

2017

Fundamental Rights, Federal States, and Sovereignty: Some Random Remarks

Donald H. Regan

University of Michigan Law School, donregan@umich.edu

Available at: <https://repository.law.umich.edu/articles/2017>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [European Law Commons](#)

Recommended Citation

Regan, Donald H. "Fundamental Rights, Federal States, and Sovereignty: Some Random Remarks." *Croatian Y.B. Eur. L. & Pol'y* 13, no. 13 (2017): VII-XVIII.

This Commentary is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Editorial note

Donald H Regan*

FUNDAMENTAL RIGHTS, FEDERAL STATES, AND SOVEREIGNTY: SOME RANDOM REMARKS

I am not an EU lawyer. The days are long gone when I could know a substantial fraction of EU law just by knowing about the free movement of goods. I get a fleeting glimpse of where the EU is going every year at the Jean Monnet Seminar in Dubrovnik, but no more than a glimpse. Still, when the editors invited me to write this Editorial Note, I could not refuse. Looking for inspiration, I read or reread all the previous twelve Notes. This was an enjoyable and informative exercise in itself, but only a few of the essays suggested topics I might have anything to say about. There were a few, however. And so, without claiming to advance discussion within the EU in any way, I will venture a few idle remarks on how some of that discussion struck this outsider. Specifically, I want to juxtapose some suggestions and assertions made in those Notes about the EU with some observations about the US and (just at the end) Canada.

The Charter of Fundamental Rights and ‘incorporation’

Both Judge Koen Lenaerts’ editorial note¹ and (now Judge) Siniša Rodin and Tamara Čapeta’s note² raise the issue of whether the Charter of Fundamental Rights should be regarded as applicable to the actions of Member States beyond what is specified in article 51, which says the Charter is addressed to the EU institutions and to the Member States ‘only when they are implementing Union law’. Lenaerts argues against any broader application. But as Rodin and Čapeta point out, Advocate General Eleanor Sharpston suggested, in her opinion in *Zambrano*, that the Charter should be applicable to Member States (not in *Zambrano* itself, but ‘sooner rather than later’) whenever they are exercising a competence shared with the Union, even in the absence of Union legislation.³ Indeed, at one point Sharpston could be read to suggest that in future the Charter might be applied ‘independently of any other link with Union law’,

* William W Bishop, Jr, Collegiate Professor of Law, University of Michigan Law School. I am very grateful to the people who read a draft for me, but I shall not name them, to avoid even the slightest chance that my errors about EU law might be charged to them.

¹ Koen Lenaerts, ‘Linking EU Citizenship to Democracy’ (2015) 11 CYELP vii.

² Siniša Rodin and Tamara Čapeta, ‘European Integration and Disintegration’ (2010) 6 CYELP.

³ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi* ECLI:EU:C:2010:560, Opinion of AG Sharpston. The quoted words are from para 177.

which could cover *all* actions of the Member States, without any limit. She writes, 'I therefore conclude, . . . , that, at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, . . .'.⁴ But we can also understand this sentence as merely repeating the suggestion of application in areas of shared competence, while emphasizing that there need be no link to Union law *other than* the unexercised overlapping Union competence.

All of these authors, despite their divergent views about the desirability of such an expansion of the Charter, analogize it to the process of 'incorporation' by which the Bill of Rights in the US Constitution was made applicable against the states (applicable in most respects – a qualification I will not repeat hereafter). Which led me to reflect on some differences. The most obvious difference is that the Bill of Rights has been incorporated into another specific provision of the Constitution (the due process clause of the Fourteenth Amendment) that is specifically aimed at the states and that was motivated by distrust of the (southern) states' motives vis-à-vis some of their own citizens (the newly freed slaves and, to a lesser extent, Unionist whites). So far as I am aware, neither feature is present in the EU. There is no suggestion that the Charter can be read into some other provision that is specifically aimed at the Member States; and there is no rights-creating provision that is specifically motivated by distrust of the Member States in their treatment of their own nationals. It might be argued that the decision in the Lisbon Treaty to make the Charter binding was partly motivated by such distrust with regard to the newer Member States. But the Charter as written is still squarely focused on the EU institutions, with some uncertain extension to Member State actions under the EU umbrella.

The one specific bit of EU primary law that I know has been suggested as a vehicle for incorporation is article 20 TFEU, on EU citizenship. I have no view about the plausibility of that suggestion from the EU lawyer's point of view, but it does prompt a comparison of article 20 with a part of the Fourteenth Amendment that we have not mentioned yet, the citizenship clause. The very first sentence of the Fourteenth Amendment reads as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'. The point of this clause was not to create US citizenship, which was already referred to a number of times (although not defined) in the 1787 Constitution. The point was to unambiguously extend US citizenship to the newly freed slaves (a status which

⁴ *ibid*, para 176.

the Supreme Court had denied them in the recent *Dred Scott* decision),⁵ and also to guarantee that the freedmen would be state citizens as well, *by taking away from the states control of their own citizenship*. This aspect of the citizenship clause is motivated by suspicion of (some) states, just like the rest of the Fourteenth Amendment.

Consider next that the theory which was relied on to justify incorporation in the US context justified a good deal *more* than just incorporation of the Bill of Rights into the Fourteenth Amendment. For a start, we have two due process clauses. There is the due process clause of the Fourteenth Amendment, which by its terms binds the states. There is also a due process clause in the Fifth Amendment (part of the Bill of Rights), which binds the federal government. I shall not pause over the oddity of finding implicit in the due process clause of the Fourteenth Amendment rights, such as freedom of speech or even jury trial, that stand *outside* the (essentially identically worded) due process clause in the Bill of Rights. It is one of those oddities American lawyers have got used to. But just as we have incorporated the Bill of Rights, originally binding only on the federal government, into a provision that binds the states (Fourteenth Amendment due process), so we have made the equal protection clause, which was originally binding only on the states (and for which there is no explicit analogue applicable to the federal government), binding on the federal government by reading it into the due process clause of the Fifth Amendment, a process we refer to as ‘reverse incorporation’. This ‘reverse incorporation’ may seem analogous to the process by which, before the adoption of the Charter, the EU institutions were held to be bound by certain general principles protecting rights that were common to many Member State constitutions. But the analogy is imperfect. In the US, the principle that is expanded from addressing only the states to addressing the federal government is not a principle rooted in the state constitutions. It is a principle first enunciated in the federal constitution, but only addressed to the states.

Next, although we talk about ‘incorporation’ of the Bill of Rights into the Fourteenth Amendment due process clause, formal incorporation has never been the official theory of the Court. The official theory has always been that certain protections found in the Bill of Rights are ‘essential to ordered liberty’, or are ‘deeply rooted in our legal traditions’. It is only because this is the theory that it was possible for the process of incorporation to have started in 1897 with the prohibition in the Fifth Amendment on uncompensated takings⁶ and to be still ongoing in 2010, with

⁵ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

⁶ *Chicago Burlington and Quincy RR v City of Chicago* 166 US 226 (1897).

the incorporation of the Second Amendment right to bear arms.⁷ And it is only because this is the theory that it has been possible for incorporation to be incomplete. There are a few provisions of the Bill of Rights that people generally assume would apply to the states, but that have not been officially incorporated (at least by the Supreme Court), because the issue has never been presented. But more importantly, there are two provisions that have been held *not* to apply to the states, the indictment requirement in the Fifth Amendment and the civil jury requirement in the Seventh Amendment. Whether proponents of incorporation of the EU Charter favor such ‘selective incorporation’ or complete incorporation, I do not know. It seems that which kind of incorporation we have ought to depend on the reason for incorporation, or the theoretical justification for it. But I do not know what the reasons or theory would be in the EU for expanding the reach of the Charter beyond the literal terms of article 51.

The American theory of ‘incorporation’ that I have described – justifying incorporation in terms of rights ‘essential to ordered liberty’ or the like – is the same theory that has allowed the highly controversial judicial discovery of ‘unenumerated rights’ like the right to abortion under the doctrine of ‘substantive due process’. When the Court read the free speech guarantee of the First Amendment into the due process clause of the Fourteenth Amendment, that was essentially an exercise in substantive due process. The free speech right was ‘enumerated’, to be sure, but not as applied to the states. Do EU lawyers who argue for ‘incorporation’ of the Charter mean to sign up for the possibility that the ECJ will create an EU version of substantive due process?

I have not undertaken research to see what theories have been suggested for ‘incorporation’ of the Charter. Of course, what sort of theory we need depends on just what we are trying to justify. Are we trying to justify article 51 itself, which makes the Charter applicable to the Member States (only) when they are implementing EU law? (Even this ought to have some justification or explanation. I assume the standard justification is consistency in EU law, at least in areas where the EU legislature has thought it important to exercise its powers.) Or are we trying to justify Sharpston’s suggestion that the Charter should apply to Member States whenever they are exercising a competence shared with the EU, even in the absence of EU legislation? Or are we trying to justify the even broader possibility that the Charter should apply to *all* Member State actions, without limitation? To raise some general points, let me posit just one possible argument, which might be offered to justify the broadest of these possibilities.

⁷ *McDonald v City of Chicago*, 561 US 742 (2010).

We might argue that the Charter represents European Union values, and that Union values ought to be reflected in, and ought to constrain, anything a Member State of the Union does. (I cannot resist suggesting that if EU citizenship is ‘destined to be the fundamental status of nationals of the Member States’,⁸ that might arguably entail the even more radical idea that EU membership is destined to be the fundamental status of the Member States themselves – a claim one might very plausibly make about the states of the US.) But this argument, as it stands, does not address the crucial question of why we should make the Charter *binding* on Member States, with the understanding that it then becomes the courts’ job, and the Court’s, to oversee the Member States in this respect. For that matter, why was the Charter made *binding* on the EU institutions themselves? In the case of the American Bill of Rights, the answer is clear. The Bill of Rights was adopted to quiet Anti-Federalist fears of a tyrannical central government. And although we now think of the Bill of Rights mainly as protecting individual rights, it was originally intended to protect the *states* against the federal government quite as much as to protect the citizens. Furthermore, although the Bill of Rights technically took the form of amendments to the original 1787 Constitution, it was essentially part of a single contemporaneous package, since it was promised by the Federalists to the Anti-Federalists during the ratification debates. None of this is true of the Charter. There may be Brexiteers and other extreme euro-sceptics who would describe the EU as ‘tyrannical’, but no one is afraid that the EU will suppress political speech critical of it, or establish a church, or disarm the Member State militaries, or use an unconstrained police and judicial system to destroy opposition.

Similarly, the Fourteenth Amendment was adopted in response to a real and present threat, this time from the states. It was adopted to protect vulnerable citizens of the states against the states themselves. As with the Bill of Rights, the Fourteenth Amendment was not adopted just out of a general commitment to the values it enshrines, in a moment of political calm that provided an opportunity for a reflective statement of the nation’s commitments. It was adopted at a time of political turmoil, in response to a specific threat to the values that the victorious Union (the non-seceding states) had fought for; and it reflected the belief that only federal institutions, both courts and Congress, could be counted on to protect those values in large parts of the country. Much of the later incorporation of the Bill of Rights into the Fourteenth Amendment can also be understood as the Supreme Court’s response to what they saw as widespread, even systemic, threats from the states to various essential freedoms (to speech in the 1920s; to criminal justice in the 1950s and

⁸ Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 31, and many later cases.

1960s; perhaps even to the right to bear arms in 2010). Is the current situation in the EU analogous?

Turning to a different aspect of rights protection (which I will eventually connect to a question about the Charter), an American lawyer cannot help but be struck by the ECJ's willingness to find that primary EU law (in *Defrenne*⁹) and general principles of EU law (in *Mangold*¹⁰) create rights of action against private individuals. In US constitutional law, the equal protection clause creates no such rights (except in special cases where the private defendant is performing a 'public function' or is somehow actively supported by the state), because of the 'state action' doctrine. (Nor does any other part of the Constitution create rights against private individuals, with very minor exceptions.) There is of course a possibly significant difference in wording between the equal protection clause and article 119 TEEC, involved in *Defrenne*. The equal protection clause says, 'No state shall . . . [deny any person equal protection of the laws]'. It is not inevitable, but it is perfectly natural, to interpret this as meaning (only) that the state itself shall not act unequally. In contrast, article 119 says, 'Each Member State shall [during the first stage] ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'. This could be read as saying only that the state itself shall not pay unequally. But because it talks about 'ensuring the application' of the principle of equal pay, it is no less natural, and perhaps more natural, to read this as requiring the state to forbid private discrimination. And then it is a fairly easy step, which the Court has taken, to say that in cases where it is clear what article 119 requires the Member State to do, we should act as if the Member State had done it. Things may not be quite so straightforward in *Mangold*. As I understand it, the 'general principles of EU law' that the Court appealed to in *Mangold* are inferred from general international law, the European Convention of Human Rights, and Member State constitutions. Has the Court ever asked whether those *sources* of the general principle on which they based a right of action against a private individual themselves create such rights? Should that matter? Can it not matter? And what if some of the sources do create such rights and some do not?

But now to my question, what is the effect of the Charter on all of this? Article 51 of the Charter says the provisions of the Charter are addressed to EU institutions, and to Member States in some limited contexts. There is no mention of it applying to private behavior. And if it binds Member States only in limited contexts, it seems that *a fortiori* it should not bind private behavior in general. But the Charter of course includes equality

⁹ Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56.

¹⁰ Case C-144/04 *Mangold v Helm* ECLI:EU:C:2005:709.

provisions. Article 21 generally forbids discrimination on the basis of age or sex, *inter alia*; and article 23 specifically forbids sex discrimination in employment. Does the combination of the focus on government institutions in article 51, and the equality provisions elsewhere in the Charter that are not explicit about who they are addressed to, suggest that the Charter does *not* create rights against private individuals and that, as *lex specialis* or *lex posterior*, it requires a retreat from *Defrenne* and *Mangold*? I doubt that many EU lawyers would be inclined to push this suggestion. The language of the equality provisions in the Charter could still support the *Defrenne/Mangold* logic. My point is only that it seems somewhat odd to this outsider that with a chance to endorse the approach of those cases, the drafters of the Charter failed to do so specifically, assuming they approved the approach. Perhaps the idea of abstractly stated rights creating causes of action against private individuals is so well established in the general European mindset that no confirmation seemed necessary. But then why were *Defrenne* and (even more) *Mangold* controversial?

Let us take a detour to consider a curiosity. Advocate General Sharpston's suggestion that the Charter might apply to Member State action in areas of shared competence, even when the EU legislature had not acted, put me in mind of an American case, *Morgan v Virginia*, decided in 1946.¹¹ In *Morgan*, decided before the Supreme Court's watershed anti-segregation decision in *Brown v Board of Education* (1954),¹² the Supreme Court held unconstitutional, as applied to interstate buses, a Virginia law that required racially segregated seating in buses. In regulating interstate buses, Virginia was exercising a competence that it shared with Congress, the regulation of commerce. So my first thought was that *Morgan* might be analogous to Sharpston's suggestion. But on reflection I realized it is quite different. The fact that Virginia was exercising a competence it shared with the federal government was essential to the rationale of the case. But not because exercising the shared competence brought Virginia within the ambit of a prohibition on racial segregation that applied to the federal government. In 1946, there was no such prohibition. As noted earlier, the prohibition on segregation by the federal government was actually established in 1954 by 'reverse incorporation' of the newly established prohibition on segregation by the states.¹³ In *Morgan*, it was the federal commerce power itself that invalidated the Virginia law. Regulation of interstate commerce is undoubtedly a *shared* competence; but the mere existence of the federal power, even if unexercised by Congress, is held to impose *some* limits on what the states can do with their power. The most important such limit is a ban on interstate protectionism. But

¹¹ 328 US 373 (1946).

¹² 347 US 483 (1954).

¹³ *Bolling v Sharpe*, 347 US 497 (1954).

another limit forbids excessive ‘burdens’ on interstate commerce, at least by state laws that regulate the *instrumentalities* of interstate commerce, like the bus system.¹⁴ The Supreme Court’s complaint against the Virginia law in *Morgan* was that it slowed down interstate transport because it required the reseating of passengers when a bus entered Virginia from a non-segregating state. The most relevant precedent was a case decided the previous year invalidating an Arizona law that limited the length of trains, with the consequence that many interstate trains had to stop and be re-constituted at the Arizona state line.¹⁵ That Arizona case had nothing to do with race or with any individual right. So *Morgan* was a case where the protection of interstate commerce against economic harm could be enlisted to protect an individual right. (I believe this phenomenon is not unknown in the EU.) But it has nothing to do with expanding the application of any individual rights guarantee as such.

For all that we academics criticize courts, we also tend to have an unreasonable faith in them. In the US, judicial review has probably been a good thing on balance, but it has not been an unmixed blessing. It would be easy to generate a long list of Supreme Court decisions that have invalidated desirable statutes, starting with *Dred Scott v Sandford* in 1857 (invalidating the Missouri Compromise, which may not seem ‘desirable’, but which was better than what the Court left in place)¹⁶ and the *Civil Rights Cases* in 1883 (invalidating the Civil Rights Act of 1875);¹⁷ continuing through the Court’s resistance to the rise of the regulatory state, for example in *Lochner v New York* in 1905 (invalidating a New York maximum-hours law for bakery workers)¹⁸ and *Hammer v Dagenhart* in 1918 (invalidating the first federal child labor law);¹⁹ right up through modern cases like *District of Columbia v Heller* in 2008 (invalidating certain gun laws),²⁰ *Citizens United v FEC* in 2010 (invalidating certain campaign finance restrictions),²¹ or *Shelby County v Holder* in 2013 (invalidating a crucial provision of the Voting Rights Act of 1965),²² to name just a few. Of course, my list of unfortunate uses of judicial review reflects

¹⁴ I argue that the doctrine forbidding excessive ‘burdens’ on commerce (by regulations, as opposed to taxation, for which there is a quite distinct test) is in fact *limited* to the protection of the instrumentalities of commerce. See DH Regan, ‘The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause’ (1986) 84 Michigan Law Review 1091.

¹⁵ *Southern Pacific Co v Arizona*, 325 US 761 (1945).

¹⁶ See n 5.

¹⁷ 109 US 3 (1883).

¹⁸ 198 US 45.

¹⁹ 247 US 251.

²⁰ 554 US 570.

²¹ 558 US 310.

²² 570 US 2.

my political preferences, but anyone, whatever their political preferences, could produce their own long list. As to incorporation and reverse incorporation in particular, they magnify the effect of many individual decisions, for good or ill (for example, extending Second Amendment limits on gun control to the states, and extending Equal Protection limits on racial affirmative action to the federal government). They also reduce the often reasonable, even desirable, variety of constitutional regimes. Arguably, incorporation is not something to wish for in the absence of a genuine need.

‘Sovereignty’ and federal states

The other topic that caught my eye as I read the previous Editorial Notes was the nature of the European Union. And I was struck especially by Steven Blockmans’ statement that the EU ‘cannot be regarded as a federal state, because it consists of a number of sovereign states’.²³ I agree with Blockmans that the EU is not a federal state; and the various elements of sovereignty retained by the Member States are surely an important part of the reason. But the conceptual claim that the EU cannot be a federal state because it consists of sovereign Member States would come as a surprise to many current and former Justices of the US Supreme Court. I take it that the US is a federal state, perhaps a paradigm case. But the Supreme Court has referred to the states as sovereign in a number of recent decisions. Indeed, the explicit rationale of many recent cases turns precisely on claims about state sovereignty. State sovereignty is the Supreme Court’s explanation for why Congress cannot require a state legislature to legislate in a way prescribed by Congress,²⁴ and why Congress may not impose positive duties on state executive officers (except perhaps reporting data).²⁵ State sovereignty is also the Supreme Court’s explanation for why an individual usually may not sue a state for money damages in a federal court, nor in a state court (under a federal statute) without the state’s consent.²⁶ Of course, there are many critics who regard these decisions as wrong, and ‘state sovereignty’ as poppycock. And there are still others who regard the decisions as right, and ‘state sovereignty’ as poppycock. But for the present and the foreseeable future, the official, and consequential, doctrine of the Supreme Court is that the states are in some sense sovereign.

²³ Steven Blockmans, ‘Is It a Bird? Is It a Plane? It’s the European Union! The German Constitutional Court’s *Lissabon-Urteil*’ (2009) 5 CYELP vii, xix.

²⁴ *New York v US* 505 U.S. 144 (1992).

²⁵ *Printz v US* 521 US 898 (1997).

²⁶ Eg, *Seminole Tribe v Florida* 517 US 44 (1996).

If we take a more disaggregated view, and think not about ‘sovereignty’ but about aspects or elements of sovereignty, it is clear that the states’ ‘sovereignty’ is very far from complete. In the cases mentioned above, it is no more than a shield against certain federal assaults on the states’ ‘dignity’ (another notion embraced by the Court in recent years). But there has to be more to it than that. The states have very broad legislative powers, and most of these powers they do not get from the federal government or from the federal Constitution. From the perspective of federal constitutional law, the reason the states have these powers is that they just do. Because they are sovereign, it is tempting to say. When the Member States of the EU created the Union, they gave away some of their ‘sovereignty’, and retained much of it. Similarly, when the then-existing states of the US created the US, they gave away considerably more of their sovereignty, but they nonetheless retained some of it.²⁷ What they gave away, they may have given away more definitively, since they did it by acts of the people in each state (through ratification conventions) rather than by acts of the executive or legislature. Such, apparently, is the suggestion of the German constitutional court in the *Lissabon-Urteil* (where there was no act of the people);²⁸ and such was the conclusion of the US Supreme Court in *McCulloch v Maryland* (where there was).²⁹ But even if the states gave away a part of their sovereignty definitively, that does not mean that what they claimed to retain they really only received back by gift of the union.

If we compare the states of the US to the Member States of the EU, it seems clear that the Member States of the EU enjoy many more of the elements or aspects of sovereignty than the states of the US. So we might think the EU Member States are overall ‘more sovereign’. But notice that both of the US judicial doctrines involving state sovereignty that I mentioned above are cases where the US states seem to be ‘more sovereign’ than the EU Member States. Congress cannot impose positive duties on state legislatures or on state executive officials. But that is precisely what the EU legislature does vis-à-vis Member States when it issues a directive. US states generally cannot be sued by individuals for money damages (even under federal law) without their consent. Under *Francovich*,³⁰ EU Member States can. This latter difference may not impress a European lawyer, who may be less inclined to see immunity from suit as an aspect

²⁷ I should note that it is controversial whether the states were ever sovereign at all. This is denied by people who think the United States began in 1781 with the Articles of Confederation, or even earlier, perhaps with the first Continental Congress. But while the Articles of Confederation purport to create a ‘perpetual union’, they also specifically refer to the states’ sovereignty (in Article II).

²⁸ Here I rely on Blockmans’ summary of the judgment (n 23) xv.

²⁹ 17 US (4 Wheat) 316 (1819).

³⁰ Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428.

of sovereignty in the first place. But if so, that merely emphasizes that we have no shared notion of what ‘sovereignty’ entails. There are other respects as well in which the US states are arguably ‘more sovereign’ than the EU Member States. The US Constitution contains no provision that would authorize even temporarily depriving a state of its representation in Congress, as article 7 of the Treaty on European Union does.³¹ And although the case has not arisen, I assume that the ‘equal footing’ doctrine in US constitutional law, under which new states enter the Union with the same juridical status as the existing states, would forbid the sort of ‘post-accession conditionality’ that was part of Croatia’s accession agreement.

We might also note briefly the issue of secession. Blockmans says that article 50 of the Treaty on the European Union prevents the EU from being regarded as a federal state, because it grants Member States a right of voluntary withdrawal.³² In the US, we fought a Civil War over the issue of secession, and it was decided, not by logic but by military might, that secession was not possible. The US is a federal state. But Canada is also a federal state, according to the Canadian Supreme Court.³³ And yet that same Court has told us that Quebec has something like a right to withdraw from Canada, a right that is not so very different from the right article 50 gives the UK to withdraw from the EU.³⁴ The Canadian Supreme Court said that a decision by the people of Quebec to secede would impose on the other provinces a *duty* to negotiate over the issue of separation, giving due respect to the expressed wish of the Quebecois. Of course, Quebec would also have a duty to negotiate, giving due respect to the interests of the rest of Canada. Quebec cannot insist unilaterally on secession on its own terms. But neither can the rest of Canada peremptorily deny Quebec’s right. As to what happens if negotiations are inconclusive, the Court declined to speculate. Similarly, under article 50, the UK, by its unilateral decision, can impose on the rest of the EU a duty to ‘negotiate and conclude’ an agreement on separation terms. Article 50(1) and (3) arguably indicate more clearly than the Canadian Supreme Court that the party that wants to withdraw from the union must eventually

³¹ The Constitution does provide for the non-seating or expulsion of individual members of Congress, which would temporarily deprive a state of a representative, but those are *ad hominem* decisions, not measures aimed at the state. A stronger objection to my claim in the text might be that Congress made ratification of the Fourteenth and Fifteenth Amendments a condition for some states’ regaining their representation in Congress after the Civil War. But the Constitution provided no basis for what Congress did. Those were special times, and a great many things were done that the Constitution did not provide for.

³² Blockmans (n 23) xviii. In what follows, I may submerge a distinction Blockmans draws in his footnote 39 between ‘voluntary withdrawal’ and ‘unilateral secession’. But if so, Blockmans seems to do the same in his text.

³³ *Reference re Secession of Quebec* [1998] 2 SCR 217, para 55.

³⁴ See generally *ibid*, paras 90-97.

end up outside, unless it changes its mind. And this now seems to be the common assumption about the EU. But there is some tension even in article 50 between the statement that the Union ‘shall’ conclude an agreement with the withdrawing State and the seeming provision in 50(3) for what happens if no agreement is reached. And on the other hand, the Canadian Supreme Court never says, or even implies, that the rest of Canada can force Quebec to remain.

Where does all this leave us? For one thing, it reminds us that the EU is not alone in presenting puzzles for any attempt to shoehorn all ‘federal-ish’ systems into a small number of well-defined categories. And that in turn suggests that instead of trying to reason from the categories, we should concentrate on trying to understand the specific genius of the system we are reasoning within. I assume that is one of the things the Court was saying in *Van Gend en Loos*.³⁵ To some, this discussion will also suggest that terms like ‘federal state’ and ‘sovereignty’ have only a meretricious rhetorical force, but no analytic content, and that we should root them out from our vocabulary. I would not go that far. These terms would not retain any rhetorical force if they did not suggest to many people some analytic content, however dimly grasped. But we need to treat them circumspectly, recognizing that there are many aspects and elements of ‘federal’-ness, and ‘state’-ness, and ‘sovereignty’, and that different combinations of elements under each concept cannot even be put in a complete ordering of ‘more’ and ‘less’. That does not make the terms useless. We all now accept the ‘bundle of sticks’ view of property rights. But we have not abandoned the word ‘property’, nor should we. Even a bundle of sticks may deserve a name, to distinguish it from other bundles.

Envoi

In conclusion, I repeat that I do not offer these remarks as serious analysis of EU law, nor as serious comparative law. Sometimes mere juxtaposition can be of interest, as I hope this has been.

³⁵ Case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.