20. Federalism, devolution and secession: from classical to post-conflict federalism
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1 INTRODUCTION

Federalism has long been a topic of study for comparative constitutional law. However, the scholarly literature on federalism is in a process of transition. For most of the twentieth century, the study of federalism was oriented around a standard set of cases in the developed world: Australia, Canada, Switzerland and the United States of America. These cases provided the raw material for certain fundamental questions: what is federalism? Why should federations be adopted? What role is there for courts? For the most part, these questions appear to have been answered, often with the aid of comparative analysis. To be sure, important debates persist. For example, scholars disagree over the relative priority to be given to the different goals served by federalism and how those goals should shape the allocation of jurisdiction. In the area of environmental policy, for example, new opportunities for democratic self-government and policy experimentation argue for greater regional authority but also generate inter-jurisdictional externalities, which argue against it. This debate relies on an implicit understanding of its terms and range, and participants in such discussions of federalism often draw on the same standard set of jurisdictions as illustrations of models to be followed and dangers to be avoided.

Recent developments in the practice of constitutional design have challenged this consensus. Many states in the developing world, such as Ethiopia, Iraq, Nigeria and Sudan, have adopted federal solutions to manage ethnic conflict, often as part of a broader package of post-conflict constitutional reforms. In these federations, internal boundaries are drawn to ensure that territorially concentrated national minorities constitute regional majorities. The difference between the standard and emerging cases is not just geographic. Rather, the very mission of federalism is different. Its principal goals are not to combat majority tyranny or to provide incentives for states to adopt policies that match their citizens' preferences, but rather to avoid civil war or secession. Federalism promotes not public accountability or state efficiency but rather peace and territorial integrity. Post-conflict federalism pursues different goals than classical federalism and thus provides an opportunity to revisit the basic assumptions underlying the field.

Advocacy of federalism as a tool for managing ethnic conflict continues to grow, with respect to a diverse set of cases that spans the globe from South and East Asia to Eastern Europe. However, its purported benefits have been challenged by those who argue that federalism exacerbates, instead of mitigates, ethnic conflict. This academic debate about the merits of post-conflict federalism has reached an impasse, largely as a consequence of methodology. Proponents and opponents of drawing boundaries to empower national minorities point to different cases of federal success and failure. But recent scholarship in comparative politics

that combines large-sample quantitative analysis with small-sample qualitative case studies promises a way forward. It shows how we might test these competing claims about the ability of federalism to control ethnic conflict across a variety of cases and begin to identify the factors that explain when post-conflict federalism succeeds and when it does not.

2   CLASSICAL FEDERALISM

Three questions dominate the classical literature on comparative federalism. What is federalism? Why should we adopt it? What role is there for courts? These questions and the standard answers to them are drawn from the experiences of a few canonical federal states and the dominant academic accounts of those experiences. The model we call 'classical federalism' emerges from these analyses.

2.1   What is Federalism?

What is federalism? In his seminal *Federal Government*, K.C. Wheare provided this influential definition of the 'federal principle': for a state to be federal, 'the general and regional governments must be coordinate and independent in their respective spheres' (Wheare 1964: 4–5). The constitutional implications of this federal principle included a written constitution expressly conferring powers on the central and regional governments, a system of direct elections for both levels of government, the power of each level of government to act (or not act) independently of the other, and the existence of an independent high court to serve as the 'umpire' of federalism. This definition has informed many investigations into the political, social and institutional conditions required for different orders of government to preserve their independence while coordinating their actions (Elazar 1987). It also has inspired scholars to propose other definitions. For example, William Riker criticized Wheare for fostering a legalistic approach to federalism and offered an alternative formula: federalism is 'a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions' (Riker 1975: 101). While Riker's definition does not emphasize the use of constitutions to create and entrench federal arrangements, it is identical in substance (Riker 1964: 11). Ronald Watts, by contrast, elaborated Wheare's constitutional model. He added the formal distribution of legislative and executive authority, the allocation of sufficient revenues to ensure the autonomy of each order of government, the representation of regional views in the central legislature (e.g. through an upper chamber), a constitutional amendment procedure requiring a substantial degree of regional consent, and an enforcement mechanism that included courts, referendums or a special role for the upper chamber (Watts 1966).

Wheare developed his definition from a set of standard cases that embodied the federal principle to varying degrees: Australia, Canada, Switzerland and the United States. To be sure, Watts extended the field to the new federations then emerging from the British Empire (i.e. India, Pakistan, Malaysia, Nigeria, Rhodesia and the West Indies) and firmly demonstrated that federalism was not confined to Wheare's four original cases. But those classical federal constitutions set the intellectual agenda for the study of federalism, and they continue to serve as the focus, or at least the point of departure, for orthodox engagements in comparative

federalism. As the initial and most prominent modern example of federalism, the United States is often considered first among equals. Although Daniel Elazar attributed a biblical pedigree to his preferred definition ('shared rule plus self rule'), he identified American federalism as the prototype for modern federalism and used it to orient his explorations in the field (Elazar 1987: 12 and 144–6). Riker also used his model of American federalism to make sense of federal experiments elsewhere (Riker 1964; Stepan 2001). With its rich history and widespread influence, American federalism remains a valuable foil for contemporary developments elsewhere, including the European Union (see, e.g., Nicolaidis and Howse eds. 2001). This narrow focus has facilitated comparative investigation, but it also has limited the relevance of the literature. The four central cases are relatively stable, prosperous and democratic. They have rarely faced domestic threats to their very existence. The theories and models that have resulted from elaborating their conditions may illuminate aspects of their experience but, at the same time, obscure distinctive developments elsewhere. Many legal scholars interested in comparative federalism have followed the lead of these political scientists by examining the same classical cases and seeking to elaborate or complement their arguments (see e.g. Aroney 2006).

The question of what is federalism has raised two derivative questions. First, what is *not* federalism? Historically, scholars were preoccupied with distinguishing federations from confederations on the basis of the mechanism for choosing political office-holders in central institutions. In federations, citizens elect central governments directly, whereas in confederations, delegates of regional governments run central institutions (Watts 1998). More recently, scholars have emphasized the distinction between devolution and decentralization, on the one hand, and federalism, on the other (Cross 2002; Feeley and Rubin 2008). Devolution and decentralization have the same political dynamic and legal form. They both involve the redistribution of authority and capacity from the central government to smaller, subordinate units of government. Consistent with this dynamic, attempts to devolve and decentralize power typically take the form of laws or regulations adopted unilaterally by the central government, in contrast to federal constitutions, which are often understood as compacts among the constituent regions. Although similar in many ways, devolution is thought to entail larger and more powerful sub-units than decentralization: comparable to provinces and municipalities, respectively (Grindle 2009). In contemporary discussions, devolution is regularly identified with the United Kingdom, while decentralization is observed in a large number of jurisdictions. However, the lack of standard definitions for devolution and decentralization make generalizations of this sort unhelpful. Following Wheare's definition, the key difference between federalism and these other forms of government is that the autonomy of the regions that comprise a federation is guaranteed by a constitution that the central government may not alter unilaterally, whereas the institutions that exercise delegated powers in a decentralized or devolved political system may have their powers modified or revoked by the central government, often through the ordinary legislative process.

Second, which constitutions that appear to be federal truly deserve that label? Even if the central and regional governments derive their powers from a constitution, on closer look that constitution may fall short of federal status. Wheare himself originally described India and even Canada as 'quasi-federal' due to their centralizing tendencies. In Canada, he was concerned with the power of the federal government to prevent provincial laws from coming into force (disallowance) or to set aside provincial legislation (reservation); in India, he was

bothered by the power of Parliament to unilaterally create new states and change state boundaries, as well as the power of the central government to assume the direct rule of states in an emergency (President's rule) (Wheare 1964). The difficulties raised by the standard definition prompted Elazar to pursue a more ambitious project, in which he sought to catalogue the many institutional manifestations ('species' or 'expressions') of the federal principle, from confederations and federacies to leagues and condominiums (Elazar 1987: 38–59). Such conceptual and categorical refinements may help to resolve certain descriptive or theoretical controversies. From the standpoint of public policy, their value is more ambiguous. On the one hand, they serve to catalogue the variety of constitutional forms through which states can respect the federal principle. In short, they indicate the broad scope for constitutional choice. On the other hand, they may draw political actors into debates over categorization (e.g. whether a proposed constitutional design is federal or confederal) that divert attention from the concrete political problems to which federalism is a response. Such debates might lead political actors to conclude that the constitutional forms discussed exhaust the institutional possibilities of federalism, when they are better understood as variations on a theme that remains open to a great deal of adaptation and experimentation.

Some scholars working within the traditional paradigm have responded to these concerns by performing empirical surveys of existing federal systems (see e.g. Kincaid and Tarr eds. 2005; Griffiths ed. 2005; Majeed et al. eds. 2006; Watts 2008; Halberstam and Reimann forthcoming). These surveys extend far beyond the four core cases of Australia, Canada, Switzerland and the United States. However, the current literature suffers from shortcomings. Although these studies amass a large amount of material on federalism and its many forms, they are rarely analytical and generally do not seek to explain the commonalities and diversity that exist in the design and operation of federal systems. Moreover, there has been little attempt to evaluate the success of the design choices made by different federations. The flight from prescription is fuelled by the methodology of these studies, which employ a minimal or ecumenical definition of federalism and aim to identify its various manifestations. This line of research should therefore be understood as an important first step that provides the raw material for more analytical and prescriptive work.

2.2   Why Federalism?

Classical federalism presupposes a shared account of how federations come into being. Federations form from pre-existing political units that are politically independent from each other. They may be sovereign states or colonies in an imperial order that lack full statehood but enjoy extensive rights of self-government. These political units are the actors that decide to form a new political community, which entails the pooling and surrendering of some of their sovereignty to a central government while retaining an important degree of autonomy. The central government's authority is derived from this political agreement. The federal constitution is a pact, compact or bargain among the regions; this agreement constitutes the central government, creates its institutions and allocates powers to them. Riker built his theory of federalism on this account, which Al Stepan aptly terms 'coming-together federalism' (Stepan 2001: 320).

Set against this backdrop, 'why federalism?' becomes a two-part question. First, 'why should existing political units combine in any form?' Scholars of classical federalism tend to invoke either collective security or economic prosperity (Riker 1964; Wheare 1964). A federation can

be understood as a mutual defence alliance against external military threats. Whether the threat comes from a former colonial ruler or another state seeking to expand its territory, the members of a federation can provide a more effective deterrent together than alone. A federation also can be understood as a common market that is larger and more efficient than one in which international borders impede the flow of goods, services and capital.

Since political units that desire such military and economic benefits could choose to pursue them by pooling their sovereignty in a new unitary state, the second part of 'why federalism?' is 'why federalism and not unitary rule?' As a preliminary matter, federalism may reduce the burden of coming together and thus make union more likely and more durable than if previously independent units sought to form a single unitary state. Federalism allows groups that have a history of self-government or a distinct culture or economy to preserve some measure of autonomy (Wheare 1964; Watts 1966). By definition, it offers the benefits of unity without the costs of imposing uniformity on a diverse population.

Once formed, a classical federal system is believed to offer numerous advantages over a unitary state. For example, it is thought to bolster democracy by guaranteeing the existence of a tier of regional governments. It not only ensures another set of offices to elect and contest and thus increases the number of opportunities for political participation; it also improves the quality of political participation by empowering relatively small political communities, in which citizens are more likely to have more in common, individual votes and voices are likely to have more influence, and representatives are likely to be more responsive to their concerns (see e.g. Merritt 1988; Friedman 1997). Classical federalism also is said to enhance efficiency in various ways. The existence of two tiers of government allows a diverse society to allocate responsibilities and assign liabilities in a manner that improves the quantity and quality of public goods by engineering a closer fit between those who benefit from them and those who bear the cost. Those goods, like military defence, that the regions might fail to produce adequately can be assigned to the central government, while those that depend on local knowledge and preferences, like education and perhaps some aspects of environmental regulation, can be left to the regions (Esty 1996; Revesz 1996). In addition, federalism makes it easier for citizens to move from one region to another, which means they can sort themselves into like-minded communities and, through the enduring threat of exit, impel their governments to satisfy their diverse policy preferences as well as or better than another regional government might (Tiebout 1956). Finally, federalism is believed to protect liberty by reinforcing limited government. By dividing power between the two levels of government, it gives politicians at each level the incentives and the means to prevent their counterparts from abusing their constitutional authority (Federalist No. 51 (Madison); Merritt 1988; Amar 1991). By engineering a competition among regional governments for mobile people, resources and money, it also ensures that those governments face economic and political pressure to refrain from infringing upon property rights and markets: a result that just so happens to enhance economic efficiency across the federal system (Weingast 1995).

These arguments prompt an array of critical responses. Some concern the manner in which federalism has been implemented: actual regions are too big, centralized and heterogeneous to deliver the democratic dividends associated with small political units (Briffault 1994; Cross 2002); they are too few and too similar (and the practical constraints on the mobility of individuals and ideas remain too severe) to sustain meaningful inter-jurisdictional competition and thus do not enhance efficiency or promote innovation as promised (Daniels 1991; Feeley and Rubin 2008); they have not, in practice, served as reliable bulwarks against

encroachments on individual and group liberties, whether by central governments or other regions (Shapiro 1995); their boundaries are too rigid and arbitrary to capture the myriad externalities their policies produce (e.g. positive and negative, economic and environmental), and agreements to redistribute those burdens and benefits efficiently are too difficult to negotiate and enforce, so they are not likely to supply an optimal bundle of public goods, regulatory or otherwise (Levy 2007). Other criticisms concern inherent characteristics of federalism. Most importantly, federalism has democratic costs that must be weighed against its contested democratic benefits. While it empowers discrete provincial majorities to make certain decisions, it compromises the ability of the national majority to set policies for the entire country. Indeed, by setting constitutional limits on the concentration and exercise of government authority, federalism may frustrate attempts to address our most pressing moral and practical problems (Riker 1964; Stepan 2001).

The arguments for and against federalism are well known. Many of them are drawn from American experience, and together they constitute the intellectual framework for contemporary analytical work on federalism within the classical mold. Although debates about federalism remain vigorous, the classical framework within which they occur is fairly stable. These criteria do not themselves require comparative analysis, and there is a vast body of country-specific work that relies on them without reference to foreign federal examples. Although the bulk of this work is done in economics and political science, legal scholars contribute to and draw upon this literature. In the American legal academy, for example, there has been an extensive debate on environmental policy and federalism. Participants dispute not only the optimal allocation of responsibility for environmental regulation among the federal and state governments but also the proper basis on which to make such decisions (see e.g. Stewart 1977; Revesz 2001).

In addition, there have been a smaller number of comparative studies that draw upon this intellectual framework in specific substantive areas. The work is both analytical and prescriptive. Comparative models offer both negative and positive guidance. Barry Weingast has collaborated with other scholars to elaborate and apply his conception of market-preserving federalism in countries from England and the United States to India and Russia (Parikh and Weingast 1997; Figueirido et al. 2007). Similar projects have considered topics that range from environmental regulation (Kimber 1995; Farber 1997) and the evolution of corporate law (Stith 1991; McCahery and Vermeulen 2005; Deakin 2006) to the fight against cybercrime (Mendez 2005). The arguments may be familiar but, perhaps for that very reason, 'why federalism?' remains a rich and relevant question.

2.3   What Role for Courts?

Comparative legal analyses of the judicial role in federations present a puzzle. Scholars and statesmen alike have long recognized that courts are an important, if not an integral, component of federal government because of the need for a mechanism to resolve jurisdictional disputes (Federalist No. 78 (Hamilton); Wheare 1964; Watts 1966). Not surprisingly, constitutional judicial review first developed in three of the classical federations: the United States, Canada and Australia. As federalism spread to Latin America in the nineteenth century, judicial review came along with it. Indeed, the rise and spread of judicial federalism occurred more than a century before the global diffusion of judicial power associated with the 'Rights Revolution' and the third wave of democratization. However, whereas this more recent

phenomenon has inspired an explosion of comparative literature, judicial federalism has attracted less comparative attention.

In part, this may be a function of the different roles played by courts of final appeal in maintaining different federal systems. In India, debates over state boundaries and the imposition of President's Rule eclipse questions about the role of courts in the federal system. Likewise Ethiopia, where disputes between the ethnic groups that comprise the federation are resolved not by judges but by the upper house of Parliament (Baylis 2004). By contrast, the United States Supreme Court has been actively engaged in the adjudication of federalism disputes during various periods of American history. This discrepancy, coupled with the passionate American debate over judicial review, may explain why the bulk of the comparative work on judicial federalism is American in origin. But even in the United States, it has been suggested that the primary determinants of the federal balance lie in the political process, and that courts play the role of enforcing constitutional baselines, such as subsidiarity, the right to free movement, the institutional integrity of the federal and state governments, the prohibition on state discrimination against persons, goods and services originating in other states, and the various burdens of justification for government action (Halberstam 2008).

The literature on courts and comparative federalism emphasizes both substance and method. The former involves the constitutional concepts, rules and doctrines appropriate or even necessary for a court operating within a federal system. These include democratic ideals, conflict-of-laws rules, tests for territorial jurisdiction and, more controversially, an anti-commandeering principle (see e.g. Halberstam 2001). Such tools enable courts to maintain and even tinker with the federal structures of their constitutions as circumstances and endeavors evolve. For example, the Supreme Court of Canada has selectively invoked American constitutional text and doctrine to support the introduction of unwritten constitutional principles of order, fairness and efficiency that reconcile elements of Canadian private international law and thus the Canadian federal system to what it perceives as contemporary economic imperatives (Hume 2006).

The latter concerns the risks, benefits and legitimacy of judicial references to foreign law when dealing with federal aspects of the constitution. Some theorists encourage such references because knowledge about foreign arrangements can illuminate new domestic possibilities and clarify existing practices. For example, Halberstam suggests that German constitutional practice could serve as a model for American courts to shift the political morality underlying American federalism jurisprudence from one that emphasizes the entitlements of different orders of government to decide whether to act in a cooperative or competitive manner to a fidelity approach that imposes duties to cooperate and act responsibly in the interest of the entire system (Halberstam 2004). Others are more equivocal about the relevance of foreign federal experiments for domestic judges, since federal constitutions are package deals defined by contextual compromises. More a product of pragmatism than of principle, their lessons often require intimate knowledge of their history and operation, which judges from other countries rarely possess. Nonetheless, Vicki Jackson concedes that judges might profit from studying foreign experience when deciding issues of federal structure and constitutional principle on which the relevant text is silent (Jackson 2004).

These debates are important, but their importance is limited to those countries in which courts play a major part in the federal system. Such issues are unlikely to resonate in federal states where the constitution is viewed predominantly as a contested, contingent political compromise rather than as a settled legal framework for the resolution of political controver-

sies. More generally, arguments that deduce the nature and implications of federalism from a small and increasingly unrepresentative sample of states risk error and irrelevance when applied beyond that narrow realm.

3   POST-CONFLICT FEDERALISM

3.1   Setting the Stage

Scholars who contribute to the literature of classical federalism disagree on many important issues: the goals served by federalism, their relative priority, the weight of any countervailing considerations and the manner in which the design of a federal system should reflect these calculations. However, this literature also tends to rely on a shared yet generally tacit set of basic assumptions. These assumptions include the following: once pre-existing political units have come together in a federal state, they shall remain members of a single political community bound in a common constitutional order; this new political community is a nation that inhabits the entire territory of the state and possesses the right to self-government; and debates over the design of the federal system are debates about how this nation should organize itself internally and thus do not raise the prior question of whether the nation should continue to exist.

That existential question is precisely what lies at the heart of constitutional politics in what Choudhry has termed a divided society (Choudhry 2008). As a category of political and constitutional analysis, a divided society is not merely a society that is ethnically, linguistically, religiously or culturally diverse. The age of the ethnoculturally homogeneous state, if there ever was one, is long over. What marks a divided society is that these differences are politically salient. That is, they are persistent markers of political identity and bases for political mobilization. In a divided society, ethnocultural diversity translates into political fragmentation: political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethnocultural groups.

Scholars of ethnic politics have long drawn distinctions among different types of ethnic groups. There are many dimensions on which to do so: the relationship they assert between ethnicity and territory, the manner in which they have been incorporated into their respective states, their relative economic and political status, the terms in which they frame their constitutional arguments and the substance of their constitutional claims. One such type is what Will Kymlicka has termed a national minority (Kymlicka 1995). National minorities are regionally concentrated ethnic groups who once enjoyed political autonomy and have become part of states in which they constitute an ethnic minority through conquest, colonization or voluntary incorporation. Other terms for this type of ethnic group include 'ethnonationalists' (Gurr 1993: 18–20). They mobilize politically around assertions of national identity and self-determination. The goal of such mobilization is to recover the extensive self-government they claim to have enjoyed historically. The degree of self-government they seek ranges from autonomy to independent statehood, which would entail secession. National minorities accept the premise that states are the means by which nations exercise their right to self-determination over their territory, but they use this premise to challenge particular combinations of state, nation and territory. National minorities argue that the state in which they live contains more than one nation, that each of those nations possesses an inherent and identical right to self-determination, and that they are therefore entitled to their own separate state.

Why do national minorities mobilize, and why do they anchor their specific policy goals around the right to self-determination? The 'grievance' or 'relative deprivation' school of civil war studies, which focuses on the question of how ethnic conflict becomes violent, offers a leading answer to these questions. On this account, ethnic difference per se is not the spark for the rise of ethnic politics. Rather, ethnic groups mobilize politically in response to their experience of economic and political disadvantage. Political disadvantage entails the systematic limitation of access to political office or basic political rights; economic disadvantage involves the systematic denial of economic goods and opportunities. The different dimensions of disadvantage are often mutually reinforcing: political disadvantage insulates politics from attempts to address economic disadvantage, and economic disadvantage undermines an ethnic group's ability to exercise political influence. Ethnic groups vary in their response to disadvantage. Some groups may demand the reform of those state institutions in which they are consistently outvoted. National minorities entertain secession because they desire the additional protection that comes from forming a political majority in an independent state. Most ethnic groups demand voice; national minorities emphasize exit.

Some states resist political mobilization by national minorities because the very existence of such groups threatens the equation of nation, state and territory on which those states base their claims to political legitimacy. A state that perceives its territory as indivisible and integral to its identity may be more likely to react in that manner (Toft 2003). In such cases, there is a clash between competing nationalisms with parallel logics: a minority nationalism that is confined to one region and seeks to realign nations, states and territories; and a statewide nationalism that asserts the exclusive existence of a single nation throughout the territory of the state and thus denies the need for realignment. Gurr argues that the conflict between competing nationalisms typically escalates in stages: from non-violent protest to violent protest and finally to rebellion. This escalation occurs through a pattern of demands and responses: non-violent protest is met with a lack of political responsiveness, which in turn leads to violent protest, which is met with a violent reaction, and which then leads to rebellion and an armed conflict (i.e. civil war). Indeed, the evidence suggests that self-determination disputes are the most common variety of civil war and are more resistant to settlement than other kinds of disputes, especially when states face more than one potential separatist claim (Walter 2009).

3.2   Theoretical Debate

This diagnosis suggests that minority nationalism may lead to civil war and secession. The question is whether federalism, either on its own or as part of a larger package of constitutional reforms, is an effective response that diminishes these risks and serves peace and territorial integrity. This question has sparked a vigorous academic debate (Hale 2008). Scholars fall into one of two diametrically opposed camps. One school holds that federalism can dampen secessionist sentiment; the other holds that federalism will in fact fuel it. In other words, federalism is either a solution or a catalyst for ethnic violence. Thus framed, these two positions are mutually exclusive.

Classical federalism cannot answer this question because it focuses on polities in which the existence of the nation is not the crux of constitutional politics. For example, although Wheare and Watts observe how federal systems can accommodate racial, religious and linguistic differences, these concerns are peripheral to their work. By contrast, this is the

central question for post-conflict federalism and it is the subject of vigorous and ongoing debate. The core design feature of post-conflict federalism is the drawing of internal borders to ensure that a national minority constitutes a majority in a region. The allocation of jurisdiction between different levels of government ensures that the national minority is not outvoted by the majority and has sufficient powers to protect itself from economic and political disadvantage. These arrangements are constitutionally entrenched and enforced by independent courts. This approach has been variously termed multinational federalism, plurinational federalism, ethnic federalism or ethnofederalism. It even shares some features and sympathies with what Stefan Wolff has labeled 'complex power sharing' (Wolff 2009). Here, we refer to 'post-conflict federalism' because we want to focus on how federalism in particular can help to contain and perhaps quell ethnic conflict. Although some of the societies that have adopted the arrangements we discuss have not yet suffered secession, ethnic violence or civil war, the term 'post-conflict' is still appropriate, since federalism is designed to prevent such conflict from occurring, and those societies are often deployed as positive constitutional models in post-conflict contexts.

The stakes in these debates are very high. Many states in the developing world, such as Ethiopia, Iraq, Nigeria and Sudan, have adopted federal solutions to control ethnic conflict, often as part of a package of post-conflict constitutional design. Moreover, the advocacy of federalism as a tool for managing ethnic conflict continues to gather momentum around the globe. In South Asia, federalism has been advocated as a solution for ethnonational conflict in Nepal, Pakistan and Sri Lanka. Federalism has also been proposed as a remedy to the frozen conflicts of the former Soviet Union: Armenia, Azerbaijan, Georgia, Abkhazia, South Ossetia, and Nagorno Karabach. In the world of post-conflict constitutional design, it has been 'marketed as a palliative to secessionist conflict' (Erk and Anderson 2009: 191). However, while Philip Roeder seems to suggest that post-conflict federalism has emerged as the presumptive policy prescription to manage ethnonationalist conflict, Will Kymlicka has the better view. He carefully charts how, in Eastern and Central Europe, international institutions have taken a much more ambivalent and complex stance to post-conflict federalism, firmly rejecting it as part of the emerging international legal framework regarding the rights of national minorities, while accepting it on a case-by-case basis in order to diffuse violent conflict (Roeder 2009; Kymlicka 2007). But even with that caveat, if federalism exacerbates rather than mitigates conflict, then the most recent wave of constitutional design proceeds from dangerously erroneous premises. It is vitally important to determine how federalism actually performs in such difficult circumstances.

The centre of gravity in this academic debate is firmly anchored in political science. Ethnonationalism and secession have been studied by scholars working from a variety of subfields within that discipline: political sociology, comparative politics, international relations and political theory. Although their debates, questions, motivations, frameworks and methodologies may differ, these scholars share a reliance on qualitative research methods that focus on a relatively small number of cases to explain the complex relationship between constitutional design and political behaviour in states with politically mobilized national minorities.

On the one hand, there are those who argue that federalism dampens secessionist sentiment. Kymlicka, a political theorist, is representative of this position (Kymlicka 1998). He proceeds from the starting point that ethnic conflict in states with politically mobilized national minorities is, at root, a conflict between competing nationalisms. This is a zero-sum conflict in which one side will necessarily lose. If secession occurs, a statewide nationalism

will lose territory that belongs to the nation as a whole. If secession does not occur, minority nationalists will argue that state and nation must still be brought into alignment. Kymlicka's case for multinational federalism responds by challenging the premise that there must be a one-to-one correspondence between nation and state. Post-conflict federalism acknowledges that the state contains more than one constituent nation and structures its institutions in such a way as to recognize and empower each of them. Post-conflict federalism halts the clamor for secession without dismembering the state because it satisfies the demand for self-determination with powers of self-government that fall short of independent statehood. Although they differ in some respects, many scholars have in essence taken this position: Nancy Bermeo, Rogers Brubaker, Ted Gurr, Yash Ghai, Arend Lijphart, Al Stepan, and John McGarry and Brendan O'Leary (Bermeo 2002; Brubaker 1996; Gurr 2000; Ghai 2000; Lijphart 1977; Stepan 1999; McGarry and O'Leary 2009).

At first blush, post-conflict federalism may superficially resemble Riker's 'coming-together' federalism because each bases the legitimacy of federal arrangements on the consent of the constituent units, which create and empower a central entity as part of a constitutional bargain. But upon closer examination, both the process of creating a post-conflict federation and the premises on which it relies are quite different. In most cases, a post-conflict federation is created from a state that already exists, and the constitutional imperative is not to make a new state but to reconstitute the existing one along federal lines in order to prevent it from coming apart. The process of reconstituting an existing state as a post-conflict federation is suitably described as 'holding together' an existing political entity for which the alternative to reconstitution is secession or perhaps even dissolution (Stepan 1999). For Riker, federalism is just one, often unsatisfactory, way for a nation to exercise its right to self-government. The existence of a single political community, which governs itself through the institutions and procedures created by the constitution, is not in question. For post-conflict federalism, this is the fundamental question. To transform a unitary, devolved or classical federal state into a post-conflict federation entails more than changes to its constitutional structure. It requires a new understanding of the state as the institutional compromise required to preserve a composite or layered political community in which the basic question of constitutional politics is what the terms of political association should be among the constituent nations (Simeon and Conway 2001).

This brief, abstract account of post-conflict federalism contains a number of ambiguities on precise questions of constitutional design that require further research. Consider the causal mechanism whereby federalism dampens the demand for secession. In the world of post-conflict federalism, secession is a defensive response to the policies of the central government. For federalism to be a substitute for secession, it must remedy the disadvantages these policies cause by providing a constitutional self-defence mechanism for the aggrieved minority nation. But scholars differ on the character of the disadvantages against which federalism is a defence. The design of an effective post-conflict federalism will accordingly vary depending on the nature of the harms to which it is a response. Kymlicka (2001) and Brubaker (1996) emphasize culture. They use the concept of nation-building to describe a set of policies that aim to create a shared national identity across a state by promoting a common language and shared historical narrative. For them, regional jurisdiction over education and the language of the public and private sectors will be of paramount importance. Scholars who highlight the failure by central governments to ensure that national minorities receive adequate benefits from the extraction of natural resources in their territories will prioritize

regional or local ownership, management and revenue-sharing. Gurr dwells on instances of political discrimination, such as the exclusion of national minorities from political power and public sector employment. On this account, any federal arrangements would multiply the opportunities to wield political power.

Set against those who promote post-conflict federalism as a tool to manage and prevent ethnonationalist conflict, there are scholars who argue that it not only will fail to stem secession but will have precisely the opposite effect and intensify the conflict it purports to manage. Philip Roeder has offered the most recent and extended argument of this position. He claims that post-conflict federalism is inherently unstable and is characterized by a constant struggle between the two extremes of centralization and secession: 'a recurring crisis of politics' that is oriented around 'competing nation-state projects that pit homeland governments against the common-state government' (Roeder 2009: 209). This political pattern is the product of four purportedly unavoidable consequences of post-conflict federalism.

First, post-conflict federalism shapes the development of political identities, in particular, regional political identities. The creation of an ethnically defined region has the effect of institutionally privileging a conception of regional political identity in which the region is imagined as the property and homeland of an ethnic group. Post-conflict federalism also provides regions with the political and economic resources to develop these distinct identities through jurisdiction over education, the adoption of official language policies and cultural policy instruments such as public holidays and monuments. These regional identities will compete with statewide political identities as a source of citizen identification and belonging. They will become political resources for regional political elites to mobilize support during conflicts with central authorities. Second, the multiplication of national identities within post-conflict federations transforms the character of political conflict between the centre and the regions. Moments of high constitutional politics that raise constitutive questions regarding the status and the powers of the national minority and the relationship between the two nation-building projects crowd out ordinary policy disputes; the latter are reframed as raising fundamental questions regarding the right to self-determination. National identity becomes the principal political cleavage. As a consequence, political debate runs the constant risk of escalating from the demand for greater powers toward the existential constitutional question of secession, which would be the logical culmination of the nation-building project of the national minority. Third, post-conflict federalism endows regional governments with coercive policy instruments that national minorities can use as institutional weapons against central authorities, whether by engaging in competitive nation-building or by pushing for enhanced powers and greater autonomy. Such instruments may include the power to interfere with statewide electoral processes and revenue collection. Finally, the constitutional empowerment of the regions entails not just autonomy but also an institutionalized voice in common institutions, up to and including vetoes. These vetoes can weaken the decision-making ability of central authorities and hobble their ability to exercise their authority and thwart minority nationalism. Roeder's views are shared by other scholars (Bunce 1999; Leff 1999; Crawford 1998).

Roeder presents these four features as flowing from the logic of post-conflict federalism and, by implication, as absent from mononational federations. But this is not entirely true. The political resources he identifies – the ability to interfere with the operation of central authorities through coercive means and regional vetoes in central institutions – are contingent features of constitutional design that do not inhere in the very nature of post-conflict federations. To be

sure, these were features of the constitution of the Soviet Union, and Roeder generalizes from the failure of the Soviet Union to argue that multinational federalism will fail more generally. But it is legitimate to ask whether the same patterns will hold in post-conflict federations that lack these institutional elements. Roeder himself states that '[t]inkering with the institutional details of different forms of ethnofederalism or autonomy is unlikely to exorcise the demons, for the devil is to be found in ethnofederalism and autonomy arrangements themselves' (2009: 207), which suggests that post-conflict federalism will collapse regardless of their adoption. However, the logic of his account suggests they are necessary for post-conflict federalism to fail. Moreover, if the presence of these features is necessary for federal failure, it is not sufficient, because they are also present in some enduring mononational federations. So Roeder's critique really turns not on the presence of these political resources but on the impact of political agendas on their use. At the root of the political dynamics that he describes are the new political agendas nurtured by post-conflict federalism: in particular, the institutionalization of minority nationalism through the designation of a region as a national minority's homeland. Since this new political orientation is precisely the point of post-conflict federalism, his critique strikes at its very heart.

3.3   Evidence

Both academic camps – those who advocate the use of post-conflict federalism to manage ethnonational conflict, and those who oppose doing so – support their arguments by reference to examples of federal success and federal failure. This debate was sparked by the collapse of the former communist dictatorships of Eastern and Central Europe (ECE) in the early 1990s (Choudhry 2007). Students of ECE were confronted with a jarring contrast. Three of the former ECE communist dictatorships – Yugoslavia, the Soviet Union and Czechoslovakia – had been post-conflict federations prior to the transition to democracy. All three began to disintegrate within 18 months after embracing democracy. By contrast, unitary states, including several with large national minorities (e.g. Poland, Hungary) and some in which nationalism served as the axis of internal political conflict, did not fall apart. If the ambition of post-conflict federalism is to manage competing nation-building projects within a single state, federalism may in fact have failed to meet its basic objective. Yet the problem went deeper still. Since only the post-conflict federations broke up, and all of them did, the suspicion was that federalism had fuelled secession, whereas unitary state structures prevented it. So in ECE, post-conflict federalism had fuelled precisely those political forces it was designed to suppress. ECE has been central to the case against post-conflict federalism. Indeed, scholars who argue that post-conflict federalism inflames ethnonational conflict have tended to be specialists on ECE who have extended their arguments to indict post-conflict federalism more generally.

The best way to respond to the anti-models of Yugoslavia, Czechoslovakia and the Soviet Union was to identify models where post-conflict federalism had actually worked. In the literature, the leading counter-examples are Canada, India and Spain. The founding of the Canadian federation in 1867 and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that existed from 1840 to 1867 and that had two wings: one with a French-speaking majority and one with an English-speaking majority. Each wing elected equal numbers of representatives to a legislative assembly, although the largely French-speaking citizens of the former outnumbered the largely English-

speaking citizens of the latter. The goal behind the merger and the departure from representation by population was linguistic assimilation. The English-speaking wing eventually became more populous and demanded greater representation in the joint legislature, a request that was resisted by the French-speaking wing, which feared it would be outvoted on matters important to its linguistic identity. The result was political paralysis. Federalism was the solution: a compromise that provided representation by population at the federal level, but also created a Quebec with jurisdiction over those matters crucial to the survival of a French-speaking society in that province. Had Quebec not been created, it is likely that the French-speaking parts of Canada would have eventually seceded.

A similar story can be told about India (Choudhry 2009). At independence, India was organized as a federation. The question that generated intense controversy at the time was whether provincial boundaries would coincide with linguistic boundaries. India has a dozen regional languages, spoken in fairly compact linguistic regions. States could easily have been drawn on linguistic lines. But the Constituent Assembly decided against drawing inter-state boundaries to coincide with linguistic boundaries, out of a fear that they would fuel secessionist mobilization in India's border states and doom the country to disintegration. However, debates over the choice of official language – especially the language of public sector employment – thrust this issue back onto the constitutional agenda. This process began in the south, with the creation of Telegu-speaking Andhra Pradesh and Tamil-speaking Tamil Nadu. Once that precedent was established, it sparked further demands for linguistic states, to which the central government responded by creating the States Reorganization Commission. The Commission proposed the redrawing of state boundaries along linguistic lines, and the process took place during the 1950s and 1960s. The accepted view is that, had this not been done, India would have come apart. The failure to address a similar dynamic in Pakistan and Sri Lanka has been a major cause of constitutional failure in those two countries (DeVotta 2004; Ayres 2009).

This academic debate has reached an impasse, largely as a consequence of methodology. As Dawn Brancati has argued, the use of qualitative case studies are at best 'useful for generating interesting ideas about decentralization' but 'do not provide strong evidence of their claims' (Brancati 2006: 653). The reason is that scholars tend to select cases on the basis of the dependent variable, with critics studying the failed communist-era federations of ECE, and advocates analysing the more successful examples. But recent scholarship in comparative politics that employs large-sample quantitative studies holds the potential to advance our understanding of federalism's capacity to manage ethnic conflict. Such studies can test competing empirical claims across a broad variety of cases and identify the factors that explain when post-conflict federalism succeeds and when it does not.

Three studies warrant discussion.

First, Roeder recently constructed a global database around the notion of the 'segmented state', which he defines as a state that 'divides its territory and population into separate jurisdictions, and gives the population that purportedly is indigenous to each jurisdiction a distinct political status' (Roeder 2007: 12). In such states, there is a 'common state' that possesses jurisdiction over the entire population and territory, as well as separate 'segment-states' that have jurisdiction over a portion of that territory and people. A segment-state is not merely a territorial subdivision; it contains 'peoples who purportedly have special claim to that jurisdiction as a homeland' (12–13). Roeder observes that, in the twentieth century, 86% of new states had been segment-states prior to independence, from which he concludes that

segmented states are far more likely to experience secession than are states that are not segmented. Although Roeder does not use the language of post-conflict federalism, it clearly overlaps with his definition of a segmented state. The interesting question Roeder poses is under what conditions is secession from the segmented state (or post-conflict federation) more likely. Roeder answers this question by reference to a global data set of segmented states created before 1990, with annual observations. The independent variables were (a) the constitutional relationship between the common-state and segment-state, on a spectrum ranging from fully exclusive common-state autocracy to fully inclusive common-state democracy, and (b) whether the segment-state was self-governing or not. His key finding is that, in anocracies and democracies that excluded the population of segment-states from central governance, self-government in a segment-state increased the likelihood of secession. Since self-governing regions are core elements of post-conflict federalism and are designed to prevent secession, Roeder concludes that the evidence does not support this policy prescription and in fact counsels against it.

But Roeder's conclusion does not follow from his results. One of his most striking findings is that the most stable form of post-conflict federalism is a fully inclusive democracy in which the regions enjoy extensive forms of self-government. Two comparisons drawn from his data are important here: (1) inclusive democracies are much more stable than other regimes when their regions are not self-governing; and (2) unlike exclusionary democracies and anocracies, inclusive democracies do not suffer an increased risk of secession when their regions *are* self-governing. What this suggests is that the rise of secessionist politics might instead be a function of the structure of politics at the centre. Roeder's data do not offer an explanation as to why, but it is possible to speculate. The finding that exclusionary democracies are less stable than inclusive democracies is consistent with theories of minority nationalism that explain the rise of minority nationalism as a defensive response to the policies of the central state, whether characterized as nation-building or as economic, political or cultural discrimination. It may be that common states have a freer hand to pursue these policies when they exclude the populations of segment-states from central governance. At a prescriptive level, this suggests that proponents of post-conflict federalism should not neglect the design of central institutions. This points to the need for further research on the link between federalism and central power-sharing, as discussed below.

Second, a more recent study by Lars-Erik Cederman and his colleagues supports the conclusion that federalism can reduce the likelihood of secession (Cederman et al. 2010). They work from the grievance school of civil war studies. Ethnic political mobilization can take a variety of forms. One hypothesis they test is that the probability of ethnonationalist conflict increases with the degree of exclusion from central executive power. To test the relationship between political exclusion and violent conflict, Cederman et al. constructed the Ethnic Power Relations data set (EPR), which identified all politically mobilized ethnic groups and measured their access to state power on an annual basis from 1946 to 2005. They draw an important set of distinctions between those groups that are excluded from central power: 'regional autonomy' (elites wield local authority within the state, e.g. through federal arrangements), 'separatist autonomy' (elites wield local authority coupled with declaration of independence), 'powerless' (elites excluded from central and local authority without explicit discrimination) and 'discrimination' (elites excluded from central and local authority as a consequence of deliberate discrimination). Violent conflict is linked to any ethnic group in whose name an armed group instigated conflict.

As anticipated, excluded groups are more likely to instigate violent conflict than those that are not excluded. But if one disaggregates excluded groups, those that enjoy regional autonomy are much less likely to instigate violent conflict than those that experience other forms of political exclusion. Even more striking is that groups that are excluded from central power but enjoy regional autonomy are *less* likely than those groups who are *included* in power – either as senior or junior partners – to instigate violent conflict. Although these observations are based on descriptive statistics and they change somewhat with regression analysis, with junior partners less likely to rebel than excluded groups that enjoy regional autonomy, the latter are still less likely to rebel than those that experience more severe forms of political exclusion, such as the powerless and the targets of discrimination. These results support the claims of those who argue that post-conflict federalism may operate as a conflict-management technique.

A third study takes the literature in a different direction. Federal arrangements may stem secession in some contexts but fuel it in others. The outcome may be a function of the central government's commitment to democratic inclusion but, as Brancati points out, federalism may fuel secession even in democratic states (Brancati 2009). The question is what additional factors explain the uneven effects of post-conflict federalism. The answer is to be found in the electoral strength of regional political parties. If they are strong, they can gain power and deploy the institutional resources provided by a federal constitutional structure to foster regional identity and mobilize a national minority around this identity to pursue secession; if they are weak, this is much less likely to happen. Regression analysis demonstrates that federalism reduces ethnic conflict and secession while controlling for the strength of regional parties, but that ethnic conflict increases with regional party electoral strength.

Critics of post-conflict federalism would counter that this constitutional arrangement itself fuels the rise of regional parties. But the evidence is more complex. While post-conflict federalism creates the opportunity for the rise of strong regional parties, they do not emerge in every post-conflict federation. The question is which other features of constitutional design, if any, determine whether that potential is realized. Brancati's principal findings are that regional parties are stronger (a) where there are more regional legislatures, because they provide more opportunities for regional parties to wield power; (b) where regional legislatures select the upper house of the central legislature, which increases the impact of regional parties in central institutions and creates additional incentives to form such parties; and (c) when national and regional elections occur at different times, which offsets the coat-tails effect pursuant to which elections to higher office influence the results in concurrent elections to lower offices.

Taken together, Brancati suggests that, in order to harness the benefits of federalism for managing ethnic conflict while mitigating its dangers, the focus should not be on federal design but on regional political parties. This leads to two sets of policy proposals. One focuses on the rules governing political parties and electoral competition. For example, it suggests that parties that run in national elections should be required to field candidates in more than one region in order to win seats. Additional research is required to untangle the relationship between the electoral system and the rise of regional parties. But the other set of proposals shifts the focus to the centre, in particular the interaction of central institutions with regional political processes. Here, the prescriptions appear to point in opposite directions. Requiring direct elections for the upper chamber would appear to disentangle the central and regional governments, whereas coordinating the timing of central and regional elections

would politically connect the two levels of government. However, if adopted as a package, the two measures should be understood as promoting the autonomy and priority of central political processes at the expense of the electoral strength of regional parties.

3.4   Future Directions for Research

We highlight and briefly discuss four areas for future research under the aegis of post-conflict federalism: (1) regional borders; (2) the relationship between federalism and the organization of central authority; (3) the status and role of local government; and (4) natural resources.

3.4.1   Regional borders

Every state that opts for a federal constitution must decide the number and shape of its regional governments. This is a topic that has been inadequately researched, but which is of the highest practical importance. Iraq's failure to resolve the boundaries of the Kurdistan region demonstrates how difficult these decisions can be, especially when the memory of ethnic strife is fresh and valuable resources are at stake (Galbraith 2008; O'Leary 2009).

Donald Horowitz has devoted the most attention to the question of regional boundaries, and his particular proposals flow from his broader views on constitutional design in ethnically divided societies (Horowitz 2000). For Horowitz, the political pathology to which constitutional design must respond is the rise of ethnicity as the principal basis of political cleavage. In polities defined by their ethnic divisions, political competition occurs among ethnic parties and within ethnic groups, who outbid each other and push politics toward extremism. Horowitz's overarching goal is to design constitutions to create incentives for inter-ethnic cooperation, by empowering ethnic moderates over ethnic radicals. The key is to 'make moderation pay' (Horowitz 1990). His principal focus has been the electoral system. The mechanism for rewarding moderation is the transfer of votes across ethnic lines, which Horowitz refers to as 'vote pooling' and for which the key mechanism is the alternative vote. The alternative vote makes moderation pay because it rewards ethnic parties that appeal across ethnic lines and should offset electoral losses from intra-ethnic competition on the extremes.

For Horowitz, regional boundaries should be drawn with the same goals in mind. The leading case around which he constructs his account is Nigeria, which offers a natural experiment. Nigeria's First Republic was a failure; its Second Republic was a success. Horowitz argues that this difference was a function of the poor design of federalism under the former and good design under the latter. The First Republic divided Nigeria into three regions, which tracked the country's major ethnic divides. Politics within each region was intra-ethnic; politics at the centre was inter-ethnic. The problem is that the largest ethnic group, the Hausa-Fulani, used the province in which it constituted the largest group as a base to capture the centre and dominate Nigeria, which ultimately led to civil war and attempted secession. For Horowitz, the Second Republic solved this problem through a combination of strategies. There were in fact three key goals: fragmenting the power of the largest group; creating cross-cutting cleavages through federal design, in order to promote non-ethnic bases for political competition; and reducing the stakes of losing the battle for power at the centre. The Second Republic pursued all three goals simultaneously. First, it divided the Hausa-Fulani into multiple states, which diminished their capacity to capture the centre and created cross-cutting cleavages (e.g. on the basis of natural resource endowments) that generated new forms of intra-ethnic political

competition. Second, it created ethnically heterogeneous states. The new internal boundaries made allies out of ethnic groups who otherwise would have been competitors. For example, members of different ethnic groups would unite around their shared material interest as residents of the same state and then compete economically against people who shared their ethnicity but happened to live in other states. Third, it created many states in order to multiply the opportunities to wield political power and dispense patronage, which in turn reduced the relative importance of controlling the centre.

Horowitz's analysis raises two questions for further research. The first question is whether his second strategy – the creation of heterogeneous regions that divide and recombine ethnic groups – coheres with post-conflict federalism. At first glance, they would appear to be inconsistent because post-conflict federalism is premised on the belief that relatively homogeneous regions, in which one ethnic group constitutes a majority, are required to satisfy demands for self-determination and to relieve the risk of secession. Moreover, comparative experience suggests that heterogeneous regions may produce political conflict. The leading counterexample to Nigeria is India, which contained many linguistically heterogeneous states after independence. These units proved to be very unstable because ethnic groups could not agree on the choice of official language. The reorganization of Indian states was a direct response to this political conflict, and resulted in the creation of states that were linguistically homogeneous and relatively stable, at least along linguistic fault lines.

The difference between the Nigerian and Indian cases raises a question for further research. One hypothesis is that different markers of ethnic identity might interact differently with the demarcation of regions. For example, compare religion and language, two possible bases of ethnic identification. While a regional government can in principle be neutral with respect to religion (i.e. not adopt an official religion), it must choose one or a few official languages in which to conduct legislative affairs, deliver public services, provide education and administer justice. So if language is the basis for minority nationalism, then the Nigerian solution might be ill-advised. The emerging large-sample studies are ill-equipped to answer this question, since they do not appear to differentiate among the different dimensions of ethnic identification.

The second question raised by Horowitz's work concerns the design of regions that contain the ethnic group, if any, that forms a national majority. To date, the scholarship on post-conflict federalism has largely focused on the design of regions that contain national minorities and has given relatively minimal attention to the manner in which internal boundaries should deal with a dominant ethnic group. Indeed, given its preoccupation with satisfying the demand for self-determination by national minorities, post-conflict federalism might appear indifferent to the constitutional structure of the rest of the state. The remainder could be federal or it could be unitary, in which case the post-conflict federation would be a federacy. However, Henry Hale has demonstrated that this indifference would be a mistake (Hale 2004). Hale observes that post-conflict federations with a dominant ethnic group that is concentrated in a single region (which he terms a 'core ethnic region') are much less stable than those where that national majority is fractured among different regions. Thus, while Nigeria (the First Republic), the Soviet Union, Pakistan, Yugoslavia, Czechoslovakia and Serbia and Montenegro collapsed (some violently), Canada, Switzerland, Spain, the Russian Federation, Ethiopia and Nigeria (the Second and Third Republics) have or did not.

For Hale, core ethnic regions undermine the stability of post-conflict federations because: (1) they lead to 'dual power' situations where leaders of the core ethnic region have the political

resources to challenge the legitimacy and authority of the central state to represent the interests of the dominant ethnic group and thus may threaten the existence of the central government by mobilizing members of the ethnic majority to shift their primary political loyalty from the central government to the core ethnic region; and (2) they fuel the rise of secession as a defensive response because they diminish the capacity of the centre to make credible commitments to national minorities, in part because the centre is more likely to exploit those minorities in an attempt to retain the support of the dominant ethnic group. Conversely, when a core region is absent, 'the core group faces high hurdles to collective action that is aimed at realizing core-group goals within the union state and that can threaten union collapse for the reasons outlined above' (Hale 2004: 176). For Hale, this explains the contrasting experiences of the USSR (which had a core ethnic region and collapsed) and Russia (which lacks a core ethnic region and has not).

Hale complicates standard accounts of the failure of post-conflict federations. Most critics of post-conflict federations (e.g. Roeder) blame political mobilization by national minorities for secession. Although advocates of post-conflict federalism generally do not try to explain situations of federal failure, if they did they would also likely place great emphasis on the role of regional governments in mobilizing minority nations. They would likely argue that federal failure is the consequence of (a) the failure of the centre to respond to the demands of national minorities for constitutional self-defence with sufficient legislative and fiscal autonomy or (b) the failure to reduce the demand for secession by inhibiting the rise of regional parties through electoral engineering. Hale suggests that we ignore the design of the remainder of the state at our peril. Although it is accepted that central government policies may fuel secessionist mobilization, little thought has been given to how constitutional design may increase or reduce that risk. Likewise, the link between constitutional design and the ability of the centre to address and overcome secessionist mobilization once the latter has commenced has not been sufficiently explored. Finally, the risk that the ethnic majority could abandon the central state is a new problem for constitutional design. In sum, we should shift our attention to the impact of the design of regions containing the dominant ethnic group on the ability of the federal structure to integrate the dominant ethnic group, discriminate against and otherwise aggravate national minorities, and accommodate those minorities.

3.4.2   Federalism and power-sharing at the centre

There is a long-standing debate over the design of political institutions in ethnically divided societies. There are two main contending positions, offered by Arend Lijphart and Donald Horowitz. Lijphart is virtually synonymous with the approach known as consociationalism (Lijphart 1977; Lijphart 2008). According to consociational theory, the constituent groups of a divided society can attain a democratic peace by striking a 'grand bargain'. This bargain consists of two essential guarantees for each constituent group: (1) power-sharing, which consists of guaranteed participation in political decision-making; and (2) segmental autonomy over matters that affect its distinct identity, such as culture and education. The classic form of power-sharing institution is a grand coalition cabinet encompassing representatives of the major ethnic segments. Segmental autonomy may consist of federalism (where territorial boundaries follow ethnic boundaries) or non-territorial federalism (where they do not). These two core elements can be supplemented by two supporting elements: (3) proportionality (in legislative representation, representation in cabinets, civil service, police, military and public expenditure) and (4) mutual vetoes on vital interests. Elements of the consociational

'grand bargain' can be found in a number of post-conflict constitutions, such as Bosnia and Herzegovina, Ethiopia and Iraq. The second position is Horowitz's incentives-based approach, introduced above. In addition to the use of the alternative vote for legislative elections to encourage inter-ethnic political appeals and a federal system based on heterogeneous units, Horowitz advocates a strong executive president who would serve a unifying role that transcends ethnic divides. The procedures for presidential elections should be designed to ensure support across different ethnic groups. In a state with geographically concentrated ethnic groups, the solution would be to require a minimum level of support from each group (as was the case under the Nigerian Second Republic).

This debate is vigorous and we need not repeat it here (for a detailed account, see Choudhry 2008). What interests us is how Lijphart and Horowitz define the nature of the problem. Both write against the backdrop of pluralists who ask why political actors who lose within democratic processes do not respond by turning on the system. This behaviour is produced by cross-cutting cleavages, a conclusion that supports a competitive model of democratic politics in which coalitions and majorities shift, political parties compete for median voters at the ideological centre, and electoral jockeying creates pressures towards moderation. Parties cycle in and out of power, and no segment of society is permanently excluded from it. In ethnically divided societies, however, cleavages are mutually reinforcing and political divisions map onto ethnic divisions. These tendencies lead political parties to organize themselves along ethnic lines. Political competition does not exist across ethnic divides. The danger is that national minorities will become perpetual political losers and will eventually reject the political system instead of continuing to participate in it.

Lijphart and Horowitz are not focused on the specific problems of secession, threats to territorial integrity and the risk of civil war. This is in part a function of timing: the Lijphart/Horowitz debate originated a decade before the developments in ECE during the 1990s that prompted this explosion of scholarly interest in minority nationalism. The question is whether this long-standing debate should change in light of what we have since learned about secessionist conflict. Future research should address two issues.

First, post-conflict federalism is a way to create incentives for national minorities to participate within the constitutional order, as opposed to repudiating that order and attempting to secede. It appears to map most closely onto the consociational model. This suggests that central institutions should be designed to reap the virtues of power-sharing, proportionality and mutual vetoes. The reason to share power at the centre is to reduce the risk that the central state will engage in economic, political or cultural discrimination, which in turn will trigger minority nationalism as a defensive response. Roeder's finding that, within the set of segmented states, exclusionary democracies are less stable than inclusive democracies supports this view. The question that requires further research is how exactly to design the centre, given the range of possibilities, in order to limit its offensive capacity.

A useful starting point would be the vast literature on the choice between presidential, semi-presidential and parliamentary forms of government (see e.g. Linz 1990a; Linz 1990b; Stepan and Skach 1993; Norris 2008). This literature has not yet addressed this basic constitutional choice within post-conflict federations. Moreover, these decisions must be studied across a large enough number of cases to permit some generalizations. At first blush, a proponent of consociationalism would likely argue for proportional representation and a parliamentary model. If drafters opt for a parliamentary system, they will have to decide whether and how to regulate the allocation of cabinet positions, including that of the Prime Minister,

among the regions and other salient social groups. But the apparent conceptual fit between parliamentary democracy and post-conflict federalism needs to be tested against the alternatives. Recent and emergent post-conflict federations have opted for other arrangements. For example, in Bosnia and Herzegovina, there is a collective presidency shared by the regional governments (Banks 2005). At the time of writing, Nepal is on the verge of adopting a strong version of presidential government, alongside a federal structure designed in part to manage ethnic conflict. The scope for choice within presidential systems is broad. If the drafters of the constitution opt for a presidential system, they must decide whether the president will be chosen by election or by appointment. If the former, they must determine whether a simple majority will suffice or whether some additional indication of broad regional support will also be required. If the president is to be appointed, the drafters will need to decide whether (and, if so, how) the position should rotate among ethnic groups or regional governments. In each case, they also will need to choose between a single-person presidency and a multi-person office, as in Bosnia and Herzegovina.

A similar set of questions arises with respect to the design of constitutional courts, which has been largely ignored in the literature on post-conflict federalism. Literature on classical federalism amply demonstrates their central role in federal states. The extent to which a constitution is a credible commitment to thwart exploitation by the centre will turn on the structure of courts. In particular, the following questions will be important: membership (e.g. minority nation representation), appointment mechanism (e.g. involvement of regions), panel composition with respect to federalism disputes, jurisdiction (e.g. direct access by regional governments) and decision-rules (e.g. majority vs. super-majority vs. minority vetoes).

Second, this line of analysis presupposes that the central problem faced by post-conflict federalism is the accommodation of national minorities. However, the basic goal of post-conflict federalism is in fact to reconcile competing nationalisms within the same state. A significant amount of energy has been devoted to the study of the constitutional arrangements that would satisfy calls for self-determination by national minorities and dampen demands for secession. As argued above, this must be supplemented by further study on the design of the centre. In contrast, relatively little thought has been given to the constitutional arrangements that would disrupt the development of a statewide nationalism and accordingly diminish the incentives to centralize authority and transform a federation into a unitary state. This issue is key to ensuring a stable allocation of authority between the central and regional governments. Scholars have not yet approached the design of central institutions in post-conflict federations with this problem in mind.

Hale seems to suggest that this problem may arise only where a core ethnic region provides the institutional resources to the dominant ethnic group to launch a statewide nation-building project. Thus, the answer may be to reduce rather than accommodate demands from the ethnic majority for more influence. However, since his dependent variable is state collapse, he fails to measure the existence of political conflict between competing nationalisms that does not reach the level of existential constitutional crisis. Post-conflict federations must integrate both minorities and majorities. The centre must have sufficient scope for action. That is, the central government must have adequate authority to mollify incipient statewide nationalism and the decision-rules for exercising that authority must not frustrate it. The research question is how to reconcile this constitutional agenda with a counter-agenda that prioritizes the need to protect national minorities from an overreaching central state.

3.4.3   Local government in post-conflict settings

Local government is incidental to classical federalism. Whether explicitly or by default, the four classical federal constitutions leave the details of local government to the discretion of regional governments. Their drafters did not foresee the rapid population growth, technological innovations and social transformations that concentrated political and economic power in cities during the twentieth century (Hirschl 2009). In contrast, contemporary scholars of comparative constitutional law and politics seem increasingly interested in local government (see e.g. Steytler ed. 2009). However, comparative studies of its role in post-conflict environments remain scarce (Jackson and Scott 2007). The studies that do exist rely on anecdotal evidence and assumptions, such as the vital importance of local government in delivering basic public goods and services (e.g. water, roads and sewers) that demonstrate state capacity and build state legitimacy, but may have little basis in experience.

Framers of post-conflict constitutions face a knot of procedural, formal and substantive questions about local government. They must decide whether, and if so how, to include local governments in the processes by which the constitution is drafted, ratified and implemented. They must decide whether, and if so how, to recognize those governments in the resulting document: as a third order of government equivalent to the central and regional governments, as a matter left to the discretion of the regional governments or as some sort of hybrid, as in India where the states are obligated to establish local governments with specific structures but allowed to choose which powers to devolve in order to facilitate self-government (Mathew and Hooja 2009). They must decide which level of government is responsible for demarcating the boundaries of local governments, whether to entrench any rules regarding their finances, how to assuage the strategic concerns of regional governments and the manner, if any, in which local governments will be represented at the centre. This list of issues is only a partial one, but the challenge is clear.

In general, we need more empirical evidence of the nature and operation of local government across various post-conflict environments. But, since the two issues traditionally associated with local government are democracy and development, we especially need to know more about how local government can best serve these goals in such circumstances. Since local governments are usually tasked with routine matters, they may seem to promise a departure from divisive ethnic politics in favour of a pragmatic, non-partisan approach that focuses on solving common local problems (Steytler 2007). However, a recent qualitative survey of 12 federal states, some of which are ethnically divided and some of which are not, suggests that national parties tend to dominate local politics (Steytler 2009). As noted above, Brancati has observed a connection between the strength of regional parties and the risk of a post-conflict federation succumbing to secession. It may be worthwhile to examine the relationships between institutional design, party affiliation and political outcomes at each of the central, regional and local levels in order to identify the conditions under which local governments might serve not only as effective providers of public goods but also as counterweights to secessionist tendencies in regional governments. For example, a comparative analysis of the local elements of comprehensive power-sharing arrangements and their ability to defuse ethnic tensions in an urban setting would complement the available case studies and perhaps provide valuable guidance (see e.g. Bieber 2005).

An alternative would be to consider which political practices and legal mechanisms might make constitutional commitments to local governments more credible. The responsibilities of local governments regularly exceed their fiscal resources, especially in societies that are both

divided and developing. They depend on financial transfers from the other levels of governments in order to even attempt to fulfil their obligations. But in post-conflict states, government revenues are often depleted by violence and diverted by ongoing ethnic competition for political and economic rents. In Nigeria, for example, the financial transfers envisioned by the constitution are diverted by opaque accounting practices, corruption and other pathologies (Galadima 2009). If local governments in such states lack a reliable resource base, they may be unable to meet the basic needs of their constituents. This failure to meet even minimal expectations may generate resentment towards a particular party or level of government or perhaps even undermine support for the entire post-conflict constitutional settlement (Manning 2003; *Harvard Law Review* Note 2008). Thus, development is linked with democracy, at least at the local level. Studies, whether qualitative or quantitative, that examine the institutional aspects of this relationship may make a significant contribution to post-conflict federalism.

3.4.4   Natural resources and post-conflict settings

In recent years, natural resources have provided a rich seam for scholars of civil war, who have explored a range of issues relevant to post-conflict constitutional design. They have used comprehensive data sets to distinguish not only different resources, such as oil, diamonds and drugs, but also different forms of the same resource, such as offshore and onshore oil or mined and alluvial diamonds, and different types of conflict, from ethnic groups seeking regional autonomy to military factions seeking control of the central state (Ross 2006; Buhaug 2006). They have developed sophisticated statistical models to isolate the effects of these resources on the initiation, duration and severity of such conflicts (Ross 2004; Lajala 2009). They also have tested multiple causal mechanisms by which these resources may spark and sustain conflict: some propose that the exploitation and degradation of traditional territory exacerbates grievances among a national minority; others suggest that a state weakened by its dependence on resource revenues presents an easy and valuable target; others still posit that lootable resources entice and enable rebel groups to extend their campaigns against the state (e.g. Ross 2004; Collier and Hoeffler 2004; Fearon 2005). As these scholars have paid relatively little attention to the institutional structure of those states that experience and avoid such conflicts, both fields could gain from being brought together (see e.g. Aspinall 2007).

The primary task of a post-conflict constitution is to contain violent conflict. Natural resources complicate this task. Although they often fuel conflict, they can also be used to finance peace. The more that constitutional scholars and framers know about the physical, historical and institutional circumstances under which certain resources are likely to inflame certain conflicts, the more effective and viable their constitutional designs will become. The new civil war scholarship could help them to diagnose the particular challenges they face, since oil reserves in the remote traditional territory of a large ethnic minority pose a different set of problems and possibilities than do contraband crops that thrive across an accessible and ethnically heterogeneous region (Lajala 2009). The former promise more substantial and legitimate revenues but require much larger investments to extract and export. However, scholars disagree on whether (and, if so, how, why and the extent to which) such deposits increase the likelihood, length and intensity of violent conflict, secessionist or otherwise (e.g. Walter 2006; Ross 2006; Lajala 2009). Similar debates surround drugs, diamonds and other resources that are relatively easy to collect. While post-conflict constitutional design might benefit from greater attention to civil war scholarship, any such benefit will depend on the scope and quality of consensus those scholars ultimately obtain.

In the meantime, we can try to learn from those post-conflict federal systems that have managed, however scarcely or briefly, to turn natural resources from an obstacle into a platform for peace. To have any chance of success, a post-conflict constitution must define a peace that the parties find both plausible and more desirable than war. When natural resources are involved, the appeal of a constitutional settlement is likely to depend on whether they perceive it as more profitable than conflict (Wimmer 2004; Wennmann 2009). The value of any such settlement, including a federal one, depends on its content and its credibility.

For example, many post-conflict federal constitutions distinguish between the ownership of a natural resource, the management of that resource and the collection and distribution of revenues from it. By assigning these various facets of natural resources to different actors in the new constitutional order, parties in divided societies like Iraq and Sudan have been able to isolate contentious political issues (e.g. ownership of oil deposits) from relatively uncontroversial technical matters that are more relevant to attracting investment, expanding production and generating wealth (e.g. management and revenue collection). If successful, this approach enables post-conflict federal states to increase the total amount of resource revenues extracted and to share those revenues in a manner that reinforces the former combatants' commitment to the new constitution (Hayson and Kane 2009).

Success may begin with creative constitutional text, but poor implementation will derail even the most ingenious legal compromise. For example, under the Nigerian Constitution, the federal government is responsible for collecting and pooling all oil revenues for distribution among federal, state and local governments. The constitution mandates a minimum 13% share for the oil-bearing states, which are largely concentrated in the Niger Delta and populated by relatively small ethnic groups, but otherwise leaves the distribution formula to be determined by a federal statute (Suberu 2009). This approach is not only subverted by poor governance, as noted above; it is also considered inadequate by many residents of the Delta states, some of whom have engaged in organized violence and sabotage against both the government and the oil industry. The Iraqi Constitution provides a newer and perhaps less familiar example. It grants the federal, regional and governorate governments concurrent authority to manage the country's oil reserves but does not specify the procedures by which they will make these decisions (Hayson and Kane 2009). In light of such cases, it might be useful to look past the relevant constitutional language and research the legislative, political and administrative steps taken to make these provisions work. By comparing such measures and their results, we might learn more about the circumstances in which different provisions do (or do not) produce the intended effects.

Another feature of post-conflict federal constitutions that relates to natural resources and warrants further inquiry is the use of scheduled referendums on regional autonomy. Although these mechanisms take different forms and promise different degrees of autonomy, they perform a similar function: they encourage national minorities whose traditional territory contains valuable oil deposits to support the federal project by increasing their control over the terms on which they participate. The 2005 Iraqi Constitution, for example, obligates the federal government to conduct a referendum in the city of Kirkuk and other disputed territories to determine whether they should join the Kurdistan Region (McGarry and O'Leary 2008). The deadline for this vote was 31 December 2007, but just as the government failed to fulfil its constitutional obligations to resettle residents of those territories displaced by the prior regime, compensate them where appropriate and conduct a census in the area, it has failed to meet this deadline and numerous negotiated extensions. In contrast, the

Comprehensive Peace Agreement that preserves the tense relationship between the governments of north and south Sudan promises the latter, which sits atop most of the country's oil reserves, a referendum on independence by the end of January 2011. Given the uncertain political situation in Sudan, doubts persist as to whether this vote will be held, whether it will be free and fair, and whether, if successful, the north will allow the south to secede without a fight (Wennmann 2009).

Such arrangements may be understood as attempts to increase the credibility of their respective constitutional packages. National minorities that control territory endowed with valuable natural resources may have reason to distrust, and thus to reject, agreements with a central government. In theory, the central government likely will face severe economic and political pressure to renege on any promise of autonomy and assert greater influence over those resources, especially if members of other ethnic groups also reside in the contested region (Fearon 2004; Ross 2004). By granting such regions the option to exit (or, in the case of Kirkuk, to join the region of Iraq most capable of demanding additional concessions and eventually obtaining independence) at a specified date in the near future, these provisions may reduce the cost of committing to such an agreement and thus make peace more probable. In turn, and again in theory, the constitutional option to exit or form a larger and more self-sufficient region may create incentives for the central government and other ethnic groups to refrain from exploiting or otherwise antagonizing these national minorities. However, if central governments do face such strong pressures to renege on promises made to resource-rich minorities, it is unclear why vulnerable minorities would trust the promise to hold and respect a referendum on secession or amalgamation more than the initial promise of autonomy. Without additional research, it is unclear whether, and if so how, such provisions make a post-conflict federal constitution more credible. As a result, it might be worthwhile to compare the origins and outcomes of these provisions to determine why they appeal to national minorities and the conditions, if any, under which they can be implemented effectively.

4   CONCLUSION

We hope that the idea of post-conflict federalism will promote critical constitutional scholarship. The familiar conception of classical federalism has fuelled important debates about essential elements of the most stable and successful federal systems. But lessons drawn from states like Australia and the USA often do not apply to more volatile conditions, such as those facing states seeking to recover from ethnic conflict. Post-conflict states must solve a very different set of constitutional problems, and in deciding whether and how to implement federalism they must respond to a very different set of challenges. At the very least, such analyses will remind us that even the most common ideas and institutions have a particular provenance, so they may be less relevant or useful in other contexts. On a more abstract level, by positing that the experiences of post-conflict federal states can support a coherent conception of federalism distinct from that fostered by the experiences of the first wave of federal states, post-conflict federalism offers a new perspective on basic questions like 'what is federalism?' and even 'what is a constitution?'. Finally, this brief sketch of post-conflict federalism suggests yet another promising avenue for inquiry. Many of the issues central to classical federalism, such as the division of powers, the role of courts and the development of a

common market, receive little or no attention in scholarship about post-conflict federalism. Even if these issues prove less relevant in post-conflict environments, it will be helpful to know how and why.

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