

Forum

The Political Theory of Federalism

Malcolm M. Feeley

In our book, *Federalism: Political Identity and Tragic Compromise*, my colleague Edward Rubin and I (2008) reacted to the parochialism in most political science and legal scholarship on federalism. Almost all discussions of federalism are of the sort, “American federalism,” “Swiss federalism,” “Australian federalism,” and the like, and are tied up with the intricacies of the particular histories of a specific country’s practical problems with inter-governmental relations. How does money flow from the centre to the parts? How are various policies jointly financed? How is over-sight shared? These are all immensely important questions with much of importance resting on the answers. They are deserving of serious and sustained responses.

However, our concern was with federalism generally, as a basic structural arrangement of governance. It was with the theory of federalism. We noted a paucity of theoretical concern with the concept of federalism in contrast to say theoretical concerns of other structures of government. There are, for instance, robust theories of presidential versus parliamentary systems, theories of representation, theories of the separation of powers, theories of democracy. But there is no comparative body of theoretical work on federalism. Our effort was to help launch such an inquiry. It is long overdue since according to some authorities up to eighty

present of the world's population lives in some sort of governmental system that can be described as "federal." (Elazar 1994), this effort seems long overdue.

Of course I overstate the matter. There is a long tradition of theorizing about federalism. Federalism theory is linked to discussions present since the middle ages about subsidiarity, the principle that argues that the lowest level of government capable of exercising authority effectively should be permitted to do so, thus forming something of a nested box of authority, thus allocating authority to the head of the house hold in a family, expanding to the authority of the chief in a clan or community, and working its way up to the authority of the king of the realm, who shares powers with all those ostensibly under his sovereign authority. Authority is allocated to each according to his sphere of expertise (Althusius 1932). Of course James Madison wrote philosophically about the virtues of the separate states, as part of a scheme to fragment power (Federalist Papers 1961). In contemporary scholarship, American political scientist William Riker is generally acknowledged to have offered the most challenging theoretical analysis of federalism (1964). In his book, *Federalism: Origin, Operation, and Significance*, he asks why federal systems form and why they persist or fall apart. His concern is not with American or Australian or Mexican or Russian federalism, but with federal structures generally. His central questions: Why do some polities, when they form, have unitary structures, and others federal structures? What happens when the conditions that give rise to the creation of federalist structures later disappear? Does the federal arrangement cease to exist, or do other factors emerge to sustain it?

His answer is, in a nutshell, that federations form when smaller allied polities fear for national security. That is, they agree to pool resources to provide for a national defence against a common

enemy, and once they do this they may find that there are other benefits—a common market, monetary union, postal service, a transportation system and the like. He suggests that federalisms are likely to be unstable and fall apart once the common enemy disappears, and that they will only remain in tact if other very specific conditions are present. One of the other conditions is the nature of political parties and elections. If political parties are organized at the state level, and elections for state officials and party activists occur at the state level at different times than the national elections, he argues, there is a built-in incentive for local party activists and government officials to allow this arrangement to persist since they receive substantial benefits and power from the distance from national elections, the national party, and national candidates.

We agree with much of what Riker says, but take a different approach. Riker's concern, like that of more recent theorists (Rodden 2006; Bednar 2009) is with institutional design - how do autocrats design the governmental system they want to work in? Our concern is for want of a better word, "anthropological." We assume that a prerequisite for nationhood is some strong degree of identity with the nation by inhabitants of the polity. Our focus is on this condition for minimally successful nationhood. In responding to this question, we follow Benedict Anderson (1991) and any number of other students of nationalism (e.g. Bendix 1977; Ignatieff 1993) who maintain that for a nation to be minimally successful, i.e. stable, legitimate in the eyes of its citizens, and enduring, it must command the respect and allegiance of its citizens. That is, people must identify as citizens or members of the nation; they must say "my" country. So the essential question for Anderson is not institutional design, but a prior and much more elemental question, one of nationalism. What are the prerequisites

for nationhood? What are the conditions that give rise to and sustain national political identity? Conceptually these questions may precede issues of institutional design by many steps, although in fact they may also arise only after a state has been established. In either case, they address the issues of legitimacy, stability, and effectiveness of governmental processes.

If Anderson is correct, the problem with federalism is that it requires the near- impossible; identification with the nation and simultaneously identification with a constituent unit. Like Anderson we take political identity seriously, and like him we believe that a distinctive feature of political identity is that it is attached to a geographical area. With many post modernists, we agree that most identities are socially constructed and thus are contingent, changeable and multiple. Most forms of identity are flexible enough to facilitate anomalies. Peoples can accept the idea of abortion and consider themselves a good Catholic, or be working class and vote Conservative, or think of themselves as both Jewish and Christian.

But we suggest that although political identity is also socially constructed, it is different from other forms of socially constructed identities. By its very nature, political identity is anchored in geography, and requires deep commitment to a land. In its full form, political identity requires a commitment to die or kill for the nation—a group bound together by many strands but also including its own distinct space. Thus dual political identities present a contradiction.

There are of course federal systems, so what accounts for them? They can occur for any number of reasons, but we argue that one feature they tend to share is incomplete political identity and the fragility that accompanies it. Thus we conclude, that in most

instances, federalism systems are unstable (Feeley and Rubin 2008: 7-17). Federalism is a tragic compromise in that those identifying with the nation are not satisfied because national identity is truncated. Those identifying with the subunits (states) are also frustrated. Their dream of autonomy or sovereignty—their distinct political identity—is unfulfilled. The result: nationalists will continue to press for more robust national unity, and those with loyalties to the parts will press for autonomy. Thus instability leads to the tendency for federalisms to resolve into unitary nations by co-optation, suppression of local sentiments, or emergence of a dominant national culture. Alternatively federalism may dissolve; if the nation weakens and the subunits are strengthened, some or all of the constituent units may secede. History is replete with both patterns.

Our argument is that these changes are more common than is often appreciated. Of course collapse of federal systems is more readily apparent, as the case of Czechoslovakia, Yugoslavia, The Soviet Union, United Arab Republic and the like show.

However the shift from federal to unitary structure is not so readily apparent. One reason for this is the confusion between federalism and decentralization. What is often said to be federalism, we maintain, is in fact decentralization (Feeley and Rubin 2008: 18-30). Indeed, many people—including almost all economists who write about fiscal federalism—fail to acknowledge that there is a difference and use the two terms interchangeably (Oates 1999). Here, we maintain, is where greater appreciation for theory and clarification of terms is useful. It is important to appreciate the differences between federalism and decentralization. The conventional understanding of federalism which we employ and I outlined above characterizes federalism as a system in which sovereignty or authority is divided between at least two levels of

government, the nation and its subunits. Each has some area of sovereignty or autonomy or rights that are inviolable, irrevocable by the other level of government. That is, federalism embraces a notion of states' rights, and for that matter national rights, that is enduring. Neither unit, however much they want to, can undermine the rights of the other. Both units have an ontological existence as it were.

In contrast decentralization is a form of organization in which the more inclusive unit divides itself into useful subunits or delegates certain of its powers to subunits. It is an instrumental decision, not an ontological reality. The purpose here is to facilitate efficiency, effectiveness, or some other set of concerns. Decentralization inevitably assumes the perspective of the whole, and asks, how do we best organize for the objectives we want to achieve—how do we best provide for national defence, health care, education, how do we best manage the economy, develop agriculture, and the like? In some instances, the answer will be centralization—national defence is almost always pursued in this manner. In others, it may be decentralization; let local units closer to those affected, do it. Education is often delegated to smaller local or regional units. But decentralization must not be confounded with federalism. In federalism, subunits are autonomous within their spheres of sovereignty. They can make or not make policies as they see fit. Exercising authority within this sphere of autonomy does not depend upon instrumental calculations set by central authority. In contrast, in a decentralized system subunit power is delegated, and if subunits fail to perform their duties, central authority can reassume power and try a different approach. Thus, a nation might delegate to states responsibility for combating air pollution, but if this does not succeed it might create special regional units to pursue the policy or adopt a single national agency to develop a

national policy. In real federalism, the nation could not usurp state authority in its sphere of sovereignty. Put succinctly, decentralization provides a means to an end.

Taking this distinction between federalism and decentralization seriously, we conclude that the United States no longer has a federal system. What appears to be federalism is in fact decentralization. What is celebrated as “Our Federalism” is nostalgia for a simpler yesteryear. It does not describe the reality of the modern administrative state (Rubin and Feeley 1994).

How do we know this? Because there is no area of policy making that the US national government cannot control if there is a sufficient national will to do so. Although the United States may once have been a federal system, historical events have transformed it into a unitary system. The Civil War in the 1860s knitted together a national polity. Nationalization was accelerated by economic development in the balance of the nineteenth century. The Great Depression of the 1930s further expanded this nationalizing trend and the Civil Rights and Administrative due process revolutions of the 1960s and 1970s completed the process.

This process was probably inevitable. Indeed this was the gist of the argument of the Anti-Federalists (Brutus 1981), who wrote in opposition to the authors of the Federalist Papers (1961), and opposed the adoption of the Constitution. While the Federalist Papers (1961), and Federalist No. 10 which discusses the division between state and national authority, have been translated into dozens of languages and widely read around the world, the lesser-known Anti-Federalist papers, are probably more perceptive about the consequences of adopting the proposed Constitution. They urged people to read the document carefully, and pointed to the expansive language in that document that granted vast powers to

the national government (Congress and the federal judiciary; everyone failed to appreciate the rise of the powerful president), while saying nothing about the powers of the states. History has proven them to be right.

Of course the states continue to have vast powers, but their powers exist at the sufferance of the national government. In one policy area after another, if the national government deems it in the national interest to create a uniform policy, it can. Of course this does not preclude the national government from delegating responsibilities for administering these policies to the state, or allowing the states to initiate policies on their own so long as they do not conflict with national policies. All this provides a veneer of federalism over what is now really a unitary state.

We began to develop our ideas in the process of examining the power of the federal courts in the prison conditions litigation in the 1960s to 1980s. Over the course of twenty five years or so, federal courts assumed vast powers to order widespread changes in conditions in state prisons and local jails. In their detailed orders, federal judges were more specific than they were in their racial desegregation rulings that they had begun to issue a decade earlier. They also differed from the racial desegregation cases in still another way. The segregation cases were based on a specific provision in the U.S. Constitution, the provision in the Fourteenth Amendment that was adopted specifically to allow the national government and the courts to combat racial discrimination—the provision specifying that the states cannot deny anyone the equal protection of the law, and providing powers to the national institutions to effect this right. There is no such nationalist provision for prison and jail administration. Indeed, when it provided for the abolishment of slavery, the Thirteenth Amendment provided for one exception—it did not abolish “indentured

servitude” for convicted felons. Furthermore, under ancient common law doctrine, convicted felons were “civilly dead” and “slaves of the states.” Over the years convicted felons had challenged such doctrine in federal courts in the United States only to be turned away by the “hands off doctrine,” which held that issues of conditions of confinement were non-justiciable issues in federal courts because prisons and jails fell within the sovereign sphere of the states, and the federal government—courts and Congress—had no authority to intervene and thus has to maintain a “hands off” posture. In the late 1960s, this doctrine collapsed overnight; the national government led by federal judges but quickly followed by the Executive and Congress, entered the gates of the prison and began to order massive changes. What changed was not that a constitutional amendment had been adopted, but the discovery of a national consensus about how prisons should be administered. To pursue this consensus, principles of federalism, Constitutional language, and longstanding doctrine were ignored; the courts barely paused to give them consideration, and even opponents of the courts’ actions rarely dwelt on them. This account is significant because up until the late 1960s, prison and jail administration were viewed as quintessential state functions in the federal division of labour.

Of course the American states still have some considerable authority. Consider for example the death penalty. Sixteen states have abolished the death penalty and thirty four retain it. This may look like federalism, and some point to it as an example of federalism in action. But a moment’s reflection will lead one to conclude otherwise. If there were a national consensus on the issue, just about everyone recognizes that Congress and/or the U.S. Supreme Court could put an end to the death penalty. That they do not is not due to federalism or to any deference to the states.

Rather it is due to the deep disagreement over the death penalty. Public opinion polls reveal that on the whole the country is divided on the issue. In light of this, national politicians or politically astute federal judges have no desire to try to abolish capital punishment. It is convenient for a great many people to side step the issue by saying in effect, “let the states decide.” Still, everyone would acknowledge that both Congress and the federal courts have the means by which to abolish capital punishment given different political conditions. Policy on the death penalty then reveals not federalism but decentralization. What can be said about the death penalty, can be said about any number of other policies.

Similarly in other countries what also appears to be federalism may be in fact decentralization. The Basque and Catalan regions in Spain have a veneer of federalism on them, but they are better understood in terms of the prudential loosening of ties by the central government to accommodate the interests of those in these regions in order to reduce unrest. However, if this policy does not have a payoff—if for instance it is thought to lead to greater violence and not less-- recentralization is a possible and probable outcome. The federalist-appearing structure here is anchored in an instrumentalist desire to maintain stability under the circumstances, and not a deeply entrenched sovereignty of the regions. What can be given away can be taken back. What can be said about Spain applies to many other regions in the world as well.

Of course there are some genuine federal systems. Switzerland comes to mind. Its governmental system is a product of language, culture, religion, valleys and mountains, and civil war. While still tension-producing and ever-shifting, it does appear that an equilibrium of competing partial political identities has resulted in a stable federal system. Certainly it is a contrast to federal systems, which have fallen apart (e.g. the Soviet Union, Yugoslavia, the

United Arab Republic, etc.) or been, swallowed up by strong central authority (e.g. Mexico; Russia). Indeed in recent years one of the emerging topics for political theory has been divorce, the specifications of how unhappy parties in a federal system may peacefully decouple (Buchanan 1991).

What are the implications of the argument that the United States and other nominally federal systems are in fact no longer federal systems? No doubt there are a great many. But one of them is *not* that states should be abolished. Every large country, even the most unitary of them such as France and Sweden, are divided into regions or districts that serve important administrative purposes. However practical it would be to combine North and South Dakota, Kansas and Nebraska, Texas and Oklahoma, Delaware and Pennsylvania, and the like, it makes no political sense to disturb traditional boundaries that have existed for one hundred years or more. (By the same token it would make no political sense to try to unite the twin cities of St Paul and Minneapolis, Minnesota [within a state and not across states-thus not involving federalist principles], or any number of other “twin cities” throughout the world, even though all sorts of efficiencies might flow from such consolidation, and they are not products of federalism!)

However, in the United States there is at least one federalism-adjusting policy that does make sense. It is this: the issue of federalism should not be justiciable. That is, states and their supporters should not be granted standing to argue that an act by Congress has violated the principles of federalism. If states are important entities, they have ample representation in the United States Congress, and particularly the Senate (in the United States, each state has two senators regardless of its population), and there is no need for the Supreme Court to say that states’ rights have been violated by a legislature which is comprised of representatives

elected at the state and local levels. This may sound far-fetched, but in fact it is a conventional argument in American Constitutional law, put forward by any number of scholars and judges over the past one hundred years. More particularly it was advanced most forcefully in the mid and late Twentieth Century by Herbert Wechsler (1954) and Jesse Choper (1980). In fact the U.S. Supreme Court explicitly adopted this principle in 1985 (*Garcia v. San Antonio Metropolitan Transit Authority*), and maintained until an emerging conservative majority on the Court overruled it a decade later in *United States v. Lopez* (1995), and went on to endorse the new new-federalism that has held sway since then. Still, since the 1930s, the U.S. Supreme Court has never struck down a major piece of national legislation on the basis of preserving federalism, and in those cases where it has struck down pieces of inconsequential legislation it has also instructed the Congress how it might refashion the legislation so that it would pass constitutional muster. This is hardly robust federalism (Feeley and Rubin 2008: 124-143).

One question that might be posed in light of the discussion above is this: Is Australia a real federalism? Nominally Australia has a federal system, but in fact does it? Maybe. I do not have the expertise to answer the question. But I do think that it would be useful to take the theory outlined above, and systematically work through its implications for Australia. Admittedly our theory about political identity as the basis of nationalism and federalism suggests scepticism about a meaningful Australian federalism. But our theory is still in its infancy and in need elaboration. Furthermore, the details of Australian history and intergovernmental relations are too complicated for a short term visitor to assess. Thus I leave it to my readers to make the effort.

About the Author

Professor Malcolm M. Feeley is currently the Distinguished Fulbright Chair at Flinders University and is Professor of Law at the University of California at Berkeley.

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