federalism. He does not clearly link the two principles, though he implicitly suggests that they can coexist as supports for the same end.

27 Gamper *supra* note 2 at 160ff details their possible relationships.

28 Gaudreault-DesBiens, “Ethos,” *supra* note 3 at 77-78 suggests that it also promotes “equilibrium” and “trust.”

29 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014) at 47.

30 Gaudreault-DesBiens, “Ethos,” *supra* note 3, s 3 is devoted to such unwritten principles.

true, federal states can secure loyalty's benefits absent legal transplant.³¹ Courts can adopt the principle as an interpretive tool and impose its constraints and other obligations on federal actors' exercises of their competences without explicit authority to do so under the constitution. Federal loyalty is supposed to secure 'smooth functioning' of federal systems, minimize conflicts between its constituent parts,³² and "ensure constitutional stability and predictability by privileging solutions that discourage abrupt and unexpected shifts in the relationships between the governments of the federation."³³ The Constitutional Court of Germany likewise suggests that federal loyalty will support "national unity" and the "integrity" of the state and its parts.³⁴ An 'inherent' federal loyalty principle could support these ends where they are lacking. Requirements in the more demanding forms of federal loyalty, like forced consultation and/or negotiation, could further foster these plausible ends and values of federalism.³⁵

The inherence claim could also provide concrete judicial tools for promoting cooperation and, consequently, produce results many would desire. Many consider cooperation itself a moral good. While 'federal loyalty' and 'cooperation' are both contested terms, many commitments under each specification of federal loyalty below appear to require cooperation.³⁶ The *kinds* of cooperation required by federal loyalty could also be valuable. For instance, some Canadian proponents of the inherence claim highlight how federal loyalty could have led to a different outcome in *Québec (AG) v Canada (AG)* as an example of the principle's potential for bolstering good cooperative action. In that case, Québec challenged the federal government's decision to destroy data in a database created pursuant to a federal-provincial long-gun registration program after the federal government decided to withdraw from the program. Québec sought to create a provincial registry and claimed that the federal government was bound to share data collected in the joint program. Every Justice of the Supreme Court of Canada (SCC) agreed that the federal government was under no such duty and that there was no way to force the federal government to share its data.³⁷ Yet proponents of federal loyalty argue that the principle could have led to a different outcome. For instance, Cyr's piece before the SCC's

31 Recall note 7, above, and surrounding. See also Klamert, *supra* note 29 at 47.

32 Gamper *supra* note 2 at 161.

33 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 62.

34 See e.g., Leonardy & Brand, *supra* note 20 at 661 (summarizing German caselaw cited elsewhere in this text).

35 For those requirements, which exist in some states, see the text and notes in "Demanding Federal Loyalty," below.

36 "On Federal Loyalty," below, outlines the specifications.

37 2015 SCC 14 [*Québec*]. Four dissenting judges did recognize a duty to cooperate. A majority decision requiring consultation could provide some support for a less demanding form of federal loyalty in

decision argued that denying access to and/or destroying the data violated the inherent federal solidarity principle and the relevant federal legislation should be “inapplicable to provinces seeking to access the data that [was] cooperatively collected.”³⁸ While the SCC did not adopt Cyr’s view, recent work argues that the principle would have required negotiation prior to the destruction of the materials and may have required keeping and/or sharing it.³⁹ Either result would have respected Québec’s input and could have helped regulate firearms in Canada, appeasing many.⁴⁰ The inherence claim could also explain some case results. For instance, the inherence claim could provide a coherent explanation for why Québec cannot unilaterally secede from Canada: no other actor must ‘buy-in’ for a secession right to exist, but other constitutional actors’ interests require that the right can only be exercised in cooperation with others.⁴¹

Whether these ends *are* salutary is questionable and claiming that any principled federalism must view them as salutary arguably begs the question,⁴² but these ends are plausibly compelling in a way that at least justifies analyzing the inherence claim. A truth claim’s potential functional value does not, of course, render it true, so some theory always remains necessary. Each claimed benefit of the inherence claim can only be defended with a plausible account of what the claim entails and how it brings about those ends. *Whether* these results are good results depends on the truth of the inherence claim — and whether all normatively justifiable accounts of federalism are necessarily consistent with

Canada. A more demanding form of federal loyalty would need to be inherent for the outcome of that case to differ though.

38 Cyr, *supra* note 10 at 33-34.

39 Nato, *supra* note 12. In another, pre-decision article, Daly, *supra* note 9 at 46 argued that the SCC should “formally recognize ... an obligation of good faith” where the federal and provincial governments create cooperative regulative bodies pursuant to joint legislative programs in dual aspect areas. Per Daly, such a principle would have constrained the federal government’s ability to destroy the data since its elimination would have negative effects on the provincial programs and required consultation prior to taking action that would undermine any cooperative regime, including the database. Whether Daly views the principle as ‘inherent’ is, again, unclear. Notably, however, Daly limits application of the principle only to joint/cooperative programs. This offers yet another articulation of the principle that can only be ‘inherent’ to forms of federalism that allow cooperative actions in the first place.

40 See e.g., criticisms in Jean Leclair, “Un principe affaibli,” *La Presse* (3 April 2015), online: <www.lapresse.ca/debats/courrier-des-lecteurs/201503/31/01-4857128-un-principe-affaibli.php> [perma.cc/HZ4Z-8HQZ]; Johanne Poirier, “Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?” (2015) 45:1/2 RDUS 47. Yet, as noted below, one should not accept federal loyalty just to avoid the result in *Québec*, *supra* note 37.

41 Nato, *supra* note 12 at 22-24, discussing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 29, 161 DLR (4th) 385 [*Secession*]. Cf. my discussion of the case below.

42 See “The Inherence Claim Cannot Explain Plausibly Justified Constitutional Law,” below.

that claim, as its proponents propose. The functional reasons to support the inherence claim nonetheless justify analyzing the theoretical case for it.

The question is whether and how any account of the claim can produce its claimed benefits. Unfortunately, the theoretical and/or functional reasons to accept the inherence claim do not survive critical scrutiny — and the reasons to accept federal loyalty as normatively valuable do not support federal loyalty's claimed inherence. Indeed, the inherence claim cannot be rendered both substantive and coherent in a way that would produce any of the claimed benefits above. Attending to the forms that 'federalism' and 'federal loyalty' could take makes this clear.

On 'Federalism'

A vast literature provides conceptual analysis of 'federalism' and 'federal loyalty.' Yet each plausible definition of federalism fits uneasily with all leading ways of understanding federal loyalty and undermines the inherence claim. It suffices here to note that 'federalism' can be understood ideologically or institutionally. Ideological federalism views 'federalism' as an idea of political justice through a combination of unity and diversity with various political forms. Institutional federalism views political arrangements' formal features as distinctive of 'federalism.'

i. Ideological Federalism

Ideological federalism distinguishes the idea of federalism from the institutional forms that may realize it. Proponents distinguish federalism as an idea, and federations as one form of realizing that idea.⁴³ The idea is rooted in a desire to combine unity and diversity.⁴⁴ Federations are a form of realizing this aim where there is no subordination to the centre.⁴⁵ In other words,

43 See e.g., Ronald L Watts, *Comparing Federal Systems*, 3rd ed (Montréal: McGill-Queen's University Press, 2008) at 6.

44 Nicholas Aroney & John Kincaid, "Comparative Observations and Conclusions" in Nicholas Aroney & John Kincaid, eds, *Courts in Federal Countries: Federalists of Unitarists?* (Toronto: University of Toronto Press, 2017) 482 at 536. For the federalism equals unity plus diversity formula, see also Eugénie Brouillet, "The Federal Principle and the 2005 Balance of Powers" (2006) 34 SCLR (2d) 307 at 310; Michael Burgess, "Federalism and Federation: Putting the Record Straight" (2017), online: *50 Shades of Freedom* <50shadesoffederalism.com/theory/federalism-federation-putting-record-straight/> [perma.cc/2VWZ-E4LT].

45 Watts, *supra* note 43 at 8.

Federalism is a normative doctrine: it promotes institutional design which favours unity and diversity, 'self-rule' and 'joint-rule,' 'autonomy' and 'participation,' within a single polity. ... [F]ederat-IONs are real-life incarnations of this political concept.⁴⁶

Whether all ideological understandings of federalism can be reduced to a 'unity plus diversity' schema is questionable in a way that immediately challenges the inherence claim.⁴⁷ But that schema is a useful placeholder in the present account. If federalism describes a variety of ideological positions with various ends, as I suspect, it will be *less* likely that each ideological form must combine with a non-trivial specification of federal loyalty. Indeed, many would deny that the inherence claim's functional 'benefits' are benefits at all.⁴⁸ The case for the inherence claim may already assume a federalist ideology amenable to federal loyalty in a way that begs the question of whether all plausible federalist ideologies must require it. But many ideological federal views, including those most amenable to the inherence claim, could be placed under the 'unity plus diversity' schema.⁴⁹ An 'inherent' principle should be consistent with — and presupposed by — the mainstream views that fit beneath it. Indeed, that schema may be most amenable to federal loyalty, making consistency here especially important for the inherence claim.

ii. Institutional Federalism

Institutional federalism views 'federalism' as the name for a set of institutional arrangements with defined features, regardless of their origins or the normative ideals that they seek to instantiate. Federalism can be used to promote various ends. Even if we focus on a single end, various institutional forms can promote unity and diversity. These facts support institutional federalism. For instance, on a classical understanding, federalism attempts to promote the benefits of large and small governance, not unity and diversity.⁵⁰ 'Normative justifications'

46 Johanne Poirier, "Who is Afraid of (Con)Federalism?" in Kris Deschouwer & Johanne Poirier, eds, *(Con)Federalism: Cure or Curse?* (Brussels: Re-Bel Initiative, 2015) 27 at 28, online (pdf): *Rethinking Belgium* <rethinkingbelgium.eu/wp-content/uploads/2019/08/Re-Bel-e-book-18.pdf> [perma.cc/WYM2-MZJB] [Poirier, "Afraid"] [emphasis in original].

47 See e.g., the sources in note 11, above. See also Daniel Weinstock, "Towards a Normative Theory of Federalism" (2001) 53:167 *Intl Soc Science J* 75. As Weinstock notes, the 'ideology' of federalism still requires greater elucidation.

48 *Ibid.* For examples of differing views, see e.g., commentary in *Québec*, *supra* note 37; *Secession*, *supra* note 41.

49 Aroney & Kincaid, *supra* note 44 demonstrate this. For a clearer example of potential overlaps, Johanne Poirier for one, both champions this ideological formulation ("Afraid," *supra* note 46) and elsewhere (Gaudreault-Desbiens & Poirier *supra* note 18) highlights the fundamental importance, if not inherence, of federal loyalty to federalism.

50 Martin Diamond, "The Ends of Federalism" (1973) 3:2 *Publius: J Federalism* 129 at 130.

for federalism include arguments that federalism best achieves the values of democracy, citizenship, and liberty.⁵¹ Those are just three prominent approaches that are not obviously reducible to unity and diversity. Moreover, while federalism is often understood as undermining efficiency,⁵² one can divide powers for the sake of efficiency.⁵³ The institutional federalist allows this conceptual possibility. It is then unclear whether the set of institutional forms that could realize these aims is sufficiently circumscribed so as to be useful for constitutional design. We even lack a clear indicator of the exact mix of unity and diversity needed to qualify as instantiating the idea. Highly centralized governance could theoretically provide the ideal mix. Nicholas Aroney and John Kincaid thus note that the meaning of ideological federalism must be “clarified.”⁵⁴

Institutional arrangements are supposed to more easily identify a unique political concept of ‘federalism.’ Yet proponents of institutional federalism debate which set of features are distinctive of federalism. Candidates include “the division of state functions between ... different orders of government both enjoying political autonomy; ... the supremacy of the federal/national constitution; and ... a system of cooperation among the levels, including the judicial adjudication of disputes between and among the entities over the respective constitutional powers.”⁵⁵ Clarity on which features are necessary is lacking. As seen below, cooperation may not be a necessary feature.

The ideological-institutional division is imperfect. Both definitions admit borderline cases. ‘Hybrid’ or ‘quasi-federal’ systems — including regional entities and ‘devolved’ systems — complicate the picture.⁵⁶ Some accounts contain ideological and institutional components, blurring boundaries.⁵⁷ Other distinctions are also important. For instance, ideological and institutional federalists both distinguish dualist federalism, in which each level of government has exclusive fields of jurisdiction that do not overlap with others’ jurisdiction and in which they are free to act as they see fit, and cooperative federalism, where, “in most areas, decision-making and implementation require action by both levels

51 Weinstock, *supra* note 47.

52 See e.g., *ibid* at 77.

53 See e.g., Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009).

54 Aroney & Kincaid, *supra* note 44 at 536.

55 Palermo & Kössler, *supra* note 6 at 39.

56 See e.g., Watts, *supra* note 43; Daniel J Elazar, *Exploring Federalism* (Tuscaloosa, Ala: University of Alabama Press, 1987). For a more recent case study, see Joaquim Rius-Ulldemolins & Mariano M Zamorano, “Federalism, Cultural Policies, and Identity Pluralism: Cooperation and Conflict in the Spanish Quasi-Federal System” (2015) 45:2 *Publius: J Federalism* 167.

57 See e.g., Watts, *supra* note 43 at 8; Brouillet, *supra* note 44 at 311.

of government and thus their integration to a certain degree.”⁵⁸ These nuances are, however, unlikely to change my analysis. The idealized types provided by the present division account for all paradigmatic federations. They are representative of most mainstream views. If federal loyalty is inherent to the system, it is likely to be inherent to a mainstream view capturing all paradigms. An ‘inherent’ principle should be consistent with one of the broadest definitions of federalism that accounts for those cases. Whether it is inherent to idiosyncratic cases says little about its general inherence. The ideological-institutional division thus suffices here. It is unlikely that adopting a different definition of federalism will provide a different conclusion on the truth of the inherence claim.

On ‘Federal Loyalty’

‘Federal loyalty’ also admits different definitions. Its most basic form asserts that “the federation and the constituent states ... are mutually bound to consider each other’s interests and to act loyally vis-à-vis each other.”⁵⁹ Yet the requirements to ‘act loyally’ and, by extension, the scope of federal loyalty, admit multiple readings, from the trivial to the very demanding. I will survey three representative interpretations before examining their relationship to ‘federalism.’

i. Trivial Federal Loyalty

The first interpretation of federal loyalty merely requires considering others’ interests. This makes federal loyalty trivial. Loyalty is always “an internal limit to the exercise of a competence. The argument ... [for a loyalty violation] is not that the ... entity over-exercises its competence outwardly, but that, within the very limits of the concerned subject-matter, it does not at all or too little consider the interests of the other tier.”⁶⁰

This approach struggles to ground a normative legal principle. Mere consideration cannot create enforceable legal obligations. Attempts to specify the requirement using other normative terms do not solve the issue and raise others. For instance, if ‘to act loyally’ is just an obligation to “respect each other,”⁶¹ the scope of consideration required remains opaque and potentially trivial. A substantive version of this definition requires a better understand of the duties

58 Palermo & Kössler, *supra* note 6 at 46 (with more distinctions at 44ff).

59 Gamper, *supra* note 2 at 160.

60 *Ibid* at 164.

61 *Ibid* at 162.

of respect. Those duties need to be grounded and may make loyalty redundant when so-grounded.

Federal loyalty thus needs to be more than just consideration of or respect for others' interests. Otherwise, it is merely 'trivial federal loyalty' with little unique normative content.

ii. Demanding Federal Loyalty

At the other end of the spectrum, mainstream interpretations of federal loyalty posit panoplies of demanding obligations governments must fulfill when exercising legislative competences. On one interpretation, Germany's federal loyalty principle "imposes ... a set of core duties ... to prevent major ruptures of the federation's equilibrium"⁶² *minimally* including:

a negative duty to show self-restraint when potentially affecting the others' interests ... limiting as much as possible negative externalities[,] ... a positive duty to act in good faith ... [which] requires that a level of government should not try to do indirectly what it is forbidden to do directly[,] ... [recognizing] the existence of a federal common good that transcends the federated units' individual or aggregate interests[,] ... [and rejecting] unilateral appropriation ... of the power to define that common good.⁶³

Federal actors must not only refrain from actions that may limit other actors' abilities to exercise their competences but must consult and cooperate with other actors to avoid such limitations. On another demanding reading that reflects South Africa's explicit constitutional requirements,⁶⁴ federal loyalty requires cooperation, coordination, consultation, and exhaustion of all remedies prior to judicial remedy to avoid encroachment on others.⁶⁵ Actors must take substantive steps to cooperate and coordinate when passing legislation. When, inevitably, conflicts arise, they must attempt to resolve the issue absent judicial interference. Call an interpretation requiring all substantive obligations associated with Germany or South Africa 'demanding federal loyalty.'

62 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 69.

63 *Ibid* at 77-78. His view relies on mainstream readings of *Atomic Weapons Referenda II Case*, 8 BVerfGE 122 (1958); *Television 1 Case*, 12 BVerfGE 205 (1961); and *Finance Equalization III*, 86 BVerfGE 148 (1992).

64 *The Constitution of the Republic of South Africa, 1996*, s 41.

65 Leonardy & Brand, *supra* note 20 at 663.

iii. Median Federal Loyalty

The final interpretation states that loyalty requires a subset of the ‘demanding’ obligations. Call this ‘median federal loyalty.’ South Africa’s demanding text is something of an outlier in transnational law. Even EU law, which includes a series of substantive obligations,⁶⁶ many of which pertain to institutional cooperation and conflict resolution,⁶⁷ may not require full coordination. This arguably makes the German version of demanding federal loyalty more plausible. Yet the obligations in the mainstream German view may only apply “whenever appropriate.”⁶⁸ The scope of federal loyalty remains unclear. As it stands, federal loyalty is used to apply to a range of duties from “[h]ard,’ confrontational rules on conflict resolution such as supremacy, pre-emption and duties of abstention” to “softer,’ more cooperative duties of conflict prevention such as duties of consideration and coordination.”⁶⁹ Deciding which of these are truly required by federal loyalty, and when, remains difficult. Even a principle for deciding which duties are appropriate when is difficult to parse. One candidate is that governments should not pass legislation that “is unreasonable and likely to paralyze institutional mechanisms.”⁷⁰ This leaves ample room for interpretation and may not explain the whole legal phenomenon. For instance, many non-cooperative, let alone uncoordinated, actions will not produce ‘paralysis.’⁷¹

Given the issues with each interpretation, I remain agnostic between accounts of federal loyalty’s demands. I believe that a non-trivial, non-overdemanding federal loyalty principle requires that each level of government in a federal system make meaningful efforts to ensure non-interference with the jurisdiction of the other. But I need not detail this definition: again, as I explain below, the inherence claim is problematic on *any* definition of federal loyalty.

66 Miglio, *supra* note 4 at 481-83; Klamert, *supra* note 29.

67 See e.g., Klamert, *supra* note 29 at 14-15.

68 Arban, *supra* note 4 at 248-49 and sources therein.

69 Klamert, *supra* note 29 at vii.

70 Gaudreault-DesBiens, “Ethos,” *supra* note 3 at 71.

71 Whether Swiss federal loyalty requirements qualify as a ‘demanding’ or ‘median’ is debatable, but difficulties with determining how to understand the Swiss test are emblematic of deficiencies with median federal loyalty. Per *Swiss*, *supra* note 25, art 44, the “Confederation” and “Cantons” are bound to “support each other in the fulfilment of their duties” and “owe each other a duty of consideration and support” that requires that they “provide each other with administrative assistance and mutual judicial assistance.” Both of these requirements are clear. Yet the further duty to coordinate is qualified by a statement that it “generally” applies and the duty to resolve matters through negotiation or mediation only applies “wherever possible.” Depending on how one reads these qualifications, Switzerland could provide an example of demanding federal loyalty or a version of median federal loyalty that raises questions about when the obligations ought to apply. In both cases, the contours of the principle remain difficult to parse. Belgium may also challenge claims about the extent to which South Africa should be understood as an outlier.

Conceptually Dividing Federal Loyalty and Federalism: An Analytical Defense

Several theoretical, legal, and practical issues undermine the inherence claim. I will address six of these issues.

i. 'Federalism' Does Not Entail Any Plausible Federal Loyalty Principle

First, and most importantly from a theoretical perspective, no version of federal loyalty follows directly from either plausible definition of federalism. Ideological federalism faces a clear problem here. Ideological federalists committed to federal loyalty must either specify the correct combination of unity and diversity demanded by their view — which has proven impossible to date and can only be done at the expense of the kind of ecumenicism ideological federalism is designed to accommodate — or admit that federal loyalty is normatively inert and/or trivial. This is hardly what can be expected of an 'inherent' constitutional principle worth discussing in detail.

Nothing about the combination of unity and diversity as such requires the kind of substantive obligations required by demanding or median federal loyalty. While many argue that a commitment to diversity requires some sense of respect for others, the *amount* of diversity that must be accommodated in a federal system remains unclear in ideological federalism.⁷² No one has established that the level of diversity required entails the kind of substantive obligations seen in demanding or even median federal loyalty in a non-question-begging manner. It is unclear how such an argument *could* be adduced. Stating that any recognition of diversity minimally requires respect between diverse actors may seem like a plausible ideological position. But this requirement then seems trivial and unenforceable as a constitutional legal norm. The nature of the respect remains opaque. Federal loyalty is thus inapplicable to some combinations of unity and diversity or applicable in a way that leaves federal loyalty undefined and potentially trivial.

Moreover, to the extent that one can establish that the proper combination of unity and diversity requires the kind of substantive entitlements that would make federal loyalty non-trivial, this finding comes at the expense of the kind of institutional ecumenicism ideological federalism is supposedly designed to provide. Ideological federalism's consistency with many institutional arrange-

⁷² For example, the quantum is lacking in sources in note 44, above.

ments is its hallmark feature. Yet if demanding federal loyalty is inherent in ideological federalism, many institutional forms that ideological federalism is supposed to recognize as ‘federal’ are not federal after all. Even dualist and/or otherwise uncooperative federations no longer qualify. Where dualist federations — including the United States of America (USA) and Canada — are representative modern federations, this is a great explanatory loss. Dualism remains a combination of unity and diversity even if one values diversity more. It is hard to explain why dualist states should not qualify as federalist on the ideological schema.

Federal loyalty faces a similar problem in institutional federalism: it is either demanding enough to make many paradigmatic cases non-federal or it is trivial. Even median loyalty may not be descriptively adequate for institutional federalists and its collection of duties may be ad hoc in any case. Institutional federalism’s definition of federalism is built on descriptive phenomena. Yet while some level of cooperation is sometimes said to be part of the “skeleton” of institutional federalism,⁷³ the obligations imposed by demanding and median federal loyalty are, again, not part of the architecture of paradigmatic federations. Even the USA may not qualify on this approach.⁷⁴ It is implausible that an empirically-grounded institutional federalism can accommodate the view that dualist federations without loyalty principles are not federations.

Dualism’s commitment to exclusivity and the possibility of non-cooperation seems at odds with anything beyond trivial federal loyalty, which remains opaque, inapplicable, and ultimately normatively inert. Inherence claim advocates take a lack of fit with dualism to be a benefit of loyalty, championing its ability to overcome the strictures of dualism since “federal loyalty acts at a deeper level as it is inherent to federalism, irrespective of the abstract model, be it cooperative or competitive, a given federation is deemed to reflect.”⁷⁵ Yet dualist states exist and one need not promote a return to ‘watertight compartments’⁷⁶ of exclusive jurisdiction to recognize that sovereignty should allow for non-cooperation and non-coordination. This is why Canadian case law continues to effectively state that there is no duty of loyalty in Canada even as Canada moves from full dualism to a more cooperative model: even where two exclusive zones of jurisdiction overlap, your own exclusive jurisdiction should

73 Palermo & Kössler, *supra* note 6 at 39.

74 Aroney & Kincaid, *supra* note 44.

75 Gaudreault-DesBiens, “Cooperative,” *supra* note 8 at 14.

76 See e.g., Asher Honickman, “Watertight Compartments: Getting Back to the Constitutional Division of Powers” (2017) 55:1 *Alta L Rev* 225 on paradigmatically dualist Canada.

be exercisable even if it will have a negative impact on others.⁷⁷ To say anything less is to deny your exclusive competence.⁷⁸

ii. Federal Loyalty Is Inconsistent with Important Features of Federalism

Indeed, one should also deny the inherence claim because, second, the claim fits uneasily with a variety of federal phenomena we should want federalism to accommodate. Failure to accommodate these phenomena is descriptively and normatively problematic.

Federal loyalty is not only not required by plausible federal theories, but at best fits uneasily with federalists' recognition and incorporation of phenomena that should be conceptually available to them, and that there may be reason for many federal jurisdictions to adopt. Dualist federalism is just one example. While dualism is, perhaps, being replaced by cooperative federalism in many states, dualism remains a common phenomenon.⁷⁹ There are also normative reasons to allow it, including its presence in the range of reasonable combinations of unity and diversity, the legitimacy of constitutional processes that recognize it, and its status as an institution that fits the institutional form of many federations and can fulfill aims, like efficiency, that institutional federalists take to be acceptable ends of federalism.⁸⁰

The inherence claim also fits uneasily with other constitutional principles. Inherence claim proponents are committed to the existence of unwritten constitutional principles. Constitutional principles are meant to be read in light of one another.⁸¹ While the principles can be in tension with one another, they

77 *Québec, supra* note 37.

78 Dualism and federal loyalty are not, of course, formally inconsistent. After all, Belgium recognizes both principles, see Palermo & Kössler, *supra* note 6 at 249. Yet, as noted below, Belgium is the only state that combines them and its combination appears to come at the expense of some of federal loyalty's purported benefits. One idiosyncratic combination surely cannot be evidence of the inherence of federal loyalty even in dualist states. The Belgian choice should be viewed as a choice. The default view of sovereignty should remain in place absent such a choice — and there is reason to question the value of Belgium's choice given the lack of easy fit between these principles. To be fair, however, a more positive discussion of the Belgian case appears in Anne Catherine Rasson, "Le principe du «vivre ensemble» belge : une épopée constitutionnelle" (2014) 1 *Chroniques Dr Public* 25. Cyr, *supra* note 10's argument that sovereignty requires a form of "positive autonomy" that entails a form of cooperative federalism even in seemingly dualist states then rests on a very controversial view of autonomy.

79 Even Palermo & Kössler, *supra* note 6 at 46 recognize this much, though they attempt to undermine dualism.

80 See notes 11, 50-51, and 53, above, and surrounding.

81 *Secession, supra* note 41 at para 29.

should be capable of being rendered consistent with each other; otherwise, they will likely fail to properly guide constitutional action.⁸² Some federal states may be unable to render federal loyalty consistent with their other constitutional principles. For instance, while federal loyalty is said to follow from federal solidarity,⁸³ its connection to the legal solidarity principle is difficult to parse⁸⁴ and federalism can undermine moral solidarity.⁸⁵

Parliamentary sovereignty, though controversial, also sits uneasily with federal loyalty. A majority of the SCC explicitly denied that the cooperative obligations characteristic of plausible accounts of federal loyalty existed in Canada because recognition of those principles would undermine Parliamentary sovereignty.⁸⁶ Yet such sovereignty is a strong candidate for a principle of federalism.⁸⁷ If there are domains of exclusive jurisdiction, actors within them should be able to exercise them alone. This is what it means to be sovereign in one's jurisdiction. This not only requires the conceptual possibility of dualism with respect to the division of powers between state and sub-state bodies. It also requires that legislators be able to act free from judicial interference in some cases. More demanding forms of federal loyalty appear inconsistent with this requirement. Making all legislative action subject to judicial review for proper coordination or consultation, for instance, is a significant restraint on a 'sovereign.'⁸⁸

82 An anonymous reviewer suggests that reading constitutional principles as in tension with one another can have positive benefits and offers Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2014) as evidence that such a reading has proved fruitful in the Canadian context. I take Webber's point about tension to apply at a higher level of analysis insofar as the 'constitutional positions' he discusses appear to speak to more comprehensive views of the constitutional order. I am focused on basic principles, but tensions between worldviews can produce tensions between principles and I can see how Webber's point can apply equally to constitutional principles in any case. It remains the case that constitutional orders are, at least doctrinally, supposed to offer consistent guidance and the principles of at least Canadian constitutional law are supposed to be co-constitutive within that order such that 'tension' can only go so far and consistency must remain possible. Whether the tensions here qualify as inconsistencies is, of course, debatable. But the possibility that they could render the constitutional order less coherent plausibly suffices to question whether federal loyalty is 'inherent' to federalism.

83 Gaudreault-DesBiens, "Experiment," *supra* note 3 at 122 and Cyr, *supra* note 10 discuss them interchangeably.

84 Arban, *supra* note 4 views them as differing, making loyalty non-redundant.

85 Weinstock, *supra* note 47 at 79.

86 *Québec*, *supra* note 37 at para 20.

87 *Ibid.* See also e.g., John McGarry, "The Principle of Parliamentary Sovereignty" 32:4 (2012) LS 577.

88 *Québec*, *supra* note 37. For a longer explanation, history, and defense of Parliamentary sovereignty, which also highlights the many criticisms thereof, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999).

Even if accepting Parliamentary sovereignty as 'inherent' to federalism begs the question at issue, its recognition as a constitutional principle in paradigmatically federal states raises a problem for those who respect a broader range of unwritten constitutional principles and/or the constitutional text. In short, it is not clear that federal loyalty can be read as consistent with other principles already clearly recognized in many constitutional systems. Parliamentary sovereignty is in other constitutions and/or recognized as inherent to other constitutional arrangements.⁸⁹ Stating that the Parliamentary sovereignty principle originated largely in Britain and is only distinctive of British colonies accordingly also does not undermine this objection to the inherence claim.⁹⁰ Indeed, federal loyalty is similarly only recognized in certain kinds of states.⁹¹ At best, the inherence claim would introduce considerable unease to many jurisdictions.

Federal loyalty also fits uneasily with commitments to flexible intergovernmental relations. Intergovernmental relations are admittedly often based on comity, "especially in countries following the model of administrative federalism. This is because the coordination of national legislation and subnational implementation quite evidently requires a high degree of mutual understanding and cooperation."⁹² Yet this model is by no means a uniform model of intergovernmental relations. Many other arrangements exist.⁹³ While differences could be described as mere 'tokens' "of the respective 'culture of Federalism' put into practice,"⁹⁴ not all of them include the kind of substantive obligations required by demanding or median federal loyalty. Federal loyalty must collapse into its trivial version to explain variations in intergovernmental relations in federal states. Yet there is ample reason to think that federalism should allow such variance.⁹⁵ For example, it is difficult to see why truly sovereign contracting parties in constitutional negotiations should be required to agree to cooperate, coordinate, etc. in the future or why we should deny the output the title of 'federation' if it otherwise shares all institutional forms and/or shows (non-trivial) commitments to both unity and diversity.

Dualism, Parliamentary sovereignty, and flexible intergovernmental relations are just three constitutional phenomena that at best fit uneasily with fed-

89 See e.g., Goldsworthy, *supra* note 88; McGarry, *supra* note 87.

90 McGarry, *supra* note 87, at least, admittedly focuses mostly on Britain.

91 See "There Are Practical Reasons to Deny the Inherence Claim," below.

92 Palermo & Kössler, *supra* note 6 at 249.

93 Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford: Oxford University Press, 2015).

94 Gamper, *supra* note 2 at 170.

95 Poirier, Saunders & Kincaid, *supra* note 93.

eral loyalty and federalist states should nonetheless be able to and do incorporate while remaining federalist on any plausible definition.⁹⁶ It is, then, not only the case that plausible definitions of federalism do not require non-trivial versions of federal loyalty. Non-trivial federal loyalty may even create conflicts with other constitutional forms, principles, and tools that should remain available to federalists.

None of this means that federal loyalty is incompatible with federalism or other principles thereof. It may fit well with autonomy and subsidiarity, as Cyr claims, and/or with democracy, which Paul Daly views as loyalty's companion principle in arguments for cooperative federalism.⁹⁷ The relationship between subsidiarity and federalism is, perhaps, more complex than many suppose, so hanging the inherence of loyalty on the inherence of subsidiarity strikes me as suspect.⁹⁸ Moreover, Cyr's argument for autonomy as a principle of federalism requiring a cooperative understanding thereof posits a form of 'positive' autonomy that is likely to remain highly contentious and Daly does not even link democracy and loyalty so much as he shows that both could support cooperative federalism.⁹⁹ Yet I remain open to the possibility that these principles can form a coherent whole. Federal states can adopt a federal loyalty principle without becoming non-federal. Doing so may help promote other principles of federalism and/or federalism-adjacent principles. It is, however, worth noting that Cyr and Daly's arguments both aim to promote cooperative federalisms in any case.¹⁰⁰ Even if one accepts their collection of principles as a consistent whole, they only show that federal loyalty can be part of a collection of principles that support *cooperative* federalism. Some options above may still be off the federal 'table.' The main point here is merely that federal loyalty is in tension with some federalist and/or federalism-adjacent principles and this undermines the

96 For another example, forms of federal loyalty that require exhausting other remedies before taking an issue to judiciary also seem inconsistent with the existence of abstract review in many federations. Of course, as an anonymous reviewer notes, Parliamentary sovereignty, for one, could be an even less plausible candidate principle of federalism than federal loyalty. I need not settle that issue here. Even if that is so, considerations in the text around notes 88-90, above, would still challenge the inherence claim. Parliamentary sovereignty is a clear principle in many federal states.

97 Daly, *supra* note 9; Cyr, *supra* note 10.

98 As NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) c 7 notes, 'subsidiarity' and 'federalism' are distinct and severable principles. Subsidiarity is just one way to allocate powers in a state. Federalism's institutional and, I suspect, even ideological commitments do not obviously require subsidiarity.

99 Daly, *supra* note 9; Cyr, *supra* note 10. Cyr's claim at 29 that subsidiarity requires that different levels of government help each other is more contentious still. Even if one could vindicate it, doing so would not show that federal loyalty is inherent to federalism if subsidiarity and federalism are severable as Barber, *supra* note 98 suggests.

100 Daly, *supra* note 9; Cyr, *supra* note 10.

inherence claim and raises questions about whether adopting federal loyalty is wise where one values other principles.

iii. The Case for the Inherence Claim Is Lacking on Its Own Terms

One should also deny the inherence claim because, third, the positive reasons offered in its favour are unpersuasive. One of the best defenses of the inherence claim grounds its case for federal loyalty as an inherent feature of federalism in the:

- (1) fact that intergovernmental organizations are constitutionally protected;¹⁰¹
- (2) fact of vertical distribution of powers; and¹⁰²
- (3) need for effective functioning of the federation.¹⁰³

The first approach is unpersuasive and not empirically uniform. The same is true of the related claim that all federal states recognize something like federal loyalty.¹⁰⁴ Not all nations recognize the principle's analogues. Moreover, the best empirical case here requires making 'federal loyalty' equivalent to other phenomena, like 'cooperative federalism' and 'solidarity.'¹⁰⁵ These concepts are non-reducible to one another and should remain different in constitutional theory.¹⁰⁶

The second approach is more compelling, but under-described. Per Gamper, "a constitution would not willingly allocate powers at different levels without safeguarding that powers are exercised in a manner that does not violate the other."¹⁰⁷ It must accordingly protect against overzealous use of one's own powers and explicit infringements of another's.¹⁰⁸ Yet the scope of these requirements is unclear. They may not require 'loyalty.' Leave aside the difficult issue of deciding what qualifies as 'overzealous' use. Exclusive competences can still be adequately protected absent coordination or pre-judicial conflict resolution. Abstract judicial review may provide the *best* protection of a division of powers. Might 'overzealous' use also be possible without cooperation agreements? The

101 Gamper, *supra* note 2 at 169.

102 *Ibid.*

103 *Ibid* at 161.

104 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 53.

105 *Ibid.*

106 Arban, *supra* note 4. A similar concern applies to Cyr, *supra* note 10's solidarity-based view, though charity demands that I accept them as equivalent when assessing his other arguments that may not rely on an equivalence.

107 Gamper, *supra* note 2 at 169.

108 *Ibid.*

empirical case that violations are more common in dualist states has not been made. The case for non-trivial substantive federal loyalty requirements thus seems underdeveloped. Avoiding violations of others' legislative competence is, in turn, a core judicial function in any state with judicial review.¹⁰⁹ Empirically, it does not seem like a federal loyalty principle is necessary for judges to fulfill this role.

The third approach arguably does not provide a normative case for federal loyalty. Gamper grounds this line of defense for the inherence claim in

the *pactum foederis*: unless all tiers cooperate in a federal state, an effective functioning of that state will not be possible. ... [T]he idea of the covenant ... stands behind both types of loyalty, namely a pre-constitutional covenant that legitimizes the foundation of a state, and a covenant between the constituent states that legitimizes the federal state. Loyalty, in both cases, does not go without legitimacy [derived] from the ... peoples, [though potentially] mediated by a constitutional convention.¹¹⁰

This approach has substantial flaws as a normative theory. Its emphasis on 'the people' as the source of legitimacy is controversial at best. It also relies on a questionable understanding of the methods of instantiating federalism. Per Gamper, "federal loyalty means that the territorial entities of a compound state oblige themselves to respect each other due to their agreement to found the compound state."¹¹¹ Yet it is unlikely that all federalist states must be 'compounds' — viz. states formed through the joint decision of pre-existing entities to form a larger state — from an ideological federalist perspective. Those who decouple federalism and its institutional structures explicitly state that only some manifestations are compounds.¹¹² Institutionalists must then recognize that not all federal structures are meant to be compound states. The relation between harmony and loyalty is likewise empirically unvalidated, undermining the claim.

Cyr offers a potentially more compelling argument for federal loyalty, but it too is unlikely to support the inherence claim. Cyr rightly notes that federal entities are part of the same state and the constituents of each entity are co-citizens. He then argues that this entails that each entity should refrain from "hurting" other entities:¹¹³ "[h]urting federal partners amounts to hurting the

109 Ethiopia and, to some extent, Switzerland are outliers, see Aroney & Kincaid, *supra* note 44 at 488-89.

110 Gamper, *supra* note 2 at 161.

111 *Ibid* at 162.

112 See e.g., Elazar, *supra* note 56.

113 Cyr, *supra* note 10 at 30-31.

shared body politic.”¹¹⁴ Each entity should also “positively assist” the others.¹¹⁵ Each level of government must “protect and promote the interests” of that shared body politic.¹¹⁶ The federal government, for example, owes duties to all citizens and should not frustrate the interests of those citizens when they are being furthered by provincial bodies and vice versa. Powers should accordingly be interpreted in ways that “sustain the common body politics.”¹¹⁷

Respectfully, however, a duty not to ‘hurt’ other federal entities also requires specification and it is unclear why any specification should require non-trivial federal loyalty. For instance, while Cyr specifies it partly in terms of a duty not to create negative externalities, he also notes that federal constitutions create specific allocations of powers to avoid externalities drafters deem unacceptable.¹¹⁸ I then fail to see why one must ‘read in’ another principle to avoid externalities. Moreover, Cyr’s argument seems to presuppose an understanding of citizens’ interests independent of politics and/or reflected equally in each level’s politics. Yet policies enacted by democratically elected governments at all levels plausibly further the identified interests of the ‘body politic.’ Citizens empower each level of government to act *within its mandate* to further interests they identify democratically. Adopting strong or even median federal loyalty could undermine furtherance of those interests, even requiring a government to go against its own interests. A weaker federal loyalty would raise other problems above and below.

iv. The Inherence Claim Cannot Explain Plausibly Justified Constitutional Law

Moving to the legal sphere, fourth, the inherence claim cannot explain the seemingly justified constitutional law of many states. This point can be addressed on a case-by-case basis and at the structural level. The case-by-case analysis is difficult to complete without begging important questions, but there are at least compelling independent reasons to support cases that do not adopt federal loyalty. *Québec* actually offers an example.¹¹⁹ While that case remains controversial, the federal case for sovereignty over the data it collected has some merit. Judicial unanimity on this point remains notable. While many were not satisfied with the result, the provincial alternative requiring that the federal

114 *Ibid* at 21.

115 *Ibid* at 31.

116 *Ibid* at 21.

117 *Ibid* at 31.

118 *Ibid* at 31-32. Daly, *supra* note 9 use of ‘hurt’-based language is likewise problematic.

119 Recall notes 38-41, above, and surrounding, suggesting that it could support the inherence claim.

government act against its own policy interest is also potentially problematic given the analysis above.¹²⁰ Indeed, regardless of what one thinks about that case, a principle under which purported sovereigns are required to act against their interests is at least *prima facie* disconcerting. This is plausibly true even when realizing the interests will negatively impact others. For instance, respecting various provincial interests negatively impacted federal plans to create a national security regulator, but judicial decisions not to require even *negotiations* for national securities regulation appear justifiable to many.¹²¹

Regardless of what one thinks about any case, the inherence claim also, and more importantly, cannot explain why some states explicitly recognize the principle in their constitutional texts and others choose not to. This is a structural problem. Explicit recognition of federal loyalty raises questions about the inherence claim. Belgium, Switzerland, South Africa, and the EU enshrine the principle.¹²² Yet explicit constitutional provisions requiring federal loyalty in given federal jurisdictions are at best redundant if the inherence claim is true. While explicitly incorporating inherent principles could, in theory, be valuable for other reasons,¹²³ the fact that states explicitly choose not to recognize the principle provides further reason to question the federal loyalty principle's purported 'inherence.' States know that they can recognize it and choose not to do so. Assuming that they incorporated principles that they knew others explicitly recognized and did not explicitly recognize themselves violates the basic constitutional rule of interpretation under which drafters' choices are intentional.¹²⁴ Where drafters know that they could explicitly incorporate a principle and do not do so, saying they assumed it was inherent is at best challenging from a legal point of view. It is even more challenging where courts in some states

120 Thank you to an anonymous reviewer for highlighting this point.

121 See e.g., *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [Securities].

122 Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 2; Arban, *supra* note 4 at 250-51; Klamert, *supra* note 29.

123 Belgium recognized federal loyalty pre-enshrinement; *Canton de Berne c Canton du Jura*, TF, 1ère Cour de Droit Public (1992) (Belgium). One might think that other constitutional principles pre-date their enshrinement. Gamber, *supra* note 2 at 167 suggests that states enshrine the principle because they do not want to leave loyalty "up to courts." But little evidence that this motivated relevant actors is provided there or in other texts on federal loyalty.

124 Both the 'originalist' who interprets the constitutional text predominantly based on the framers' intent and the proponent of 'purposive' interpretation who views legislative intent as a mere indicium of constitutional purpose should be able to agree on this much. 'Textualist' approaches to unwritten norms may be more complicated still. My favourite text on 'purposive' interpretative, which contrasts it with other approaches, remains Aharon Barak, *Purposive Interpretation in the Law*, translated by Sari Bashi (Princeton: Princeton: University Press, 2005). Like Barak, I believe that any plausible purposive interpretation must view the constitutional text as an essential component in identifying its purpose. We may disagree on how to weigh the relative value of text, though a full analysis of this is beyond the present inquiry.

have identified a set of unwritten federal principles that does not include federal loyalty.¹²⁵ Authorities in those states arguably already identified the principles they take to be 'inherent.'

While there is reason to question federal loyalty's application in some cases, then, the problem here is not primarily case-based. We simply cannot impute an assumption that inherent principles will be recognized to drafters who know that not all courts recognize federal loyalty as inherent. It is more plausible and consistent with constitutional norms to assume intentional desires not to recognize the principle. Recognizing it as inherent to the system then undermines the original constitutional agreement. Amendment more legitimately remedies past 'errors.'

v. The Inherence Claim Cannot Permit Varied Relationships Between Constitutional Texts and Constitutional Principles in Existing Federations

Fifth, the rule of law in such states does not allow recognition of federal loyalty as an underlying principle. Once more, either many seemingly federal states are not really federal, federal loyalty is not inherent to federalism, or federal loyalty can be invoked to overrule the constitutional text in violation of the rule of law. I described my issues with the first lemma of this problem above. The third not only leads to a violation of the rule of law, but also of the nature of constitutional principles. Some states are explicitly dualist.¹²⁶ The rule of law requires attending to the text. To go from explicit dualism to 'cooperativism' in such states violates the constitutional text. Unwritten principles are not supposed to be able to do that. While 'purposive' theories of interpretation suggest that the text can be interpreted in different ways over time to reflect how that purpose can be realized differently in different eras — and some states adopt this approach to constitutional interpretation — even those theories are limited by the constitutional text. One cannot simply read a dual set of exclusive competences as necessarily entailing cooperation, and states seem to recognize this.¹²⁷ Even

125 For example, Canada does not include federal loyalty in its constitutional principles in *Secession*, *supra* note 41.

126 Even Gaudreault-DesBiens & Poirier, *supra* note 18 recognize this at 398.

127 The majority judgment in *Québec*, *supra* note 37, especially at paras 17-20 is again notable here. Canadian constitutional law has subscribed to a "living tree" doctrine for nearly a century, see *Edwards v Canada (AG)*, [1930] AC 124, [1929] UKPC 86. Yet the majority in *Québec* at para 18 rightly noted that "the primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework" and that neither a principle of cooperative federalism many would like to read into the constitutional text — perhaps on purposive grounds — or cooperative actions between levels of governments could alter the basic dualist structure of Canadian federalism.

saying that the principle is ‘subordinate’ to written text, as it is in Germany,¹²⁸ presents a similar problem: either texts that explicitly disavow federal loyalty are not federalist or the principle is not inherent as claimed. Denying the inherence claim is preferable, especially given other reasons to question it.

While courts can recognize unwritten constitutional principles on several theories of interpretation and can do so as a matter of legal doctrine in many states, adding a principle that would change the fundamental structure of the division of powers within a more fundamental constitutional text should require amendment. Agreements to deviate may be rational,¹²⁹ but remain deviations. No plausible understanding of ‘principles’ justifies deviations from the text. Constitutional loyalty may accordingly, contra Gamper, *require* deviation from federal loyalty.¹³⁰ The practice of intergovernmental relations in dualist states may often include ample *de facto* cooperation.¹³¹ Yet we should want governments there and elsewhere to be able to say ‘no’ to certain cooperative arrangements if we truly value diversity. The SCC thus allows provinces to opt out of cooperative schemes and stresses this possibility as a feature that allows such constitutionality.¹³² Still other jurisdictions explicitly chose not to go the integration route. The rule of law and ‘nature’ of constitutional principles require allowing them that much.

vi. There Are Practical Reasons to Deny the Inherence Claim

There are, moreover and sixth, practical reasons not to accept the inherence claim. Some may justify decisions not to adopt federal loyalty in some federal states. Federalism’s aforementioned ability to undermine moral solidarity is one example. For another, related to issues above, constitutionalizing federal loyalty may create practical problems in intergovernmental relations. Even if federal loyalty were a component of some ideal form of intergovernmental relations and constitutional drafters should commit to its basic tenants, there would still be reason not to adopt the inherence claim if it entailed that federations must constitutionalize the principle. Flexibility is a benefit of intergovernmental relations in one dominant tradition.¹³³ Constitutionalizing any principles of such relations can thus be problematic. There is reason to keep them more infor-

128 Palermo & Kössler, *supra* note 6 at 250.

129 Bednar, *supra* note 53.

130 See also Aroney & Kincaid, *supra* note 44.

131 Gamper, *supra* note 2. See also Gaudreault-DesBiens & Poirier, *supra* note 18.

132 *Securities*, *supra* note 121.

133 Watts, *supra* note 43.

mal.¹³⁴ Recognizing the inherence claim may thus create practical problems in some states.

Federal loyalty also tends to be recognized in certain types of states, undermining its claimed necessity. At least Germany, South Africa, and Switzerland are all proponents of “administrative federalism where subnational entities execute the bulk of national legislation”; this usually correlates with “vertical cooperation regarding the implementation phase” of legislation.¹³⁵ This should not surprise us: so-called ‘integrative’ federalisms modelled on German federalism are more likely to recognize *any* values as inherent to constitutionalism than alternatives.¹³⁶ The same is true of federal loyalty-recognizing states. Yet the fact that the principle generally appears only in particular kinds of systems provides reason to question the inherence claim.

The Practical Benefits of Conceptual Division

There is, then, reason to think that ‘federalism’ and ‘federal loyalty’ are conceptually severable and one cannot derive a principle of federal loyalty from the fact that one has a federal state alone. A global constitutional norm of federal loyalty is thus difficult to procure. Harmonization of federal constitutional arrangements cannot follow from theory alone.

Happily, the practical benefits of this conceptual division suggest that the forgoing finding is not a loss for global constitutionalism. The inherence claim could have negative repercussions. Two representative issues make this clear. The first follows from the final practical fact in the last section. Federal loyalty’s historical appearance in certain kinds of federal states alone leaves us uncertain about how it will operate in other kinds of federal states. Norms of action under uncertainty then provide at least *prima facie* reason not to recognize the principle in all federal states. Scholars often attribute federal loyalty to Rudolph Smend.¹³⁷ Yet Smend’s work described a particular federal arrangement: the *monarchical* federal state.¹³⁸ While we have seen it operate in other kinds of systems, only certain kinds of integrative federations tend to recognize it.¹³⁹ Civil law jurisdictions, in turn, are more likely to formally recognize any principle

134 Poirier, Saunders & Kincaid, *supra* note 93.

135 Palermo & Kössler, *supra* note 6 at 248.

136 Aroney & Kincaid, *supra* note 44 at 512-15.

137 Gaudreault-DesBiens, “Ethos,” *supra* note 3 at 63-64.

138 Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, translated by Thomas Dunlap (Chicago: University of Chicago Press, 1998) at 89, n 3.

139 Palermo & Kössler, *supra* note 6 at 248.

of intergovernmental relations in their constitutions.¹⁴⁰ We lack evidence of the impact that an unwritten federal loyal principle will have in, for instance, traditionally dualist or common law states. Negative impacts are a distinct possibility we should avoid.

Evidence of how federal loyalty operates in some states actually provides reason to question whether it will always have its intended *positive* impacts. Belgium appears to be alone in adopting dualism and “comity.”¹⁴¹ There is reason to question whether persons in that state want to remain together.¹⁴² Unity can appear lacking. Moreover, even if one takes the formal unity of Belgium as sufficient, explicit constitutional recognition of federal loyalty has not led to actual cooperation in South Africa but to domination by a single party federal government.¹⁴³

Federal loyalty, in other words, may not be fulfilling its positive aims in many jurisdictions and we really do not know what it will look like in many other jurisdictions. This provides reason to question whether we should even want conceptual analysis that requires it in all federations.

The second practical reason to favour conceptual division is that the inherence claim may create incentives to deviate from the federal division of powers. These incentives undermine the commitment to exclusive spheres of jurisdiction that is supposed to make federal loyalty ‘inherent to federalism.’ Wide latitude for interpretation creates incentives to deviate from the division of powers in any constitutional text.¹⁴⁴ The claimed concurrency of federalisms that require federal loyalty arguably presupposed wider spheres of jurisdiction and could now incentivise attempts to broaden those spheres to more concurrent areas. Federal loyalty then itself admits of a wide number of interpretations and may introduce opportunities for argument about the scope of powers. Actors must address the scope before going to the neutral arbiter of the judiciary that also present opportunities to introduce new interpretations of heads of power. The inherence claim produces many opportunities to deviate from the original division of powers that may also serve as incentives to do so. If the latter is so, the inherence claims is self-defeating: it is anchored in, but ultimately undermines, the exclusivity of constitutional powers.

140 Gaudreault-DesBiens & Poirier, *supra* note 18 at 395.

141 Palermo & Kössler, *supra* note 6 at 249.

142 Aroney & Kincaid, *supra* note 44 at 519.

143 Nico Steytler, “Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study” in Tom Courchene et al, eds, *The Federal Idea: Essays in Honour of Ronald L Watts* (Montreal: McGill-Queen’s University Press, 2011) 413.

144 Bednar, *supra* note 53.

Implications for Legal 'Transplants'

Adopting federalism, then, does not entail adopting federal loyalty. A further 'transplant' of the concept of federal loyalty is necessary if some federal states, including the USA and Canada, want to adopt a principle of federal loyalty. If the forgoing is correct, moreover, then judicial recognition of a federal loyalty principle is inapt, at the very least in countries that do not have the same constitutional and factual circumstances as Germany and/or those that explicitly acknowledge constitutional rules or principles that fit uneasily with federal loyalty.

None of this means that federal states cannot adopt federal loyalty, but it sets independently valuable limits on how incorporation should take place. The above reasons to question whether adopting federal loyalty is *always* a good thing are non-dispositive of whether a state should adopt it. But a non-inherent principle must — or at least should — be incorporated into constitutional arrangements through normal constitutional amendment processes if a state wants to recognize it. This is actually another benefit of my proposal: it protects the separation of powers in federal states. Making the incorporation of federal loyalty into the constitution a matter of amendment puts control over the content, rather than the interpretation, of the constitution in the hands of the executive and/or legislature, not the judiciary. This not only protects the divisions of powers in many states but keeps the separation of powers intact in all states.

Objections and Replies

Given the inherence claim's transnational support, objections surely remain. I will very briefly address three of the most pressing and representative criticisms I have faced to date. My responses are, in turn, representative of my general strategies for lingering objections. The three that I will address focus on my 'formalism,' the prevalence of the inherence claim, and my use of dualism.

i. The Argument Against Formalism

First, Gaudreault-DesBiens states that explanatory issues like those raised above only arise if one adopts the "formalistic legalism" used by the SCC, rather than his "principle-based view of federalism."¹⁴⁵ Some may argue that I am likewise too formalistic. Yet even if my legal arguments above are too formalistic, this objection misses the mark by leaving questions about *which* principles federa-

145 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 78.

tions should use open. Making federal loyalty an analytic requirement of a 'principle-based' approach to federalism begs the question. I just presented several reasons to question non-analytic claims that the 'principles' of federalism must include 'federal loyalty.'

ii. The Strawman Charge

Second, one may argue that no one adopts the inherence claim. Perhaps those who discuss the principle being 'inherent' to federalism do not mean that it is a necessary component of federal views. They mean something weaker, like that it is part of all 'well-constituted' or 'principled' federal systems. Scholars who discuss federal loyalty as being inherent to federalism admittedly sometimes talk about it as a feature only of functioning or principled constitutions.¹⁴⁶

Two truths blunt the force of this objection: (1) the inherence claim is often also made in an unqualified fashion and we can read appeals to 'functioning' or 'principled' constitutions as further arguments for federal loyalty to support why the inherence claim is a good, and (2) the arguments above also undermine these weaker versions of the case for federal loyalty in all federal systems. We should take scholars at their word when they make the inherence claim, but the arguments above undermine their claims even if we adopt the principle of charity and qualify the inherence claim as only discussing features of 'functioning' or 'principled' federations.

iii. The Anti-Dualism Objection

Finally, one may argue that I miss the point by highlighting the importance of dualist federations. After all, part of the point of the inherence claim is to establish an account of federalism that goes beyond those traditional distinctions.¹⁴⁷ Insights here may be 'deeper' than the dualist federalism-cooperative federalism debate and any inconsistency between the inherence claim and the existence of dual federations should be resolved in loyalty's favour.

Yet this objection raises the same kind of problem that occurs throughout this piece. Either federal loyalty is so undemanding that it is effectively trivial and non-justiciable and so not a good candidate for the underlying norm of federalism, or it is so demanding that many paradigmatic federations that appear unable to adopt the principles due to the formal structure of their system and/or other principles that they adopted are not real federalist states. I doubt

146 *Ibid.*

147 Recall e.g., Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 3.

proponents of the inherence claim want it to apply to trivial federal loyalty alone. But we have been given little reason to think that a more substantive federal loyalty is the kind of underlying norm that should be the core 'principle' of federalism. So, there is ample reason not to adopt the second lemma and say that states that do not adopt it are not 'federal.' Finding a stopping place between these polls, as in median federal loyalty, must itself be done in a principled manner. But even if, contrary to historical trends, we could find such a principle, that would mean federal loyalty is not our normative bedrock after all. The inherence claim will remain a dubious proposition.

Conclusion

Ultimately, no non-trivial specification of federal loyalty is a necessary component of any plausible understanding of federalism. There are reasons not to adopt it in some federal states. Federal loyalty is thus a poor candidate for the underlying norm of federalism and should not be a harmonizing principle in global constitutionalism. Each federal state must instead decide whether to adopt it through regular amendment procedures. The variety of goods served by non-loyalty-compliant forms of federalism outlined above may provide reason to question the search for harmony, but a full analysis of the desirability of harmony is beyond the scope of this work. The implications of this work for global constitutionalism are narrower than a full-scale analysis of the benefits of harmonization could provide. Yet those seeking harmony across federal states must look elsewhere: federal loyalty is not inherent in the idea or institutions of federalism.