

**THE FEDERAL STATE: THEORY AND COMPARISON OF
DIFFERENT EXISTING FEDERAL STATES**

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Comparative law

“Comparative constitutional analysis tells us how relative texts, words and dogmas are. Texts themselves do not create democracy ...Texts only create some conditions — for political evolution, transformation and realization”, B Mirkine-Guetzévitch, ‘Les méthodes d’étude du droit constitutionnel comparé’(1949) 1 Revue

- international de droit comparé 396, 417
- Comparative process

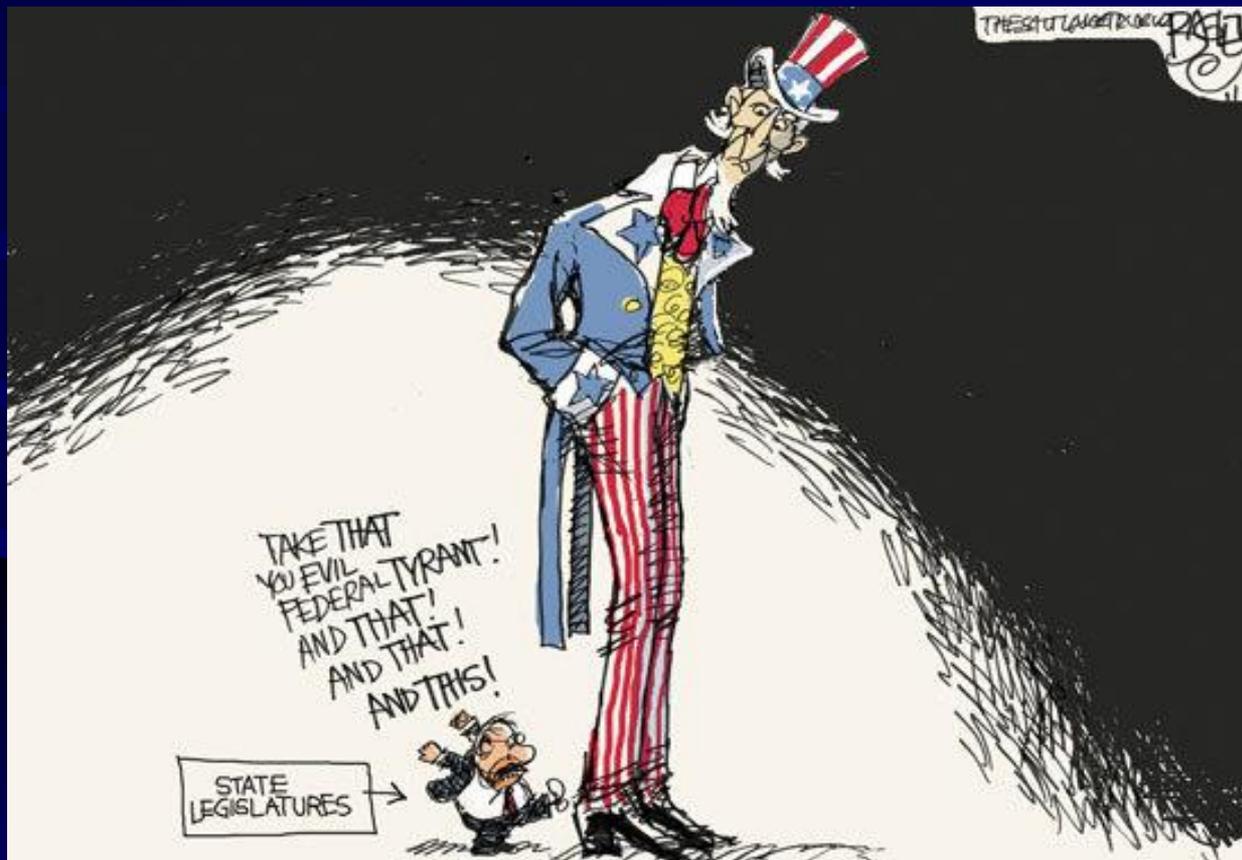
Elazar

- 2 crucial elements:
 - A) The ambiguity of the federal goals
 - B) The nature of the compact
- The importance of the “constituent” moment which then affects the entire life of the federal polity

Balance of Powers

- *Foedus* (Compact)
- Centre or Periphery?
- Sustainability of centrifugal forces
- Equality

But actually...



The importance of the Canadian Reference 1998

From a conceptual point of view (i. e. what federalism is)

From a methodological point of view

From a political point of view

From a doctrinal point of view

Definitions

- “Federalism is a natural constitution for a body of states which desire union and do not desire unity” (Dicey)
- self-rule and shared rule (Elazar)
- “Federalism is about the co-existence of multiple loyalties and identities and about shared and divided authority” (Robinson and Simeon)
- “The nature of federalism is a form of government designed to get the best of two worlds: the advantages of a unified state and the benefits of the diversity which is inherent in the peoples and the regions which make up the state” (Johnson)

Watts

- “1) two orders of government each **acting directly on their citizens**; (2) a formal constitutional distribution of legislative and executive authority and the **allocation of revenue sources** between the two orders of government ensuring some areas of genuine autonomy for each order; (3) provision for the designated representatives of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the **federal second chamber**; (4) a supreme written constitution **not unilaterally amendable** and requiring the consent of a significant proportion of the constituent units; (5) an umpire (in the forms of courts or provision for referendums) to rule on **disputes between governments**; (6) processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap”. Watts

Federal Constitution and Federal Government

- “The method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent” (Wheare)
- “quasi-federalism” (Canada). What about Germany? (Laursen)
- *Federal Government*, Oxford University Press, New York

Federal variety

- “An examination of governments which are usually called federations reveals the fact that few of them are completely federal. In most of them modifications of strict federalism have been introduced, and, in the present writer’s view, they are not necessarily the worse for that” (Wheare, ‘What Federal Government Is’).

Static Patterns

- Confederation/Federation
- Sovereignty
- Regional vs. Federal State
- *Trends of Federalism in Theory and Practice* 1968
- «Formalistic, juristic argument» (Friedrich, *Constitutional Government*)

Indicators

- Second chamber?
- State constitutions?
- Participation in the Amendment Process?
- Judicial Power?
- Bottom Up Process?

Hay, “functional federalism”

- “Federal is therefore used in an adjectival sense: it attaches to a particular function exercised by the organization”
- Dynamic and empiric approach
- International organizations

Against static patterns

- “Federalism should not be considered as a static pattern, as a fixed and precise term of division of powers between central and component authorities. Instead, **federalism should be seen as the process of federalizing a political community**, as the process by which a number of separate political organizations, be they states or any other kind of associations, enter into arrangements for making joint decisions on joint problems, or reversely the process through which a hitherto unitary political organization becomes decentralized to the point where separate and distinct political communities arise and become politically organized and capable of making separate decisions on distinct problems.” Friedrich, *Federal Constitutional Theory and Emergent Proposals*

Staatenbund and Bundesstaat

- “No sovereign can be discovered in the federal system; autonomy and sovereignty exclude each other in a political order. At least that is true unless such autonomy is itself designated as ‘sovereignty,’ The only theoretically clear and admissible way of putting the matter is to admit that instead of being directed by a sovereign power a constitutional system rests upon the constituent power....The idea of a compact is inherent in federalism, and the ‘constituent power’, which makes the compact, takes the place of the sovereign” (Friedrich, Trends of Federalism)

Autonomy

- [autonomy] “signifying the power and authority, the legitimate right, to govern oneself, but not excluding the **participation** in a group of similar entities which form in turn an autonomous community”” Friedrich, Federal Constitutional Theory and Emergent Proposals

Participation

- «The autonomy of a community is not considered as impaired by participation in a wider community if the sphere of authority of the wider community is instituted, maintained and altered only with the effective participation of the component community, as likewise the autonomy of the inclusive community is considered unimpaired if its sphere cannot be altered without **its effective participation**. It is evident that this intertwining of participating communities can only be accomplished within the context of a constitution, and furthermore that it necessarily and significantly divides governmental power and authority over the citizens of such federal (or federated) communities”
- (Friedrich, Federal Constitutional Theory and Emergent Proposal)

The Amendment

- “If federalism implies the process of federalizing a group of communities and thus building a federal community, then obviously the relative flexibility of any formal constitutional arrangements is of crucial importance....such amendments (must)...**provide for the full participation of the component communities as well as the inclusive one in the process of amendment.** For it should always be borne in mind that a federal system arises from, that is to say, is constituted by a federal community, a composite community in other words. In such a composite community, the “constituent power” is also composite and the amending power needs to be molded here, as always, upon the structure of the constituent power” (Friedrich, Federal Constitutional Theory and Emergent Proposal)

Continuum

- «Federation is a very general pattern of political conduct, continually employed by all kinds of organized entities when certain conditions are calling for it. **Federations of states and the federal state must be seen as particular applications of a recurrent formula for effective, organized cooperation between groups.** A federation is a union of group selves, united by one or more common objectives but retaining their distinctive group being for other purposes. Federation is, on the intergroup level, what association is on the interpersonal level. It unites without destroying the selves that are uniting, and is meant to strengthen them in their mutual relations. It organizes cooperation” (Friedrich, Man and His Government: An Empirical Theory of Politics)

Criticism

- *Catch all* concept
- von Krosigk “teleological implications”. ‘The federalizing process’, which was originally ‘designed as a “permanent give and take” between cooperating communities secretly gains a cumulative pattern, becomes an “integrative federalizing process” with an “initial phase”...and a cumulative conclusion, the federal state’.

Empirism

“it must be stressed that if we are looking for examples of federal government, it is not sufficient to look at constitutions only. What matters just as much is the practice of government. A country may have a federal constitution, but in practice it may work that constitution in such a way that its government is not federal. Or a country with a non-federal constitution may work it in such a way that it provides an example of federal government....For the student of the working of federal government, it is obvious that the practice of the constitution is more important almost than the law of the constitution. It is usually convenient to begin with the law as a basis of classification. But before a country with a federal constitution can be regarded as providing an example of federal government, the practice of the constitution must be discovered” (Wheare, ‘Federal Government’)

Essence of Federalism (Elazar)

- “The essence of federalism is not to be found in a particular set of institutions but in the **institutionalization of particular relationships among the participants in political life**....a wide variety of political structures can be developed that are consistent with federal principles”