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### Federalism: Theory, Policy, Law

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CHAPTER

## **27 Federalism: Theory, Policy, Law**

Daniel Halberstam Author Notes

## I. Introduction

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Even France now values local government. Over the past 30 years, top-down appointment of regional prefects and local administrators has given way to regionally elected councils and a revision of Article 1 of the French Constitution, which proclaims that today the state's 'organization is decentralized'.<sup>1</sup> The British Parliament, too, has embraced local rule by devolving powers to Scotland, Wales, and Northern Ireland. And in China, decentralization has reached a point where some scholars speak of 'de facto federalism'.<sup>2</sup> A systematic study of the distribution of authority in 42 democracies found that over the past 50 years, regional authority grew in 29 countries, remained stable in 11, and declined in only two.<sup>3</sup> And various projections over the past half-century place over 50 percent of the world's landmass into federal systems in 1964,<sup>4</sup> 40 percent of the world population in federal systems in 1987,<sup>5</sup> and 50 percent (or up to 70 percent if we include China) of the world's population in federal systems by 2009.<sup>6</sup>

Just as subnational authority is on the rise, so, too, global governance is gaining ground. With the creation of the European Union, the birthplace of the nation-state has fostered an historic enterprise of governance beyond the state. The nation-states of Europe have also created the most ambitious and effective international human rights regime to date.<sup>7</sup> Efforts of transnational governance are taking shape in Africa, the Americas, and Asia.<sup>8</sup> Three-quarters of all states have joined the World Trade Organization with its compulsory jurisdiction over, and adjudication of, trade disputes.<sup>9</sup> The United Nations is more active than ever before in peacekeeping missions, resolutions, and direct actions against individuals.<sup>10</sup> And an International Criminal Court has been established to prosecute individuals for crimes against humanity, war crimes, and genocide.

From Belgium to India, traditional forms of federalism are generally understood to be constitutional arrangements. But the extent to which constitutional law serves as the foundation for some of the other arrangements is very much contested. France's devolution is tied to the constitution by only a thin thread, China's is a product of simple legislation formally reversible at will, and whether Britain's will be deemed constitutional only time can tell. On the global level, the very idea of applying constitutional language to governance beyond the state is still hotly debated and conceptually uncertain.<sup>11</sup>

p. 578 This chapter focuses on federalism. But it presents the terrain of federalism to lay the foundation for understanding the constitutional significance of arrangements among multiple ↪ levels of authority from private to global governance. As we shall see, even traditional federalism covers a broad set of legal arrangements. And the fact that federalism is generally understood to be a constitutional arrangement should not be taken to suggest that the role that constitutional law does or should play in federal systems is uncontested. To the contrary, for some, such as Proudhon, the idea of federalism even contains a hint of anarchy.<sup>12</sup>

The chapter proceeds in six sections. Section II critically examines the (relevance of) historical debates about defining federalism. Section III turns to arguments about the origins of federations. Section IV analyzes normative federalism theory and its applicability in legal disputes. Section V discusses the sustainability of federal systems. Section VI considers the consequences of federalism for various policy outputs. Section VII takes federalism beyond its traditional boundaries—first down to regional, local, and private governance, and then up into the global arena. A brief conclusion ends the chapter.

## II. Federalism—Federation—Confederation

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Federalism can be a charged and sometimes confusing word. A political rallying cry for decentralization in the United States, the F-word means more Brussels in Europe. Back when James Madison, Alexander Hamilton, and John Jay battled their opponents in pamphlets, both sides of the debate desperately sought the mantle of federalism to help their cause. And among academics, what is and what is not federalism has been embroiled in definitional squabbles that have been, at times, quite caustic<sup>13</sup> and, more often, of questionable significance.<sup>14</sup>

### 1. Capturing 'Federalism'

Part of the problem is an accident of history. Recall that at the birth of modern federalism in the United States, the Founders described their novel creation as 'in strictness neither a national nor a federal constitution; but a composition of both'.<sup>15</sup> As contemporary discussion and usage in the Federalist Papers suggested, the word '*federal*' at that time signified a distinctly international idea 'which regards the Union as a *confederacy* of sovereign states'.<sup>16</sup> Put another way, 'federal' was roughly synonymous with what we would generally call 'confederal' today.<sup>17</sup> The new American Republic was in this sense a hybrid system of governance that combined international with national modes of governance. For example, according to Madison's Federalist 39, the American Republic exemplified the 'federal' form in the mode of constitutional ratification (ie, assent via ratification convention in every state that joined the Union) and in the states' equal representation in the Senate.<sup>18</sup> But, again according to Madison, the new republic also had 'national' features, as for instance, the representation of the people 'in the same proportion, and on the same principle, as they are in the Legislature of a particular State'.<sup>19</sup> A similarly 'national' feature of the new government was that the central government's ↪ powers operated not merely 'on the political bodies composing the confederacy, in their political capacities' but directly on the individual citizen.<sup>20</sup>

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In their campaign documents, the Founders deployed a strategy of imprecision. For instance, in a proper confederation of the type known at the time (or indeed since then), the mode of ratification within each signatory state would ordinarily rest with each signatory state's internal legal requirements. The US Constitution, by contrast, spelled out the mode of its own ratification within each state by demanding popular ratifying conventions that bypassed existing state government institutions. It was, after all, to be a product of 'We, the People' not the 'We, the States'. In this sense, even the purportedly 'federal' features of the US Constitution were far less 'federal' (ie in modern terms, far less 'confederal') than the Framers let on.

The most cunning imprecision of all, however, still influences how we think of the subject today. Call it the Federalists' strategic synecdoche. By presenting their distinctly hybrid form of governance in 'The Federalist' papers, the Founders appropriated for the whole of their new enterprise a term that only described part of the arrangement: 'federalism'. The 'national' bit was subtly dropped. The public relations campaign (and the quest to create the American republic) was a success. And so, today, 'federal' and 'federalism' are understood primarily in terms of the American hybrid form of governance as opposed to the older idea of federalism as confederation.

But that was not the end of conceptual controversy. In modern times, K.C. Wheare's influential work *Federal Government* promoted an American-centered understanding of the 'federal principle' as 'the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.'<sup>21</sup> On Wheare's account, the United States, which exemplified the federal principle, was an 'association of states' in which federal and state governments are 'co-equally supreme within their sphere'.<sup>22</sup> But for all his focus on the United States, it was questionable whether Wheare understood American federalism properly, especially as it had developed over time. As critics were quick to point out,<sup>23</sup> Wheare neglected the cooperative elements of US federalism as well as the role of the Supremacy Clause. More important for present purposes, Wheare defined federalism so narrowly that it excluded Argentina, the Weimar Republic (and later the Federal Republic of Germany and many others), in which central and constituent government institutions were more closely intertwined than in Wheare's idealized conception of federalism in the United States.

What followed was a long battle of definition and redefinition—at least within English speaking scholarship—mostly to broaden the scope of 'federalism' beyond Wheare's particular (and mostly outdated) understanding of the American model. William Livingston, for example, suggested a sociological approach that focused not on 'legal and constitutional terminology' but on the 'economic, social, political, [and] cultural' forces necessary to sustain federal government.<sup>24</sup> Carl Friedrich, in turn, insisted on a strong conceptual link between federalism and constitutionalism, but viewed both not as fixed legal constructs but as dynamic 'processes' by which society continually organizes and reorganizes itself.<sup>25</sup> And just as Morton Grodzins famous 'marble cake' metaphor debunked the idea that US federalism involved mutually distinct spheres,<sup>26</sup> so Daniel Elazar's simple definition of federalism as a combination of 'self-rule plus shared rule' expanded the reach of 'federalism' and 'federalisms' well beyond the US model to describe such arrangements as Union, Federation, Confederation, Federacy, Associated Statehood, Condominium, and League.<sup>27</sup>

The most lasting definitional contribution, however, has come from William Riker. His was grounded in, and accompanied by, an approach to federalism studies that has dominated the political science literature ever since: causal analysis of actors engaged in rational political strategies within defined institutional settings.<sup>28</sup> Riker's classic definition held that

A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee

(even though only a statement in the constitution) of the autonomy of each government in its own sphere.<sup>29</sup>

Mostly usable to this day,<sup>30</sup> Riker's definition should be taken as properly linked to a specific research project. It should not be taken to distract from the fact that in some federal systems, such as Brazil, the European Union, Germany, or India, more than two levels of government have constitutionally based claims to rule that can usefully be analyzed in terms of federalism as well. And it should not deflect attention away from a more modern conception of the distribution of powers (in the United States and around the world), which recognizes that jurisdiction and accompanying policy actions of the various levels are not distinct and autonomous from one another but compete and intermingle with one another.<sup>31</sup> Finally, Riker's definition should also not distract from the general importance in a federation of each level of government's organizational autonomy as distinct from any substantive jurisdiction over execution, adjudication, or promulgation of law and policy. An alternative definition that embraces all these features might take federalism to mean *the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority*.<sup>32</sup>

## 2. The Territory of 'Federation'

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One of the useful analytic insights to emerge from the definitional debates is the central importance to traditional federalism of territorial government, or what Ivo Duchacek long ago termed the 'territorial dimension of politics'.<sup>33</sup> Some scholars along the way have suggested a more abstract understanding of federalism that would include jurisdictions organized not along geographic but along functional lines. Most prominent in this regard, has been the work of Swiss economists Bruno Frey and Reiner Eichenberger, who advocate a system of functional overlapping competing jurisdictions (FOJCs).<sup>34</sup> Such jurisdictions would have governance authority over a single policy issue (such as education or religion) and not be organized along geographical boundaries.<sup>35</sup> Analogies between such functionally organized jurisdictions and federalism do indeed exist and can yield useful insights.<sup>36</sup> And yet, in common parlance as well as in the scholarly literature, there is still considerable force to Livingston's blunt statement that 'No government has ever been called federal that has been organized on any but the territorial basis'.<sup>37</sup>

In a less promising move, scholars such as Preston King,<sup>38</sup> Ronald Watts,<sup>39</sup> and Michael Burgess<sup>40</sup> have argued for distinguishing between federalism and federation along normative/institutional lines. King, for example, suggested that federalism is best thought of as an ideology, political philosophy, or normative concept as distinguished from the institutional manifestation of federalism in federation.<sup>41</sup> This, he thought, would help to focus debates about the political philosophy that underpins federal arrangements. But it is not clear that anyone was ever seriously confused by the use of 'federalism' to signify both normative theory and institutional practice. And so this particular distinction between federalism and federation has never taken root.

Somewhat more promising has been the effort to tease out the idea of a federation as only one particular kind of federal arrangement. Ronald Watts, for example, notes that

Within the genus of federal political systems, federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens.<sup>42</sup>

Whether using the term 'federal system' or 'federalism' as the umbrella term, most scholars seem to take the basic point about genus versus species. An accepted distinction, then, exists between federalism as the

general phenomenon (be it normative or institutional) and federation as a more specific institutional manifestation. To be sure, as we shall see, scholars still quibble about the precise institutional characteristics of a federation. But 'federation' lays the foundation for teasing out one particular institutional manifestation of federalism and distinguishing it from the others.

### 3. Beyond 'Confederation'

p. 582 Among the species of federalism, the distinction between federation and confederation has long generated the most interest. The German-speaking literature on federalism has been especially focused on this distinction, that is, between *Staatenbund* (confederation) and *Bundesstaat* (federation), as first Switzerland and then Germany moved from looser alliances to more closely knit forms of federalism. Because the 'state' as fundamental unity has loomed so large in the German legal tradition,<sup>43</sup> scholars (especially lawyers) have grappled hard with understanding the very possibility of federalism. Today, we witness a new variant of these debates as scholars, judges, politicians, and citizens argue about whether, for example, the European Union is a federal state, federation, confederation, or *sui generis* entity.<sup>44</sup>

All these definitional arguments, however, say more about the conceptual imagination or intellectual agenda of those arguing for one view over another than they do about the entity being discussed. At times, such inquiries focus on the rather elusive (and frequently unhelpful) idea of 'sovereignty', as in asking whether sovereignty ultimately resides at the central level (federation) or component state level (confederation).<sup>45</sup> They occasionally worry about whether the system as a whole qualifies as a 'state' (either under the definition of international law or on Weber's definition of the monopoly of the legitimate use of violence) before speaking of federation. Or they may turn to more concrete operational questions, such as (1) whether the central level of government has the authority to expand its powers without the unanimous consent of the component states,<sup>46</sup> (2) whether there is a direct electoral link between the citizen and the central level of government,<sup>47</sup> and (3) whether the central government can directly impose legal obligations on the individual as defining elements of a federation.<sup>48</sup> Reasonable arguments can be made for the significance of many of these operational characteristics in distinguishing between federations and confederations. But the choice of elements selected by the various definitions here, too, will usually depend mostly on the purpose of the academic study or political argument advanced.

When opting for one or more of these characteristics to distinguish federations from other federal arrangements, we are therefore well advised to heed Harold Greaves's early dictum that 'it is not always possible to draw clear and incontestable distinctions[;] ... alliance shades into league, league into confederation, confederation into federal state, federal state into unitary state.'<sup>49</sup> The Italian scholar and statesman Pellegrino Rossi made a similar point back in 1833 noting that in moving from federation to confederation he saw no bright lines but only 'degrees and nuances'.<sup>50</sup> Federalism, federation, and confederation may therefore be deployed one way or another as a matter of rhetoric for political gain. But for purposes of theoretical or empirical scholarship, it makes no sense to speak about the accuracy of one definition over another in the absence of a specific research project or theory regarding the causes, effects, or normative implications of the phenomenon being defined.

### III. The Origins of Federal Systems

Koen Lenaerts and Alfred Stepan (writing separately in different fields),<sup>51</sup> distinguish between two principal ways in which federations come about. In the first, ‘integrative’ (Lenaerts) or ‘coming together’ (Stepan) federalism, independent states form a federation to reap the gains of unity while maintaining the individuality of their component parts. In the second, ‘devolutionary’ (Lenaerts) or ‘holding together’ (Stepan) federalism, a unitary state devolves power to component governments in an effort to appease political demands for decentralization or to pacify separatist movements while maintaining the unity of the overarching state.<sup>52</sup> By introducing this basic distinction, both Stepan and Lenaerts sought to counteract the normalization of the American experience in the study of federations. Stepan, in particular, took aim at Riker’s exclusive focus on federalism as the coming together of independent sovereign states. Federations such as India, Spain, and Belgium, did not fit that model and yet they needed a home at the core of what we understand as federalism.

Especially with regard to integrative federations, scholars continue to debate what caused them. Riker boldly posited that such federations are created because politicians desire territorial expansion in the face of an external military threat or opportunity.<sup>53</sup> This ‘primacy of the military motive’<sup>54</sup> as well as the original hypothesis that such threats or opportunities are always external, has come under severe attack.<sup>55</sup> Scholars soon noted that the threat could come equally from internal, as opposed to external, sources as in the case of Nigeria’s attempt to control ethnic factions within the federation.<sup>56</sup> The origins of the European Union in an attempt of Franco–German reconciliation could be added as an example here as well. Others urged that federation reflects an ideological commitment of elites<sup>57</sup> or the social qualities of its people.<sup>58</sup> Reviewing the literature on the subject in light of the formation of a host of federations, Michael Burgess concludes that the theory about the necessary existence of a military threat is not very informative. ‘Closer historical analysis’ in his view ‘demonstrate[s] that a complex amalgam of socioeconomic, historical and political variables were also present at the creation’.<sup>59</sup> Burgess ultimately pleads for a theory—we might call it an anti-theory—of federal formation: the theory of ‘circumstantial causation’.<sup>60</sup> With regard to the various motives for federation, all of which are easily identifiable, he concludes that ‘it remains very much a matter of conjecture as to how far we can prioritize among them’.<sup>61</sup>

p. 584 Later studies have tried to hone in more closely on what motivates the choice between federation and its alternatives in the formation of a new political union. Daniel Ziblatt, for instance, calls into question Riker’s hypothesis that a federation derives from a failure of the expanding power to ‘overawe’ its neighbors in the unsuccessful attempt to achieve a greater, unitary state.<sup>62</sup> Ziblatt suggests, instead, that elites with expansive ambitions seize upon the capacity of each of its potential negotiating partners to govern their own internal affairs effectively. He argues for what we can call a supply-side theory of federalism. It holds that

the most decisive factor in [the] moment of institutional creation is the preexisting supply of regional political institutions ... with high levels of institutional capacity that can be used both to negotiate the terms of polity formation and to govern after the polity has been formed.<sup>63</sup>

Ziblatt, then, would turn the traditional theory of formation on its head: ‘federalism was not a second-best strategy adopted when necessary. Instead, federalism emerged when possible, while it was unitary structures that were viewed as necessary’.<sup>64</sup>

Chad Rector’s recent study approaches the comparison from the other end.<sup>65</sup> He asks why independent states seeking the benefits of union opt for federation as opposed to some form of looser, international alliance. Rector’s argument is also radical. The principal reason for institutions of federalism, on his account, is not to enhance gains from cooperation but to impose costs for defection. He suggests that states



which have less to lose from the potential breakdown of cooperation would prefer an international alliance whereas states with more to lose want federation. Accordingly, the principal purpose of federation is to ‘contrive symmetry’<sup>66</sup> among the parties where none would otherwise exist. After investing in federation, everyone loses equally if the deal breaks down.

Despite several sophisticated contributions, debate about the origins of federations will clearly continue. No single accepted theory has taken the place of Riker’s rash model. The more general theories tend to be vague or in the nature of anti-theories. The more specific theories need more proof. For example, Ziblatt’s and Rector’s studies provide the most nuanced current analyses of the choice between federation and the alternatives of a unitary state, on the one hand, and an international alliance, on the other. And yet, each suffers from obvious limitations (many of which the authors themselves acknowledge). Ziblatt, for example, creatively draws four comparisons from his two-system study by including a difference analysis among the component states of each (would be) federation. After reaching his conclusions, he adds a quick sketch of a broader comparison throughout Europe. This goes a long way to unsettle previous assumptions. But it will take more detailed work outside his two principal case studies to confirm his specific thesis.

Rector’s analysis, while comparing a good deal more systems than Ziblatt’s, often includes judgments of self-restraint through investment that are uncomfortably close to the simple manifestation of dominance. So, for example, he argues that non-vulnerable states must and do invest more heavily in federal institutions as a way to post a credible bond in favor of cooperation with their more vulnerable partners.<sup>67</sup> At the same time, however, such relatively greater investment of strong states in the institutions of federalism—say, Prussia’s preeminence in the German Federation of 1871—may also reflect a hegemonic element within the federation that simply serves to benefit the stronger party.

Perhaps most important, however, we should be careful in this terrain before privileging too much any given moment of ‘creation’ or distinguishing too starkly between ‘coming-together’ (or ‘integrative’) federations and their opposites. Returning to Lenaerts and Stepan, for example, they seem to characterize a federal system based on a chosen moment of creation as falling into one or the other category for all time. But by privileging the moment of foundation to characterize the system as a whole in this way, they suggest that the founding dynamic of politics is the one that will persist and dominate the life of the federation. And yet, a system of governance—especially a long-lived one such as Switzerland, the United States, Germany, Canada, or Venezuela—may undergo successive periods of integration and devolution over time. Indeed, before any given system emerged as a holding-together federation in the first place (as in the case of, say, the modern-day United Kingdom), it most likely had come together at a much earlier point in time to form the unity from which power is now being devolved.

## IV. Why Federalism?

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The terrain of normative political theory on federalism is well worn. And yet all too often one still finds no more than a disparate collection of individual reasons for or against central or local authority without considering the analytic structure of federalism theory as a whole. This leads to blind spots. Some scholars, for example, thereby fail to appreciate the significant difference between federalism and decentralization or which of several potential values of federalism are at stake in any given decision.<sup>68</sup> As existing federal systems continue to struggle with maintaining a workable division of authority among their various levels of government, and as questions of the constitutional design gain renewed importance around the world, it is therefore useful to bear in mind a *general* (albeit brief) normative theory of federalism.<sup>69</sup>

US scholars and judges may shy away from using the term, but the key theoretical concept underlying a general theory of federalism is what Europeans call ‘subsidiarity’.<sup>70</sup> To make it palatable to all, we shall simply call it here the ‘federal power principle’. Regardless of name, the basic principle should be familiar to

Americans. It animated the Virginia Plan, which James Madison drafted and Governor James Randolph introduced in Philadelphia to serve as the blueprint for the US Constitution. With striking similarity to the later European analogue of subsidiarity, the plan proposed that the central legislature be given the power 'to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.'<sup>71</sup> The Constitutional Convention voted in favor of the provision and used it as the basis for the more specific enumeration of powers found today in Article I, section 8 of the US Constitution. As it turns out, unpacking the Randolph plan, that is, unpacking subsidiarity, gets us all we need (or, more accurately, gives us all we can get) from a general normative theory of federalism.

## 1. The Benefits of Local Power

Subsidiarity begins with a presumption in favor of a multiplicity of local authorities. Ever since Rousseau argued in favor of small states over large ones, democratic theory and public choice literature have recognized important arguments in support of local over central authority.<sup>72</sup> Some arguments trade principally on size, others emphasize the multiplicity of local power, and yet others build on both. This terrain is for the most part all too well known. But it is nonetheless useful to sketch out briefly before we turn to arguments in favor of a single central authority.

### (a) Voice

It is a staple of federalism literature that, all else being equal,<sup>73</sup> local government will better reflect citizen preferences if citizens with different preferences cluster within different jurisdictions.<sup>74</sup> Even if such clustering is slight (or non-existent at first) mobile citizens can move from one jurisdiction to another, thereby sorting themselves into the various jurisdictions that best satisfy their individual preferences.<sup>75</sup> Politicians at local levels will have greater incentives to respond to this diversity than will the politicians in a central government eager to form 'universalistic coalitions'.<sup>76</sup> And even in the absence of mobility or preference diversity, the smaller the jurisdiction, the greater the weight of an individual citizen's vote and the greater the individual citizen's access to, and control of, his or her representative.

### (b) Community

Smaller jurisdictions are often said to foster and reflect a greater sense of community among its citizens than do larger jurisdictions.<sup>77</sup> One argument is that smaller jurisdictions increase the quality of democratic interaction and incline individuals more charitably toward their fellow citizens and to public engagement. The anti-federalists generally called this sentiment republican or civic 'virtue'.<sup>78</sup> Madison took the point and was therefore keen on maintaining states alongside the federal government in the new compound republic. De Tocqueville later would add that when coupled with larger jurisdictions, smaller jurisdictions serve as schools of democracy for citizens and representatives alike.<sup>79</sup> The deeper sense of community in smaller jurisdictions may have benefits for the enforcement and implementation of laws as well, as citizens will more likely follow the rules of a more closely knit community than of one that is large and diffuse.

Scholars have, of course, argued that many constituent states in federal systems are so large today that the argument based on size cannot carry much weight. Constituent units are too large to create the kind of deeply affective community envisioned by the anti-federalists of the eighteenth century. And yet, conclusions about the existence of thicker forms of political participation in smaller jurisdictions as compared to larger ones<sup>80</sup> are remarkably robust even when those smaller jurisdictions contain, say, up to a million citizens.<sup>81</sup> More broadly, regional affinities including language, religion, ethnicity, history, or

morality indeed reflect commonalities within a component state that are not shared by the larger citizenship of the federal polity as a whole.<sup>82</sup>

### (c) Expertise

Smaller jurisdictions can be more effective because local decision-makers have a better grasp of the relevant local facts than would actors at the central level of governance. This argument about information asymmetries, in particular, applies well beyond democratic settings and even well beyond federalism.<sup>83</sup> In the federalism literature, the classic example is the property tax, where local officials are likely better than national officials at valuation.<sup>84</sup> But the point can be extended to any other matter of local variation presumed to be within the better grasp of local officials. In the European Union, this basic idea is one of the driving forces behind issuing so-called 'directives'. Even after having decided on a certain policy goal at the central level of governance, a directive (at least in theory) leaves the implementation to local officials who can better tailor the appropriate measures to local conditions.<sup>85</sup>

### (d) Risk

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A multiplicity of jurisdictions helps to manage risk. This is only an indirect argument in favor of smaller units of government, as its main focus is on the multiplicity of jurisdictions. Spreading governance authority over multiple jurisdictions can increase resistance to bad rule and lower the cost of governance experiments more generally. For example, it should come as no surprise that the first move of fascist government in Germany was the elimination of federalism through '*Gleichschaltung*' of the *Länder*.<sup>86</sup> So, too, in Venezuela, federalism has recently come under attack as an obstacle to the move from democracy to a more authoritarian regime.<sup>87</sup> There can be, of course, no paper guarantee for the preservation of federalism (or constitutionalism or the rule of law). But the existence of multiple sites of authority within a system of governance is designed to protect against the ill effects of tyrannical elites seizing power over any one level or unit of government. Similarly, seeing how a politician first does in a component jurisdiction is often a good way of testing for, and assuring citizens (especially in fledgling democracies) of, the trustworthiness of potential leaders of the republic as a whole.<sup>88</sup>

Federalism helps to hedge our bets not only against tyrants, but also against the risk of bad policy. Better that Drachten and Ipswich try out the elimination of all road signs in an effort to increase traffic safety than that we run this experiment Europe-wide. Or that Oregon and the Netherlands experiment with physician-assisted suicide while the rest of us look on. And most important, if we really want experiments to take the federal polity tomorrow where it may not want to go today, we must give local governments the power to choose their own policy goals as well.<sup>89</sup> Thus, local experience with same-sex unions in the United States comes at a time when a majority of Americans is still firmly opposed to the practice and public opinion is slowly changing.<sup>90</sup> Justice Brandeis famously captured this phenomenon in saying that 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'<sup>91</sup> A related, but sometimes less well recognized, argument is that by allowing a multiplicity of jurisdictions to try their own policy experiments, federalism can unsettle policies that have become entrenched at the central level of government due to inertia, capture, or corruption.<sup>92</sup> Here, too, the effects of bad (in)decision can be mitigated by unsettling the status quo through local action.<sup>93</sup> Sometimes local experiments with locally contained costs lead the nation by shining example. At other times, local experiments prod the nation into considered action by causing national irritation.

## 2. The Benefits of Central Power

The literature on the benefits of central power is vast as well. Here, too, modern arguments in public choice literature often echo theorists and statesmen of long ago. In any event, the arguments can be usefully grouped into the following three simple categories.

### p. 589 (a) Cost Savings

The basic point about economies of scale and scope needs little elaboration. Just as it can be cheaper to produce certain goods or services by consolidating production or supply, so, too, it can be cheaper to consolidate certain government activities in a central authority. In the European Union, for example, one argument in support of the creation of a common currency was the cost savings entailed by eliminating currency conversion in cross-border market transactions.<sup>94</sup> Similarly, American businesses operating nationwide often lobby for a single federal regulation that preempts state regulation as a way to save the cost of having to comply with 50 different local rules.<sup>95</sup> Greater policymaking resources at the central level may also mean that difficult policy problems are better solved at the central level of government than by experimentation throughout smaller constituent entities.<sup>96</sup> In law enforcement, too, scholars and officials have advanced scale efficiencies as supporting prerogatives of federal over state powers.<sup>97</sup> Others have argued that delegation of policymaking powers to a central agency saves costly ad hoc negotiations once overall policy goals have been set.<sup>98</sup>

These and similar transactions cost savings point in favor of establishing central power, although not all of them argue for displacing local authority at the same time. In some cases the existence of more cost-effective governance facilities at the center could simply function as resources that component units could tap into at their convenience. Where the center has greater policy-solving or crime-solving capacity, for instance, local governments might avail themselves of the central resource by choice. In other cases, however, such as a common currency, the cost savings derives from the singularity of the central government policy. In these cases, any savings necessarily depend on engagement of the central government and simultaneous disengagement of the component states.

### (b) Inter-Jurisdictional Difficulties

The second category reflects problems that arise due not to size but to the multiplicity of local jurisdictions. And they arise not merely due to the increased costs of doing things many different times instead of once but because of difficulties of coordinating multiple jurisdictions. Call this category 'inter-jurisdictional difficulties'.

The most commonly cited inter-jurisdictional difficulty is an externality, which figures prominently in Wallace Oates's famous decentralization theorem.<sup>99</sup> Policy effects—whether negative or positive—that radiate beyond any given local jurisdiction can lead to regulatory mismatches for several related reasons. The jurisdiction externalizing effects on others may under-appreciate those effects because it does not feel them; it may value those effects differently even if it were to feel them; or it may be trapped in a multilateral prisoner's dilemma in which all jurisdictions feel each other's externalized effects and value them equally but cannot reliably coordinate their regulatory responses. And, indeed, externalities of one sort or another justify a good deal of central government power from certain forms of environmental regulation to central government support for roads or higher education.

But there are other consequences arising from the lack of coordinated policy strategies of multiple jurisdictions as well. Although many might be packed into the model of an externality, some collective action problems are best thought of as creating rather distinct kinds of inter-jurisdictional difficulties.

For example, scholars have long pointed to the twin aspects of Tiebout's famous sorting hypothesis.<sup>100</sup> Think of it as two sides to the coin of mobility: 'voter mobility' and 'object mobility'. On the one side is the mobility of the resident as 'voter' who moves from one jurisdiction to another in search of the proper mix of taxes and services. On the other side is the mobility of the resident as 'object' of regulation, say a manufacturing plant that can flee a costly regulatory regime. As long as the costs and benefits of a particular local regulation roughly fall on the same entity, Tiebout sorting can be a straightforward affair, happily leading to the proverbial race to the top. I move to a certain jurisdiction because of the packages of taxes and benefits I receive much as I buy a widget at a certain store for a price I like.

But as soon as the incidents of regulation fall heavily on one entity, say a manufacturer (and its workers), while the benefits fall on another or on citizens more generally, object mobility limits the exercise of public power. This is why, for example, redistributive policies are difficult to maintain at the level of local government, as the US Supreme Court recognized in upholding federal unemployment laws.<sup>101</sup> Indeed, component jurisdictions within federal systems have often found themselves in competition with one another for movable capital investments, leading to what some have called a race to the bottom.<sup>102</sup> Whether giving up on environmental standards, worker protection, or, ultimately, taxes, subunits within federal systems have frequently sought to outbid one another to attract mobile industry.<sup>103</sup>

The effects of this kind of inter-jurisdictional competition are hotly debated. Some scholars have challenged the race-to-the-bottom hypothesis by arguing that such competition is generally efficient. They claim that this kind of hustling merely reveals each jurisdiction's true preference for trading off tax revenue and other regulatory impositions for the jobs and the economic development the state expects incoming capital investments to provide.<sup>104</sup> Indeed, Barry Weingast maintains that the limitation of public power by virtue of component unit regulation of the economy and the (constitutionally enforced) mobility of the objects of economic regulation are key elements of the 'market preserving federalism' that has sustained economic growth in the West.<sup>105</sup> And yet, others find it is hard to see the value in moving a fixed number of jobs from Seattle to Chicago, as happened in the case of Boeing, in exchange for state and local tax breaks.<sup>106</sup> One component jurisdiction gains at the expense of another, while the federal system as a whole has lost public revenue and compromised its power of regulation.

p. 591 Whether this is a good or bad outcome mostly depends on one's theory of public choice and whether democratic government is seen as benign or malign. If one has reason to believe that democratic government is merely a self-interested affair by those in power, the analogy between jurisdictional competition and competition among widget manufacturers makes a good deal of sense. In that case, we should applaud the loss of regulatory and taxing power that federalism occasions. If, on the other hand, one has reason to believe that government policies reflect some broader common good, then we might be more worried about certain forms of inter-jurisdictional competition. On the benign view of democracy, allowing the central government (ie, a monopoly jurisdiction or at least one with what economists would call 'market power') to extract supra-competitive 'rents' from industry is not, in principle, objectionable. It all depends on the uses to which the government puts its gains from trade.

Even from a component state's perspective, it can often be vexingly difficult to sort through whether any particular limitation of public power through regulatory competition is ultimately beneficial or harmful. Put another way, it's hard to tell whether the race is to the bottom or the top. As Fritz Scharpf has explained in discussing the European Union, to understand whether a race is benign or malign, we must attend to a host of factors that affect local regulatory capacity as well as those that affect central regulatory capacity.<sup>107</sup> These can range from formal legal authority and institutional voting rules to whether regulatory standards are embedded in goods or services and the extent to which signaling can mobilize market actors who reward quality. Which way a race tends to run can therefore be judged only by looking at the particular dynamics of the sector in question.

Perhaps the only general conclusion we can draw is the following rather obvious principle. Call it the ‘federal conservation of powers principle’: unless a loss of component state authority is made up for by a gain in authority at the center, federalism institutionalizes a bias in favor of deregulation. And whether that bias is good or bad depends (once again) not on federalism, but on one’s theory of democracy, regulation, and the market.

### (c) Intra-Jurisdictional Difficulties

The final reason for moving politics from constituent units to the center is a failure of the political process within the component units of governance. Call this an ‘intra-jurisdictional difficulty’. This reason is entirely absent from Wallace Oates’s famous theorem on decentralization. Perhaps as a result, it receives less attention in the public choice literature on federalism even though this reason figured prominently in the Framers’ argument.

An intra-jurisdictional difficulty focuses on the political process of a given jurisdiction. But it is not concerned with the failure to consider costs and benefits external to that jurisdiction. Instead, an intra-jurisdictional difficulty is the failure of the political process at the local level to take into account and respond properly to interests that are internal to the local jurisdiction itself. Even when the costs of failure are borne entirely by locally affected parties, shifting politics to the center can help to make politics—in particular, democratic politics—better.

This was Madison’s well-known argument in Federalist 10. In small jurisdictions, representatives may win elections by ‘vicious arts’, become ‘unduly attached’ to local interests, and be swayed by a ‘fe[w] distinct parties and interests’ forming relatively consistent majorities.<sup>108</sup> All this, Madison argued, leads to the oppression of minorities. His answer was to enlarge the republic: ↵

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of the other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>109</sup>

In addition, ‘where there is consciousness of unjust or dishonorable purposes, communication is always checked by distrust, in proportion to the number whose concurrence is necessary.’<sup>110</sup> Madison’s idea, then, was safety in numbers. As for central power in a federation, this meant ‘that the same advantage ... in controlling the effects of faction ... enjoyed by a large over a small republic ... is enjoyed by the Union over the States composing it.’<sup>111</sup>

We see responses to such intra-jurisdictional difficulties in a variety of federal settings. Federal systems often protect certain basic rights at the central level of government—especially when fearing an invasion of rights by factions that form local majorities but remain national minorities. A classic response is, for example, the combination of the Bankruptcy Clause and the Contracts Clause in the US Constitution. Taken together, these provisions protected creditors against local levelers while lodging politics over debt relief squarely with the central government. The post-Civil War provisions granting Congress the power to protect civil rights were similarly enacted out of mistrust of state politics—in that case on matters of race. Indeed, state political dysfunction on race continued for so long in the United States that William Riker concluded his comparative study of federalism with the scathing lines: ‘If in the United States one disapproves of racism, one should disapprove of federalism’.<sup>112</sup>

More generally, scholars of democratization have cautioned that decentralized power abets the persistence of subnational authoritarian practices, and complicates efforts to deepen democracy in federations that have made the formal transition to democracy at the federal level.<sup>113</sup> Perhaps the most dramatic provisions

intended to protect against this kind of failure of local politics are those guaranteeing the republican or democratic character of constituent state governments. Rarely used in most federations, it can, however, be a powerful weapon of centralization in the hands of some. For example, a transplant of the Guarantee Clause has enabled the federal government of Argentina to take over state government functions repeatedly and for extended periods of time.<sup>114</sup>

### 3. Subsidiarity Redux: Instrumental or Intrinsic?

Recall the basic federal power principle: the center will assist the constituent units of government (only) in case of need and help to coordinate their activities with the rest of society with a view to the common good. Subsidiarity may be used, as it was in the Randolph plan, to sort out the distribution of powers when founding a federation. But no constituent assembly can specify with precision all the powers of the various levels of government necessary to sustain a functioning compound polity. And unless a polity governs by frequent constitutional revisions or referenda (as, say, in Switzerland), the various actors (including courts) must make due with interpreting existing power provisions to fit the problems of the day. This is where subsidiarity enters the life of the federation as an operative principle of constitutional law.

But subsidiarity is easier said than applied. How do we assess 'need' or 'the common good?' How do we decide (to use the Randolph formula) when component states are 'incompetent' or when the harmony of the union risks being 'interrupted'? Unpacking the federal power principle into its component claims in favor of local and central authority, as we have just done, provides a much better grasp on the structure of the various arguments hidden in the sleek opening formula. But it does not yet fill these arguments with content. That is because subsidiarity contains a further difficulty.

In addition to the complex empirical judgments involved in some of the arguments in favor of local or central authority, many of these arguments will raise questions of first principle that cannot be resolved absent politics. Take the rather simple sounding idea of externalities. How do we know when they should matter?<sup>115</sup> Every policy affects interests beyond its jurisdictional boundaries even if only because outsiders who know about the policy do not like it. Slavery in the American South had tangible economic effects in the North and elsewhere. It also offended the moral sensibilities of many northern Unionists. Capital punishment in Poland most likely would have a negligible economic impact outside its borders. It is restricted today as a condition of membership in the European Union because it offends stated European values. Gay marriage, physician-assisted suicide, and the use of medical marijuana have all made it onto the national agenda of politics in the United States in large part due to ideological objections voiced outside the jurisdictions in which these policies were instituted. Are such ideological externalities bona fide externalities? The Millian harm principle is of little help here, as it does not come with ready-made content.<sup>116</sup> After all, one jurisdiction's externality may be another's autonomy.

What is often overlooked is that this basic question bedevils most arguments in favor of central (or local) authority. Consider the simple case of transactions costs. They are worth reducing only, of course, if we have agreed on the goal we are trying to pursue. Otherwise, high transactions costs may indeed be a welcome safeguard against policies we dislike. Intra-jurisdictional difficulties, too, create harm only to the extent that we view the particular form of intra-jurisdictional politics we are trying to cure as problematic. When African-Americans are excluded from the franchise, the answer is easy. But whether felon disenfranchisement at the component state level compromises the local democratic process already generates little agreement in the United States.<sup>117</sup> Although we may be able to reason our way from universally accepted principles to a few conclusions, we will often need politics to get there. What Robert Dahl observed with regard to the question of how to determine the proper boundaries of a democratic polity applies with equal force here: 'Democratic ideas ... do not yield a definitive answer. They presuppose that one has been somehow supplied, by history and politics.'<sup>118</sup>

In trying to apply the federal power principle to concrete cases, it can therefore be useful to distinguish between two kinds of arguments. The first are instrumental arguments, which presuppose agreement on the goal or interest to be achieved. These arguments debate only which level of government will best get us there. The second kind are intrinsic arguments, which debate the very goals and interests. These arguments ask which level of government has the better claim to determine the goals and interests in the first place. This difference between instrumental and intrinsic arguments of federalism can often be confusing. And both kinds of argument can be in play at the same time. And yet, when applying subsidiarity, especially (but not only) in judicial settings, it can be useful to tease out which of these arguments is at stake.<sup>119</sup>

Take, for example, the European Union's subsidiarity clause, which sets forth an exclusively instrumental version of subsidiarity:

Under the principle of subsidiarity ... the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>120</sup>

This provision assumes that the Union has the authority to decide upon the goals of a given action by virtue of an enumerated power spelled out elsewhere in the treaty. Article 5 adds that the Union must now consider whether the member states can achieve this Union-determined goal equally well on their own. For example, in enacting a European-wide deposit guarantee scheme, the Union was to have considered whether exercising its legislative power under then Article 57 of the EC Treaty was necessary to achieve the goal of protecting depositors against loss.<sup>121</sup> The prior question whether the Union should have power to set goals in the area of financial services regulation had already been made by then-Article 57 EC. It may not be very hard in this case to decide that inter-jurisdictional difficulties would require Union legislation once the decision is taken that a baseline of deposit protection is needed throughout the Union. And so, applying subsidiarity might well be rather easy here.

Consider, by contrast, Canada's Peace Order and Good Government (POGG) Clause, which contains both substantive and instrumental elements of subsidiarity:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.<sup>122</sup>

This residual clause in favor of central power is paired with a competing residual clause in favor of exclusive provincial power: 'In each Province the Legislature may exclusively make Laws in relation to ... [g]enerally all Matters of a merely local or private Nature in the Province.'<sup>123</sup> In applying these clauses, we must ask not only which level of government can better achieve a set goal. We must also determine which level of government should have the power to set a particular policy goal in the first place.

A jumbled mix of unstated subsidiarity considerations seems to animate a host of judicial decisions interpreting various enumerations of powers. Nowhere has this been more apparent than in the United States. Here, the exceptional difficulty in amending the constitution has created tremendous hydraulic pressure on interpretation. And so, important shifts in interpretation are often accompanied by an implicit return to the federal power principle that animated the distribution of power among the federal government and the states in the first place. Justice Holmes's landmark decision upholding federal power to make a treaty protecting migratory birds, for example, appealed to subsidiarity by pointing out that 'the States individually are incompetent to act' and noting that the treaty furthered 'a national interest of very nearly



the first magnitude ... [that] can be protected only by national action in concert with that of another power.<sup>124</sup> Justice Cardozo's opinion in *Steward Machine Company* upheld a national unemployment tax as necessary because states had 'held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.'<sup>125</sup> And Justice Stone noted for the Court in *United States v Darby* that 'interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the state from and to which the commerce flows.'<sup>126</sup> More recently, Justice Stevens in *Gonzales v Raich* upheld federal preemption of California's medical marijuana laws as necessary to regulate (ie, suppress) the nationwide market in the drug.<sup>127</sup> Conversely, the Court struck down several pieces of federal legislation not because of a lack of connection to interstate commerce, but because the kind of connection to interstate commerce present in those cases would have allowed the federal government to regulate family law, education, and violent crime.<sup>128</sup> Many of these subsidiarity questions turn on conceptually simple but empirically complex questions about instrumental rationality. But other subsidiarity decisions turn on substantive claims about national interests and local prerogatives that cannot be solved absent moral argumentation and political contest. Recognizing (and acknowledging) which of these are at stake would allow courts, in particular, to understand better their own powers and limitations in sorting out the various claims.

## V. Sustaining Federalism

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Scholars have pointed out that the relation between federalism and democratic governance is far more complicated than the happy story of normative theory would suggest. Subsidiarity and high-minded normative theories of federalism are not enough to control the political avarice that can make federalism fail. Courts can help,<sup>129</sup> but they are only a (small) part of the story. A sustainable federation needs a system of institutions that can channel the ambitions of powerful actors to the benefit of the federation and its citizens. The point is as old and as simple as Madison's classic caution in the *Federalist Papers* that we will not be governed by angels, or even enlightened statesmen. As we might put it here (only somewhat tongue in cheek), politicians are not inherently apt to act with subsidiarity in mind. Madison's conclusion was clear: 'Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.'<sup>130</sup>

### 1. Incentive-Compatible Federalism

p. 596 In the language of modern political science, federalism must be embedded in an 'incentive compatible' system that gives actors concrete political incentives to put their energies to ↴ productive uses. To move beyond mere 'parchment barriers', federalism—along with any other constitutional arrangement—must channel political ambition to create a 'self-enforcing' system.<sup>131</sup> This involves politicians as well as all other actors within the system. As Rui de Figueiredo and Barry Weingast succinctly put it 'The general problem concerns how to structure the political game so that all the players—elected officials, the military, economic actors, and citizens—have incentives to respect the rules.'<sup>132</sup>

This is no easy task. Jenna Bednar, for example, has demonstrated that any one institutional arrangement for punishing what she terms shirking, encroachment, or burden-shifting in a federation is not enough.<sup>133</sup> A federation needs structural, popular, political, and judicial safeguards, each providing a different 'trigger mechanis[m]' to punish aberrant actors.<sup>134</sup> Safeguards must cover all the different kinds of transgressions, complement each other in the nature of the punishment they offer, and be a sufficiently redundant check for mistakes.<sup>135</sup> If we add to Bednar's theory an understanding that what counts as a transgression is itself the

subject of intense debate, the matter becomes even more complicated. Other authors therefore push for a greater reliance on less structured 'populist safeguards of federalism'.<sup>136</sup>

## 2. The Role of Political Parties

The key challenge of designing a federal system seems to require giving political elites incentives to consider the interests of the federation as a whole. In this vein, Riker long ago stressed the significance of the political party system for the creation of vertical links across jurisdictions.<sup>137</sup> Such links may push uncomfortably toward unification as in the case of US Senators who, at times, controlled the fortunes of local politicians.<sup>138</sup> And yet, they may also reign in the central government when central government politicians must rely on the support of the local machine for their electoral success, as Larry Kramer has shown.<sup>139</sup> Jonathan Rodden has similarly pointed out how incentives of local politicians to act in the interests of the national party can be highly beneficial for the stability and efficiency of the union as a whole. Contrasting fiscal responsibility of political subunits in Germany and Australia with the fiscal profligacy on the part of constituent states in Brazil, he writes:

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German state officials, like those of Australia are embedded in a highly integrated national party system that shapes their career prospects. Protecting the value of a national party label is generally not a priority for state-level officials in Brazil, providing few electoral incentives to avoid debt and bailout demands.<sup>140</sup>

Similarly, if local politicians had no realistic aspirations to higher office, the logic of collective action would suggest that few local jurisdictions would run costly policy experiments for the benefit of all.<sup>141</sup>

For politicians, then, this often means acting against the best interests of their most immediate electorate. As Mikhail Phillipov, Peter Ordeshook, and Olga Shvetsova put it, an important element of creating a self-sustaining federation is to make political elites '*imperfect agents* of those they represent and to motivate citizens to reward such imperfection'.<sup>142</sup> The most consistent finding in this regard is that an integrated party system must tie politicians not only to their immediate electorate, but to the political system (and hence the electorate) of the system as a whole. Voters, in turn, can similarly be drawn into this incentive structure if parties and party labels are effective at both national and regional levels of governance at once.<sup>143</sup>

## VI. Does Federalism Deliver?

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Does all this work? There are, of course, innumerable ways to ask this question. In the following, however, we shall concentrate on only two concrete considerations: policy stability and polity stability.

## 1. Policy Stability

One of the most persistent critiques in the literature stems from the understanding that federalism in one form or another constrains the central government and, thereby, the central (or, better, the general) body politic.<sup>144</sup> Given that powers in a federation are, in one way or another, distributed or shared among the central and component governments, the central government in a federation has more limited powers as compared to the government of a unitary state. With the exception of Venezuela,<sup>145</sup> the central legislature in a federation depends to varying degrees on the concurrence between a lower house and an upper chamber representing geographic units or component governments. This upper chamber, in turn, departs—again to varying degrees—from the principle of equal representation of citizens in favor of the principle of equal representation of territorial units. As a result, politics at the center do not reflect the equality of each individual's voice in the way that democratic theory often seems to demand. Indeed, in some federal systems, such as Brazil and the European Union, even the composition of the lower chamber departs significantly from the strict principle of equality of individuals in favor of boosting the representation of the smaller territorial component units of the federal system.<sup>146</sup> All these institutional features shape the decision-making at the central level of governance on matters ranging from ordinary legislation and the selection (and removal) of presidents, judges, and other officials to amending the constitutional framework itself.

### (a) Demos-Constraint and the Status Quo

Alfred Stepan has called these institutional features of federalism '*demos constraining*'.<sup>147</sup> The principal observation regarding this constraint on the general *demos* has been that, as compared to a unitary state, the institutional structure of federalism creates a systematic policy bias in favor of the status quo. Concerns have focused in particular on the politics of redistribution. Recall that decentralization of redistributive decisions, say the provision of welfare, has the tendency to create a race to the bottom. Because subunits will fear becoming welfare magnets in the competition for mobile capital, each individual unit will have an interest in lowering welfare payments as compared to neighboring jurisdictions.<sup>148</sup> That is why in a federation redistributive measures should be moved to the central level of government. But as it turns out, here, too, redistributive policies face hurdles.

For instance, a broadly representative lower house with the backing of a popularly elected President may vote in favor of easing inequalities in wealth only to be foiled by a less broadly representative upper chamber upon whose consent the legislation also depends. Madison, of course, thought of federalism and bicameralism along with the separation of powers as just such bulwarks against the dangers of populism: 'a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it.'<sup>149</sup> And, indeed, the phenomenon of federalism and bicameralism stalling redistributive reform<sup>150</sup> has replayed itself the world over. The status quo is maintained not by general preferences but by a 'structure-induced equilibrium', to use Kenneth Shepsle's term.<sup>151</sup> In the case of Brazil, for example, a small group of Senators representing only 9 percent of the population can block legislation, foiling broadly shared preferences to tackle economic inequality.<sup>152</sup> Comparative studies investigating this phenomenon across democratic systems have found a significant correlation between federalism and greater income inequality.<sup>153</sup>

p. 599 To the extent we find an institutional bias against change at the center, however, it is not limited to the redistribution of wealth. Multiplying veto points favors the policy status quo across all political domains, including spending.<sup>154</sup> Structure-induced equilibria can limit the redistribution of wealth as well as new forms of central government regulation. Conversely, it can lead to overspending and overregulation by locking in spending and regulatory programs whenever change is subject to the agreement of multiple

actors. Especially when change from the status quo depends on the concurrence of the federal government and the states, this can lead to the infamous ‘joint decision trap’.<sup>155</sup>

One question that has largely eluded the federalism literature is the general normative evaluation of this dynamic in cases where it exists. Some amount of policy stability is, of course, necessary for people and economic actors to have projects, plans, and goals. At the same time, too much stability can perpetuate certain forms of domination. And so, as is often the case, much depends on one's normative priors to figure out how much policy stability is just right with regard to any given policy domain. Some scholars applaud federalism as a protective shield against overregulation and too much redistribution.<sup>156</sup> Others worry about a loss of regulatory power and the persistence or exacerbation of inequality of income.<sup>157</sup> As Daniel Treisman puts it, ‘Entrenching the status quo may be desirable or undesirable, depending on what gets entrenched.’<sup>158</sup>

But there are far deeper problems with this picture about *demos*-constraint and the bias in favor of the status quo. First, it is not clear whether an authoritative *demos* constrained by federalism exists in any meaningful sense. Secondly, not all forms of federalism contain the same degree of bias in favor of the status quo. Indeed, some federal systems help to foster change and may even feature less of a status quo bias than unitary systems.

### **(b) Which Demos?**

The assumption that a particular ‘*demos*’ is being ‘constrained’ by the federal institutional architecture can be quite misleading. Take redistribution. The suggestion seems to be that the *demos* would have redistributed wealth in the absence of federalism. The people generally would have voted for redistribution, but the popular will is foiled by an unrepresentative upper chamber. Or so the argument goes. But we should not forget that the raw calculation of majority preferences within a given system does not necessarily indicate that an authoritative democratic will in favor of change is being foiled by a less authoritative democratic will blocking change. That would be giving in to the Schmittian fallacy.<sup>159</sup> After all, the political system under investigation may not (and, in an important sense, does not) exist in the absence of federalism and its ‘constraining’ political institutions.

p. 600 The European Union, for example, might well be added to the roster of federations with an institutional bias against redistribution. And yet it would be odd to posit a pan-European *demos* that is being constrained in its desire to equalize wealth across Europe. Without the Union, questions of redistribution between Germany and Greece, for example, would be discussed under the rubric of foreign aid. Income inequalities would be maintained all the same but no one would be talking about a stalled *demos*. In short, we should be careful not to use the idea of a ‘*demos*’ as a mystical entity that we identify with only one or another of the institutions in a federation or with majority preferences and polls writ large. The positing of an actual ‘*demos*’ that transcends the institutional architecture of the federation itself may be more imagined than real. In a federal system, the compound polity is all we ever have.

### **(c) What Constraint?**

Federal systems need not increase constraints on policy action.<sup>160</sup> To be sure, bicameralism (along with the separation of powers) adds more veto points as compared to a unified parliamentary system. But just as not all unitary systems are created equal, not all institutional elements of federalism add barriers to change. Some may even counteract the status quo.

For example, Jonathan Rodden and Erik Wibbels have suggested that in terms of macroeconomic policy, the constraining effects of decentralization posited by Weingast and others are contingent on a host of features more specific than the brute fact of federalism itself.<sup>161</sup> Systems with weak national parties that rely on

intergovernmental transfers, for example, tend to allow subunit politicians to compete among one another in ways that ultimately put pressure on the central government to run up the deficit. But where vertical party linkages exist and subunits have the capacity to, and are forced to, rely on their own revenue, subunit politicians seem to resist the temptation to spend beyond their means.

Important differences exist more generally in terms of federal architecture. Distinguish, for example, among three kinds of federal governing mechanisms. Call them 'joint rule', 'multiple rule', and 'separate rule'. 'Joint rule' is where the central government and the component states must both agree before making a change to the status quo. 'Multiple rule' is where both levels of government have the authority and resources to act on their own in the same policy area unless and until a conflict arises between two positively chosen policies. 'Separate rule' is the idea that each level separately governs mutually exclusive arenas of action. Multiple and separate rule line up closely with what are often called concurrent and exclusive powers (or competences).<sup>162</sup> But the idea of 'rule' as used here extends beyond the formal distribution of powers to include principles of preemption as well. A component state may, for example, enjoy concurrent powers with a central government over a given area but see its powers displaced as soon as the center acts. The idea of multiple rule presumes weaker preemption norms, favoring rule by multiple governments until more concrete conflicts develop. Multiple rule is also made stronger where a federation's upper house is independently elected, as in the United States today, as opposed to being composed of recallable emissaries of component state executives, as in Germany or the European Union.<sup>163</sup>

p. 601 In areas of multiple rule, the institutions of federalism may counteract the status quo that results from policy inertia. This has been the central idea behind what is commonly called 'competitive federalism'.<sup>164</sup> When, for example, component states have the authority and capacity to make and implement policies on their own—subject only to central government preemption through positive law—states can prod the center into action. Component state officials (and political parties that form local majorities but national minorities) may adopt and implement policies as a way of competing with central government politicians and governing majorities for voters' affection. This adds an element of 'vertical competition' to governance in federal systems to the 'horizontal' competition among the component states.<sup>165</sup>

Multiple rule federalism can thereby push against the status quo especially where separation of powers and bicameralism have multiplied the number of veto players at the federal level of governance and slowed federal response to change. A slow federal government can now be moved to action by constituent state policies that irritate the federal system by altering the status quo. Even in such matters as foreign affairs, where the number of veto players at the national level is reduced by virtue of executive branch dominance, component states can push for change that would not otherwise occur. Component states can prod the center into action by engaging foreign governments and global corporations to bring pressure to bear on the central government to change, reconsider, or reaffirm through more deliberate action existing policies.<sup>166</sup>

Under multiple rule federalism, the multiplicity of actors at federal and component state levels does not create additional 'veto' points but instead adds more policy drivers. To be sure, at times component units thereby may impose what others will perceive to be negative externalities on other jurisdictions or actors within the system. For example, it is especially important in multiple rule settings to maintain fiscal responsibility for the actions that each level chooses to pursue. If the component level can take on financial obligations in the hopes of a central government bailout, for example, multiple rule can turn into a fiscal disaster.<sup>167</sup> But where bailout is not an option or component government officials are held partially accountable to the national electorate, multiple rule federalism becomes a viable option.<sup>168</sup>

Externalities created by multiple rule federalism can often be in the nature of a Socratic gadfly or beneficial irritant. Given sufficient mobilization and legal authority at the center, the center can always react by preempting, adopting, or even tolerating the individual state action. The multiplication of arenas for democratic decision-making and policy activity in such multiple rule federalism thus serves to create

‘political disequilibria’ that unsettle the status quo—especially one based on inaction.<sup>169</sup> Indeed, we can turn Shepsle’s term on its head to suggest that multiple rule’s political disequilibria are *structural disequilibria* because that the local median voter is unlikely to match up perfectly with the median voter of the system as a whole. To be sure, there are limits to this effect in that component units will still face the familiar fear of leading a charge in favor of redistribution or other costly investments in public goods.<sup>170</sup> More generally, however, these political disequilibria can yield productive conflicts by forcing constructive engagement among the multiple authorities throughout the system.

## 2. Polity Stability

The greatest promise and challenge of federalism is to sustain the compound polity. This means preventing centripetal forces from collapsing the federal polity into a unitary entity, on the one hand, and centrifugal forces from exploding the polity into its separate parts, on the other. The first of these is the (sometimes bland) worry that federal systems will centralize authority over time. The second is the (often more acute) worry that federalism will exacerbate political cleavages that motivate secession, strife, and civil war. Incentive-compatible federalism seeks, of course, to address both.<sup>171</sup> Nonetheless, a separate debate has developed with respect to the management of divided societies, to which we shall turn briefly here.

### (a) Fate Follows Formation?

Some scholars seek to derive lessons for the longevity of the Union from the history surrounding its formation. Leslie Goldstein, for instance, has suggested that federations ‘formed in the crucible of revolt against imperial power will be more likely to have state resistance to central power’.<sup>172</sup> Such unions may be less stable than federations formed under other circumstances, as a comparison between the Dutch, American, Swiss, and European federations would seem to indicate. Friedman similarly suggests that unions ‘precipitated by a war among its member states will be less likely to undergo overt member-state rejection of its authority’.<sup>173</sup> These explanations seem to draw on the political and cultural dispositions of actors whose self-understanding has been indelibly marked by the history of formation.<sup>174</sup>

A different kind of argument based on federal formation would be that a stable federation demands the continued presence of the original cause for union. For instance, federations formed to gain economies of scale in matters of military security may become unstable as the outside military threat (or opportunity) evaporates.<sup>175</sup> Riker, for example, maintained that the ejection of Singapore from the Federation of Malaysia was occasioned by the perception that Indonesia was no longer as threatening as it had once appeared.<sup>176</sup> Although Riker’s specific argument regarding Malaysia has been discredited,<sup>177</sup> recent European experience may provide some support for a version of the more general suggestion. As calls for secession in Flanders, Walloon, Scotland, and the Basque region may indicate, separatist movements are likely to draw strength from the fact that the state from which they wish to secede is embedded in a larger union that would, in any event, provide security to everyone involved.

Arguments based on the continued presence of the causes for federation can seize upon other suggested causes of federation as well. In this vein, scholars have argued that where elite ideological commitment to federalism drove formation of the union, the loss of that commitment will imperil the longevity of the federation over time.<sup>178</sup> One could add to this other, more speculative theories. For example, if Ziblatt is right that the choice between federation and unitary state depends on the supply side of constituent states’ governance capacity, then the erosion of that capacity or the increased direct governance capacity of the center (as, say, in the United States) would allow for a renewed push for centralization.<sup>179</sup>

What’s good for formation is good for dissolution—or so it seems. These theories look for the causes of endurance in the causes for federation. They posit a rather direct relationship between the purpose of

federation and the endurance of a union. First-order reasons for federalism are translated into long-term cultural dispositions of all the actors of the system. Or first-order reasons for federalism drive the formation as well as the endurance of the union as actors continually re-evaluate whether those first-order reasons still apply. Either way, these views see federation as an outcome that actors independently choose based on their bird's eye perspective or historical experience of whether the values of federalism are (still) being served.

## **(b) Back to Politics**

Incentive compatible federalism presumes, by contrast, that politicians are likely to act based on more immediate gain than on whether the values of federalism are ultimately served by their actions. For these theorists, the prescription to prevent secession and strife follows from the prescription for other areas: fuse the interests of individual actors with the interests of the polity as a whole. This means the maintenance of an integrated party system here, as well.

An integrated federal party system, however, does not spell consociationalism.<sup>180</sup> This point taps into a longstanding debate about whether federalism or consociationalism better promotes polity stability in divided societies.<sup>181</sup> The common argument against federalism is that territorially divided rule exacerbates regional separatism by giving institutional structure and governance capacity to destabilizing regional identities.<sup>182</sup> Scholars such as Lijphart present consociationalism as the cure. Others dismiss consociationalism as an independently workable solution. Pointing to the Netherlands, Israel, and Lebanon, for instance, Daniel Elazar has argued that consociationalism in the absence of territorialization, that is, without some form of federalism, is inherently unstable.<sup>183</sup> Some go one step further and reject the usefulness of consociationalism even as an element of federalism.<sup>184</sup> Based on the experience of Nigeria, Canada, and Malaysia, Donald Horowitz has argued that federalism lowers political stakes by diffusing decisions into multiple arenas, creates coalitions across ethnic divides within constituent states, and socializes citizens and politicians at the local level into conducting productive politics system-wide.<sup>185</sup> An important element in the latter calculus is that subnational federal units remain heterogeneous even if they allow for a particular group to gain a majority in any given component state, and that an ethnic minority not be aggregated in a single state.<sup>186</sup>

An integrated party system may indeed help the federalism side of this debate. Dawn Brancati, for instance, has provided empirical support for the value to stability in divided societies of maintaining parties that operate beyond a single region.<sup>187</sup> As Sujit Choudhry points out, however, there are still many unanswered questions, from whether societies divided by language differ from those divided by religion to whether the management of natural resources located in a given region should occasion special rules.<sup>188</sup>

## **VII. Federalism All the Way?**

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How far can the model of federalism take us? The question has implications for liberal theory, public policy, and political practice writ large. Scholars have explored whether federalism can inform dispersing power further down within the constituent state or up into the realm of global governance. Although parts of this terrain are well trodden, it is a vast terrain that is still largely underexplored. Some quick thoughts will have to suffice here.

## 1. Federalism All the Way Down?

Federalism traditionally has focused on only two levels of government. And yet, some scholars have argued for recognizing the possibility of extending federalism further down into the state. From a normative perspective, this is consistent with a vision of liberal democratic federalism that sees ‘the preservation of diverse, semi-autonomous forums’ as allowing ‘a citizen to become a member of several “issue publics”, each responding to different aspects of a citizen’s interests or identities and each providing a manageable arena for individual political engagement.’<sup>189</sup>

There are three aspects to this potential extension of federalism, some obvious and others speculative. First, constitutional protections can be taken down to cities and regions, as they are, for example, in Brazil<sup>190</sup> and India.<sup>191</sup> In light of Tiebout’s famous sorting hypothesis, running federalism down to cities is, of course, nothing fancy, but simply following first principles of basic theory. And yet, questions remain, such as whether all but the largest cities can engender sufficient loyalty to create effective political communities or whether they have sufficient capacity for governance to warrant hard constitutional autonomy guarantees.<sup>192</sup> Municipal autonomy may also backfire as it can weaken the component states and enable the center to gain more power than it otherwise could.<sup>193</sup>

p. 605 Secondly, we might recognize school districts, water districts, and other functionally defined jurisdictions as elements of federalism.<sup>194</sup> Heather Gerken would add such institutions as the jury as a domain for the exercise of circumscribed public power.<sup>195</sup> Here, too, normative federal theory fits these other forms of power dispersion quite naturally. And yet, the political phenomenon of functional federalism differs sufficiently from territorially based federalism to warrant some caution before drawing on more specific lessons gained from territorial federalism. For instance, territorial federalism draws its practical force from conducting a reasonably broad range of politics within any given jurisdiction. Single-issue districts, however, prevent the cross-issue tradeoffs and bargains that are essential to productive politics and peace throughout a (traditionally conceived) federal system.

Thirdly, following federalism all the way down suggests understanding many forms of private governance and perhaps even the autonomy rights of individuals as continuous with federal principles and federal design.<sup>196</sup> As a matter of constitutional practice, protected spheres of private governance may come in disguise. Some free speech doctrines, for example, show evidence of constitutionally protected self-governance rights of social institutions.<sup>197</sup> Political parties may be constitutionally protected, sometimes explicitly so.<sup>198</sup> The family, too, is a constitutionally protected institution of collective self-governance.<sup>199</sup> And even though traditional democratic theory tends to reject placing the individual on a continuum from small to large spheres of governance,<sup>200</sup> it is not entirely implausible to understand individual rights as constitutionally protected spheres of governance as well—especially where an individual makes decisions that affect others.

To be sure, the normative structure of federalism may quickly seem both empty and all-encompassing on this account. But that may not be the result of any mistake in applying federalism theory all the way down. It may, instead, reveal that federalism theory is just as thin and demands just as many off-stage substantive decisions when applied to the traditional realm of territorial federalism. Taking federalism all the way down to private governance, then, is quite possible. Its usefulness as an organizing concept just depends on what we seek to gain.



## 2. Federalism All the Way Up?

At least since Immanuel Kant's essay 'On Perpetual Peace',<sup>201</sup> liberal theory has toyed with the idea of world federation. More recently, an increase in the density and impact of global governance regimes has pushed the more general question to the fore: can federalism play a useful role in how we should understand the relationship between global and domestic levels of governance?

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Modern constitutional enthusiasts from Hans Kelsen to David Held have argued for global, hierarchically organized, multilevel rule.<sup>202</sup> These scholars and their fellow global travelers have tapped into certain conceptual and functional continuities between constitutional orders within and beyond the state.<sup>203</sup> One way or another, such cosmopolitan constitutionalists draw on functional and normative theories to suggest that the global level of governance is but another central authority to which the state—even the federal state—is now local.

Then there are the skeptics. In particular, a new group of sovereigntists insists on grounding all claims of legality in the constitutions of independent states.<sup>204</sup> This group of scholars denies any real claim of authority to international law. International law is presented as what emerges when states act based on self-interest. On this view, as Posner and Goldsmith put it, international law is 'endogenous to state interests'.<sup>205</sup> International law may purport to prescribe particular conduct for a given state. But a state need not and will not follow that prescription unless it matches the state's independent rational calculus of self-interest. This is not offered as a general theory of law according to which no law has normative pull beyond that which matches self-interest or an independent moral evaluation. Instead, it is offered as a distinction between a state's domestic legal system, which has normative pull, and the realm of international law, which does not.

A third way to mine the continuities between federalism and global governance is to re-imagine the role of constitutional law both within and beyond the (federal) state. This approach rejects the view that constitutional law is synonymous with a hierarchically ordered legal system. Instead, it recognizes that constitutional law can lead to a multiplicity of claims of authority without a single, final, legal authority, or to what Neil MacCormick first dubbed the idea of 'constitutional pluralism'.<sup>206</sup>

The pluralist approach opens up new vistas. As various writers forging this tradition have shown,<sup>207</sup> we can learn a good deal about global governance and perhaps even understand domestic constitutionalism better when considering that constitutionalism does not spell universal hierarchy and settlement. To be sure, there are grand discontinuities between federalism and global governance. Even if we agree that some form of international community exists, it stretches the imagination to think of the global community as a compound polity. And yet, for federalism, the idea of pluralism and the unsettled nature of legal authority among different levels of governance is a coming home of sorts. After all, the Federalists created a new hybrid that mixed international and domestic forms of governance. And they created a hybrid that sought to complicate the question of final authority beyond what was conceived of as possible at the time.

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## VIII. Conclusion

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'The twentieth Century', Proudhon predicted, 'will open the age of federations, or else humanity will undergo another purgatory of a thousand years.'<sup>208</sup> How the destruction wrought in the twentieth century compares to purgatory is anyone's guess, but the age of federations has certainly come. Federalism as a normative ideal has captured the imagination of political theory, and federalism as a concrete institutional arrangement has proven useful and reasonably enduring around the world. So much so that the world seems headed for more federalism and more federation, not less. This chapter has provided a framework for how we should approach this development as a matter of theory, policy, and law.

Having sorted through competing definitions of federalism, and placed the endeavor of conceptual classification of federations and their historical origins into critical perspective, this chapter turned to articulating a succinct general normative theory of federalism. By elaborating on the idea of subsidiarity, termed here the ‘federal power principle’, the chapter teased out the various arguments in favor of local and central rule. Arguing in favor of the local under minimal conditions of diversity, we find familiar claims of greater democratic voice, solidarity, expertise, and risk management. Arguments in favor of central power can be usefully grouped into the three categories of cost savings, inter-jurisdictional difficulties, and intra-jurisdictional difficulties.

The succinct general theory allows us to see that there are two fundamentally distinct aspects of the federal power principle—the first regarding instrumental claims to rule and the second regarding intrinsic claims to rule. This, in turn, allows us better to understand political and judicial practice. It shows, for example, that in some jurisdictions, such as the United States, courts argue over subsidiarity without quite knowing it. And it shows that others—indeed most—fail to distinguish adequately between instrumental and intrinsic arguments. We may indeed need distinct procedures and forms of review to evaluate the various claims depending on which value of federalism we are intending to protect or which kind of claim a given actor intends to advance.

In practice, federalism has always been far more messy and dangerous than normative theory would suggest. At the same time, however, there seem to be basic answers within federalism to the two principal worries: policy stability and polity stability. Regarding the first, we have seen that federalism need not contain a pervasive structural bias in favor of the status quo. In contrast to ‘joint rule’ or ‘separate rule’ federalism, ‘multiple rule’ federalism may even lead to structure induced ‘political disequilibria’ that can be useful in unsettling an ill-considered or under-considered status quo. Regarding polity stability, the literature seems to suggest that an integrated party system can help to mitigate the centrifugal forces of accommodation so as to allow federalism to reap the best of both worlds of the proverbial unity and diversity of a federation.

p. 608 The chapter concludes by suggesting that federalism might well go all the way from private to global governance, depending on the purpose for which we employ the model. Comparative studies of political incentives across a more strictly defined set of ‘federations’ may well yield ↪ certain insights that cannot be translated sensibly to a broader context. And yet, many structural principles of federalism seem to apply to a pluralist conception of multilevel governance from the global level all the way down. The anticipated discomfort that such a move may engender would not be new. After all, federalism shattered preconceived notions of hierarchy and settlement from the very start.

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a community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.

Catechism of the Catholic Church, para 1883.

72 Unless specifically stated otherwise, central and local are used throughout this chapter as generic opposites without referring to any particular level or institution of government.

73 Of course, all else usually isn't, but this will be unpacked in Section III.2 below.

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77 Cf eg Michael J. Sandel, *Democracy's Discontent* (1996), 347. Most of these arguments, too, can already be found in Rousseau's *Social Contract*.

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79 Alexis de Tocqueville, *Democracy in America* (J.P. Mayer ed, 1988), 62–70.

80 See Robert Dahl and Edward Tufte, *Size and Democracy* (1973).

81 Eric J. Oliver, *Democracy in Suburbia* (2001). See also Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics* (1994).

82 See eg Daniel J. Elazar, *The American Mosaic* (1994); Tom Vandenbrande (ed), *Mobility in Europe* (2006), 26, available at <http://www.eurofound.europa.eu/pubdocs/2006/59/en/1/ef0659en.pdf>.

83 A related argument about informational asymmetries underlies the basic argument for the decentralized mechanism of allocating goods through the market. See George J. Stigler, 'The Economics of Information' (1961) 69 *Journal of Political Economics* 213.

84 See eg Bednar (n 6), 29.

85 See Sacha Prechal, *Directives in European Community Law* (1995), 3–5.

86 See Daniel Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia Law Review* 731, 753.

87 See eg Michael Penfold-Becerra, 'Federalism and Institutional Change in Venezuela' in Edward L. Gibson (ed), *Federalism and Democracy in Latin America* (2004), 198.

88 See Roger B. Myerson, 'Federalism and Incentives for Success of Democracy' (2006) 1 *Quarterly Journal of Political Science* 3.

89 Cf Michael C. Dorf and Charles F. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

90 Jeffrey M. Jones, 'Americans' Opposition to Gay Marriage Eases Slightly', Gallup, May 24, 2010, available at <http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx>.

91 *New Ice Co v Leibman* 285 US 262, 311 (Brandeis J dissenting).

92 See eg Heather Gerken, 'Dissenting by Deciding' (2002) 57 *Stanford Law Review* 1745; Daniel Halberstam, 'The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation' (2001) 46 *Villanova Law Review* 1015.

93 See also Section V.1 below.

94 This argument is based on the broader Optimal Currency Area theory, attributed to Robert Mundell. See eg Ronald McKinnon, 'Mundell, the Euro, and Optimum Currency Areas' in Thomas J. Courchene (ed), *Money, Markets, and Mobility* (2002).

95 Roderick M. Hills, Jr, 'Against Preemption: How Federalism Can Improve the National Legislative Process' (2007) 82(1) *NYU Law Review* 20.

96 Ken Kollman, John H. Miller, and Scott E. Page, 'Decentralization and the Search for Policy Solutions' (2000) 16(1) *Journal of Law, Economics, and Organization* 102.

97 Jamie S. Gorelick and Harry Litman, 'Prosecutorial Discretion and the Federalization Debate' (1995) 46 *Hastings Law*

- Journal* 967.
- 98 Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 *Journal of Common Market Studies* 473.
- 99 Wallace E. Oates, *Fiscal Federalism* (1972), 54.
- 100 Tiebout (n 75).
- 101 *Steward Machine Company v Davis* 301 US 548 (1937). Most policies, however, have (re)distributive effects, which makes the category of redistributive policies that should be shifted to the central level of government difficult to assess in the abstract.
- 102 See eg Paul E. Peterson, *The Price of Federalism* (1995), 27–30, 108–28.
- 103 See eg John D. Donahue, *Disunited States* (1997).
- 104 Richard Revesz, 'Rehabilitating Interstate Competition: Rethinking The "Race-To-The-Bottom" Rationale For Federal Environmental Regulation' (1992) 67 *NYU Law Review* 1210.
- 105 Barry R. Weingast, 'The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development' (1995) 11 *Journal of Law, Economics, & Organization* 1.
- 106 Bednar (n 6), 37.
- 107 Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (1999), 84–120.
- 108 James Madison, 'The Federalist No 10' in Cooke (n 15), 56, 61.
- 109 *Ibid* 62.
- 110 *Ibid*.
- 111 *Ibid*.
- 112 Riker (n 4), 155.
- 113 See eg Edward L. Gibson, 'Boundary Control: Subnational Authoritarianism in Democratic Countries' (2005) 58 *World Politics* 101. Others argue that party system dynamics, rather than federal institutions, play a causal role in the persistence of authoritarian enclaves. See eg Alberto Diaz-Cayeros, 'Do Federal Institutions Matter? Rules and Political Practices in Regional Resource Allocation in Mexico' in Gibson (n 87).
- 114 Gibson, 'Boundary Control' (n 113), 102.
- 115 See Don Herzog, 'Externalities and Other Parasites' (2000) 67 *University of Chicago Law Review* 895.
- 116 John Stuart Mill, *On Liberty* (1859) (Elizabeth Rappaport ed, 1978), 9.
- 117 Cf Laurence H. Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063.
- 118 Robert A. Dahl, *Democracy and Its Critics* (1989), 209.
- 119 For further discussion of this idea, see Daniel Halberstam, 'Comparative Federalism and the Issue of Commandeering' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision* (2001).
- 120 Treaty on European Union, Art 5.
- 121 Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paras 22–8.
- 122 Constitution Act, 1982, s 91.
- 123 *Ibid* s 92(16).
- 124 *Missouri v Holland* 252 US 416, 433, 435 (1920).
- 125 301 US at 588.
- 126 312 US 100, 115 (1941).
- 127 545 US 1 (2005).
- 128 See *United States v Lopez* 514 US 549 (1995) and *United States v Morrison* 529 US 598 (2000).
- 129 See generally Halberstam (n 32).
- 130 James Madison, 'The Federalist No 51', in Cooke (n 15), 349.
- 131 See eg Rui J.P. de Figueiredo, Jr and Barry R. Weingast, 'Self-Enforcing Federalism' (2005) 21 *Journal of Law, Economics, & Organization* 103. Cf Filippov et al (n 30), 145 (defining an incentive-compatible institution). For discussions in legal scholarship, see Daryl J. Levinson, 'Parchment and Politics: The Positive Puzzle of Constitutional Commitment' (2011) *Harvard Law Review* 657; Ernest A. Young, 'Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments' (2004) 46 *William and Mary Law Review* 1733; Mark Tushnet, *Taking the Constitution Away From the Courts* (1999), 123–6.
- 132 *Ibid*.
- 133 Bednar (n 6), 9.
- 134 *Ibid*.
- 135 See eg *ibid* 215–17.
- 136 See Robert A. Mikos, 'The Populist Safeguards of Federalism' (2007) *Ohio State Law Journal* 1669; Larry D. Kramer, *The People Themselves Popular Constitutionalism and Judicial Review* (2004).
- 137 Riker (n 4), 91–101. On political parties see further Chapter 41.

- 138 William H. Riker, 'The Senate and American Federalism' (1955) 49 *American Political Science Review* 452.
- 139 Larry D. Kramer, 'Putting the Politics Back into the Political Safeguards of Federalism' (2000) 100 *Columbia Law Review* 215; Larry D. Kramer, 'Understanding Federalism' (1991) 47 *Vanderbilt Law Review* 1485.
- 140 Jonathan A. Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (2006), 274.
- 141 For an argument that subunit politicians have an insufficient incentive to take on the costs of a risky policy experiment, see Susan Rose-Ackerman, 'Risk Taking and Re-Election: Does Federalism Promote Innovation?' (1980) 9 *Journal of Legal Studies* 593. But see eg Roderick M. Hills, Jr, 'Federalism and Public Choice' in Daniel Farber and Anne Joseph O'Connell (eds), *Research Handbook on Public Choice and Public Law* (2010), 207, 222.
- 142 Filippov et al (n 30), 40. See also eg *ibid* 169–76.
- 143 See eg *ibid* 254.
- 144 See Robert A. Dahl, 'Federalism and the Democratic Process' in J. Roland Pennock and John W. Chapman (eds), *NOMOS XXV: Liberal Democracy* (1983), 95.
- 145 In 1999, Venezuela adopted a new constitution that abolished the Senate and instituted a unicameral legislature. See Penfold-Becerra (n 87), 217–19.
- 146 See Scott P. Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil* (1999); Jonathan Rodden, 'Strength in Numbers? Representation and Redistribution in the European Union' (2002) 3 *European Union Politics* 151. Malapportionment is, of course, not limited to federations. See eg David Samuels and Richard Snyder, 'The Value of a Vote: Malapportionment in Comparative Perspective' (2001) 31 *British Journal of Political Science* 651.
- 147 Alfred Stepan, *Arguing Comparative Politics* (2001), 335–6.
- 148 See Peterson (n 102), 1995.
- 149 Madison (n 108), 65.
- 150 Ian Shapiro, *The State of Democratic Theory* (2003), 109–10.
- 151 Kenneth Shepsle, 'Institutional Arrangements and Equilibrium in Multidimensional Voting Models' (1979) 32 *American Journal of Political Science* 27. See also Kenneth Shepsle and Barry R. Weingast, 'Structure-Induced Equilibrium and Legislative Choice' (1981) 37 *Public Choice* 503.
- 152 Stepan (n 147), 339. See also *ibid* 351.
- 153 See eg Pablo Beramendi, 'Inequality and the Territorial Fragmentation of Solidarity' (2007) 61(4) *International Organization* 783; Vicki L. Birchfield and Markus M.L. Crepez, 'The Impact of Constitutional Structures and Collective and Competitive Veto Points on Income Inequality in Industrialized Democracies' (1998) 34 *European Journal of Political Research* 175–200; Evelyne Huber, Charles Ragin, and John D. Stephens, 'Social Democracy, Christian Democracy, Constitutional Structure, and the Welfare State' (1993) 99 *American Journal of Sociology* 711.
- 154 See generally Tsebelis (n 28).
- 155 Fritz Scharpf, 'The Joint Decision Trap' (1988) 66 *Public Administration* 239.
- 156 See Madison (n 108); Weingast (n 105).
- 157 Scharpf (n 107); Stepan (n 147).
- 158 See Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (2007), 208, 274.
- 159 Recall that Carl Schmitt complained about Weimar parliamentarism as a constraint on the German *demos*, which he took to exist apart from the institutions of democratic governance. See eg Carl Schmitt, *Verfassungslehre* (1928), 235; Carl Schmitt, *Die Geistesgeschichtliche Lage des Heutigen Parlamentarismus* (5th edn, 1979).
- 160 See eg Treisman (n 158), 206.
- 161 See Jonathan Rodden and Erik Wibbels, 'Beyond the Fiction of Federalism: Macroeconomic Management in Multitiered Systems' (2002) 54 *World Politics* 494; Erik Wibbels, *Federalism and the Market* (2005); Rodden (n 140).
- 162 Although there is considerable overlap between the labels introduced in the text and the more traditional 'competitive', 'cooperative', and 'dual' federalism, the more traditional labels are often used without analytic precision. For example, it is often unclear whether 'cooperative' federalism (or the frequently invoked 'shared' rule) involves 'joint' or 'multiple' rule as used here. Also, the traditional labels characterize the general effect or character of federalism as opposed the specific underlying governance mechanism, which is important for our present discussion.
- 163 See generally Halberstam (n 119), 213.
- 164 See eg Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (1980), 168–86.
- 165 Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (1998), 184–90.
- 166 See eg Halberstam (n 92).
- 167 See eg Rodden (n 140).
- 168 *Ibid* 270–5.
- 169 Halberstam (n 86), 824.
- 170 See Peterson (n 102); Shapiro (n 150), 109–10.



- 171 See Section IV above.
- 172 Leslie F. Goldstein, *Constituting Federal Sovereignty* (2001), 151.
- 173 Ibid.
- 174 A similar culturally based suggestion is that unions ‘where obedience to the rule of law is more routinized in general will experience less resistance by member state officials to the rule of federation-level authorities.’ Ibid.
- 175 See Jonathan Lemco, *Political Stability in Federal Governments* (1991), 144.
- 176 Riker (n 13), 30–1.
- 177 See Burgess (n 40), 93.
- 178 See Thomas M. Franck, *Why Federations Fail* (1968).
- 179 This is not Ziblatt’s idea. It is a variant of an argument made by Justice Stevens in dissent in *Printz v United States* 521 US 898, 959 (Stevens J dissenting).
- 180 Consociationalism brings together rival subgroups by including them in governing coalitions, granting the various groups mutual vetoes, ensuring proportional representation in elections, cabinets, civil service positions, and granting self-governance authority to segmented groups over such matters as education and culture. See Arend Lijphart, ‘Consociation and Federation’ (1979) 12 *Canadian Journal of Political Science* 499, 500.
- 181 See Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation* (2008).
- 182 See Philip G. Roeder, ‘Ethnofederalism and the Mismanagement of Conflicting Nationalisms’ (2009) 19 *Regional and Federal Studies* 203, 217–19.
- 183 Elazar (n 5), 23–4.
- 184 Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (1991), 221.
- 185 Ibid 214–27. See also Treisman (n 158), 240–2.
- 186 Henry Hale confirms the importance of dispersing a dominant ethnic group as a way of taming secessionist tendencies. See Henry Hale, ‘Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse’ (2004) 56 *World Politics* 165. Even where the polity is not in immediate threat of breaking up, much is to be gained from drawing competitive election districts in the context of racially or ethnically polarized voting, see Ellen D. Katz, ‘Reviving the Right to Vote’ (2007) 68 *Ohio State Law Journal* 1163.
- 187 Dawn Brancati, *Peace by Design: Managing Intrastate Conflict through Decentralization* (2009).
- 188 See Sujit Choudhry, ‘Federalism, Secession, and Devolution: From Classical to Post-Conflict Federalism’ in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook on Comparative Constitutional Law* (2011).
- 189 Halberstam (n 86), 823–4 (internal footnotes omitted).
- 190 See Brazil Constitution, Arts 18 and 30.
- 191 See India Constitution, Art 243B.
- 192 For a sampling of some of these problems, see eg Jacob T. Levy, ‘Federalism, Liberalism, and the Separation of Loyalties’ (2007) 101(3) *American Political Science Review* 459.
- 193 See J. Tyler Dickovick, ‘Municipalization as Central Government Strategy: Central-Regional-Local Politics in Peru, Brazil, and South Africa’ (2007) 37 *Publius* 1.
- 194 See Halberstam (n 86), 824.
- 195 See Heather Gerken, ‘Foreword: Federalism All the Way Down’ (2010) 124 *Harvard Law Review* 6, 28–33.
- 196 Many, of course, will not take federalism this far down See eg Gerken (n 195); Richard Schragger, ‘Federalism All The Way Down’, September 23, 2009, at <<http://www.constitution2020.org/node/87>><sup>1</sup>.
- 197 See eg Robert Post, ‘Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech’ (2007) 12 *University of Illinois Law Review* 939; Daniel Halberstam, ‘Commercial Speech, Professional Speech and the Constitutional Status of Social Institutions’ (1999) 147 *University of Pennsylvania Law Review* 771.
- 198 See Richard H. Pildes, ‘Political Parties and Constitutionalism’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (2011), 254.
- 199 See Roderick M. Hills, Jr, ‘The Constitutional Rights of Private Governments’ (2003) 78 *NYU Law Review* 144.
- 200 See eg Dahl (n 118), 205.
- 201 Immanuel Kant, ‘Perpetual Peace: A Philosophical Sketch’ in Hans S. Reiss (ed), *Kant: Political Writings* (2nd edn, 1991), 93.
- 202 See eg Jürgen Habermas, *The Divided West* (2006), 115; David Held, *Democracy and The Global Order* (1995); Hans Kelsen, *Reine Rechtslehre* (1934), 129–54; Hermann Mosler, ‘The International Society as a Legal Community’ (1974) 140 *Recueil des Cours* 11; Thomas Pogge, ‘Cosmopolitanism and Sovereignty’ (1992) 103 *Ethics* 48; Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of A New Century’ (1999) 281 *Recueil des Cours* 9.
- 203 See eg Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529; Ernst-Ulrich Petersmann, ‘The WTO Constitution and Human Rights’ (2000) 3 *Journal of International Economic Law* 19.
- 204 See Peter J. Spiro, ‘The New Sovereignists’ (2000) 79 *Foreign Affairs* 9.

- 205 Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005), 13.
- 206 Neil MacCormick, *Questioning Sovereignty* (1999), 104.
- 207 See eg Daniel Halberstam, 'Local, Global, and Plural Constitutionalism' in de Búrca and Weiler (n 11); Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006), 256; Miguel P. Maduro, 'Contrapunctual Law' in Neil Walker (ed), *Sovereignty in Transition* (2003), 501; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *Modern Law Review* 317.
- 208 Pierre-Joseph Proudhon, *The Principle of Federation* (Richard Vernon trans, 1979), 68–9.