

DOWNLOAD PDF THE LIMITS OF FEDERAL LEGISLATIVE POWER : JUDICIALLY OR POLITICALLY ENFORCEABLE FEDERALISM?

Chapter 1 : Separation of Powers & the Limits on the Federal Judicial Power

Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power Congressional Research Service Summary The lines of authority between states and the federal government are, to a significant extent.

Federal systems do this by distributing power among general and constituent governments in a manner designed to protect the existence and authority of all the governments. Different conceptions No single definition of federalism has proved satisfactory to all students, primarily because of the difficulties in relating theoretical formulations to the evidence gathered from observing the actual operation of federal systems. Social and political principle. Federalism, conceived in the broadest social sense, looks to the linkage of people and institutions by mutual consent, without the sacrifice of their individual identities as the ideal form of social organization. This conception of federalism was given new theoretical form by nineteenth-century French and German social theorists. Closely related to the various theories of social contract , it is characterized by the desire to build society on the basis of coordina-tive rather than subordinative relationships and by the emphasis on partnership among parties with equal claims to legitimacy who seek to cultivate their diverse integrities within a common social order Boehm This means, in effect, that political institutions common to different political systems, when combined within a federal system and animated by federal principles, are effectively endowed with a distinctive character. For example, while political parties are common in modern political systems, parties animated by the federal principle show unique characteristics of fragmentation and lack of central discipline that increase the power of local groups within the system as a whole Grodzins a. Federal ideas have been systematically conceptualized in two different ways. In such cases, the polities that constitute the federal system are unalterably parts of the national whole, and federalism invariably leads to the development of a strong national government operating in direct contact with the people it serves, just as the constituent governments do. On the other hand, federalism has also been conceived as a means to unify diverse peoples for important but limited purposes, without disrupting their primary ties to the individual polities that constitute the federal system. In such cases the federal government is generally limited in its scope and powers, functioning through constituent governments which retain their plenary autonomy, and, to a substantial degree, is dependent upon them. Both conceptions of federalism have evolved from early federal experiments. The principles of strong national federalism were first applied by the ancient Israelites, beginning in the thirteenth century B. Several centuries later, the Greek city-states experimented with federal-style institutions as means for the promotion of intra-national harmony and cooperation, primarily for defensive purposes, through associations e. A modified form of the Greek view was developed by the sixteenth-century theorists Gierke They held that federalism meant a permanent league of states united through a perpetual covenant, binding under international law , in which the constituent states delegated enumerated powers to a general government while retaining full rights of internal sovereignty. However, when the American systemâ€”the prototype of modern federal systemsâ€”emerged in the late eighteenth century, its architects developed a conception of federalism much like that of ancient Israel. Just as the American system became the prototype for other modern federal systems, so the American conception of federalism became the generally accepted one. The two systems described by these different conceptions reflect, in part, the distinctions implied in the German Staatenbund confederation and Bundesstaat federation , terms developed in the mid-nineteenth century Mogi A certain degree of confusion remains because the terms invented to describe both systems were used indiscriminately for many years. Though the American conception of federalism is today almost universally accepted as the most accurate usage, the confederal conception remains a living and legitimate aspect of the federal idea in its largest political sense. Today, the latter is most prominent among certain advocates of limited European union the Common Market exemplifies a confederal form and among many so-called world federalists. Federal systems are often confused with four other forms of political order which make use of specific federal principles. The use of some federal principles in multiple

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monarchies, legislative unions, empires, and decentralized unitary systems can have important consequences similar to those in authentically federal systems. But the fact that such principles do not permeate the four systems makes the distinctions between them and true federations extremely important. Federal systems differ from multiple or dual monarchies in two essential ways. The central constitutional characteristic of the multiple monarchy is that union exists only in the person of the sovereign and is maintained only through the exercise of executive power in his name. No significant common institutions exist to unite the constituent polities—no common legislatures, no common legal system, and little in the way of a common political substructure. On the contrary, each constituent polity maintains its own political system, which the monarch guarantees to support under the terms of his compact with the realm. Multiple monarchies have historically been less than democratic regimes. Even where there have been tendencies toward democratization, the very fact that union exists only by virtue of the common sovereign has tended to elevate the position of the monarch to one of real power. Attempts to transfer sovereignty or the attributes of sovereignty elsewhere by their very nature stimulate the division of this kind of association of civil societies into separate polities. Thus, the Austro-Hungarian Empire was held together by the Hapsburg emperors and disintegrated when that family ceased to rule Sharma , chapter 7. The dual monarchy of Sweden and Norway ceased to function when democratic government was introduced, transferring the attributes of sovereignty from the monarch to the nation s. In Spain, on the other hand, the inability of the Spaniards to transform a multiple monarchy into a federal system, in a locale which by nature demanded peninsular union of some sort, led to the consolidation of the constituent polities into something approximating a unitary state which remained highly unstable because of the local barriers to consolidation that could neither be accommodated nor eradicated Elliott The United Kingdom is a case in point. The centrifugal tendencies of the seventeenth-century dual monarchy linking England and Scotland were finally eliminated through a legislative union of the two nations in Legislative union bears very close resemblance to federal union at several crucial points. Though designed to direct public allegiance to a single national authority, the terms of the union encourage the political system to retain certain noncentralizing elements. The government of the nation remains national rather than central in character, since it is created by a perpetual covenant which guarantees the constituent parties their boundaries, representation in the national legislature, and certain local autonomies, such as their own systems of municipal law. Legislative unions usually unite unequal polities. The centralizing tendencies induced by this are somewhat counterbalanced by the residual desire for local self-government in the constituent states. Thus, in the United Kingdom the cabinet has acquired a supremacy not foreseen in , but within the framework of cabinet government Scotland has acquired a national ministry of its own with a separate administrative structure, based in Scotland, for most of its governmental programs Milne Federal systems also differ from empires allowing cultural home rule. Such empires have often been termed federal—“in some cases because they claim to be. The Roman Empire was the classic example of this kind of political system in the ancient world, and the Soviet Union may well be its classic modern counterpart. In both cases, highly centralized political authorities possessing a virtual monopoly of power decide, for reasons of policy, to allow local populations with different ethnic or cultural backgrounds to maintain a degree of cultural home rule, provided that they remain politically subservient to the imperial regime. While this often appears to offer a substantial degree of local autonomy, its political effects are purposely kept minimal. Any local efforts to transform cultural home rule into political power are invariably met with suppressive force from the central government, even to the point of revoking cultural rights, as examples from the history of both empires reveal. Federal systems are clearly different from decentralized unitary states, even though such states may allow local governments considerable autonomy in some ways. In such states local powers are invariably restricted to local matters, as determined by the central authorities, and are subject to national supervision, restriction, and even with drawal, though tradition may mitigate against precipitous action by the central government in areas where local privileges have been established. Still, as the English experience has shown, even powerful traditions supporting local autonomy have not stood in the way of great reconcentration of power by

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democratically elected parliaments when such action has been deemed necessary by a national majority. Mature and emergent federal systems. Several recent studies Macmahon ; Wheare have attempted to draw distinctions between mature and emergent federal systems. The thrust of their argument is that federalism, when used to unify separate political systems to form a new nation, and federalism, as a form of decentralized government in an established nation, encourage markedly different kinds of political behavior. In the former case, federalism serves as a means to bring tenuous unity to nations composed of highly autonomous polities, with the locus of power remaining among the constituent units. As federal systems mature, so the argument goes, power is increasingly concentrated at the center, and federalism remains only to promote a certain amount of decentralization within an otherwise highly unified political system. Wheare goes so far as to argue that federalism is a transitional phenomenon useful in promoting progressively larger polities which are then gradually discarded in fact, if not in form as an unnecessary encumbrance. This argument may have some validity in describing the history of nonfederal political systems which have utilized federal principles to promote national unity. For example, it can be used to describe the evolution of the United Kingdom into its present constitutional state. It cannot be applied, however, to any of the three exemplary federal systems—Canada, Switzerland, and the United States. Their national ties existed from the first, and their national governments were granted broad powers at the outset. Nor has federalism declined in importance as those nations have matured. There are undoubtedly differences between mature and emergent federal systems, but those differences are more likely to relate to the character of conflict and negotiation between the general and constituent governments than to their relative strengths. Federalism and intergovernmental relations. Because the study of federalism at its most immediately empirical level heavily stresses the study of intergovernmental relations, the two are often considered to be synonymous. Federalism, however, is something much more than the relationships between governmental units, involving as it does principles which are designed to establish the proper character of those relationships and which must also affect the character of other political institutions within federal systems. As already indicated, federalism concerns the way in which federal principles influence party and electoral systems in federal polities just as much as it concerns the way in which local governments relate to their regional or national ones, or to each other. Moreover, the study of intergovernmental relations exists apart from the study of federalism, since such relationships are to be found in all political systems, federal or otherwise, where there is more than one government extant within a given polity. Characteristics and operational principles The most useful way to attempt to understand federalism as a political phenomenon is to undertake a survey of the basic characteristics of federal systems, principles, and processes in order to understand both the manner and the direction of their development. As a first step it seems necessary to identify the various federal systems that exist today or have existed in the past; only then can we analyze them as operating political systems. However, identifying federal systems is no simple matter, as we have just seen. Moreover, federal systems have historically been marked by great internal distinctions between theory and practice, perhaps more so than other political systems. In the United States, the measure of the maintenance of federalism was long considered to be the degree of separation of government activities by level, because it was generally believed that such separation actually existed. In fact, American federalism from the first had been characterized by extensive intergovernmental functional collaboration within the framework of separate governmental structures Elazar Similarly, the Canadian federal system has always been described as one in which the federal government is clearly dominant—the repository of all powers not explicitly granted to the provinces. Yet since the brief period of federal supremacy in the years immediately following confederation, the provinces have consistently gained power at federal expense Smiley The Russian federal constitution goes so far as to grant each Soviet republic the right of secession—a patent impossibility under the realities of the Russian political system. Nevertheless, some basic characteristics and operational principles common to all truly federal systems can be identified, and help us to define such systems. These may be divided into three essential elements and a number of supplementary ones. Every existing federal nation possesses a written constitution, as do most of

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the other nations incorporating elements of the federal principle. Juridically, federal constitutions are distinctive in that they are not simply compacts between the rulers and the ruled but involve the people, the general government, and the polities constituting the federal union. Moreover, the constituent polities retain local constitution-making rights of their own. The political system must reinforce the terms of the constitution through an actual diffusion of power among a number of substantially self-sustaining centers that are generally coincident with the constituent polities established by the federal compact. Such a diffusion of power may be termed noncentralization. It differs from decentralization—the conditional diffusion of specific powers to subordinate local governments by a central government, subject to recall by unilateral decision. It is also more than devolution—the special grant of powers to a subnational unit by a central government, not normally rescindable. Non-centralization ensures that no matter how certain powers may be shared by the general and constituent government at any point in time, the authority to participate in exercising them cannot be taken away from either without mutual consent. Constituent polities in federal systems are able to participate as partners in national governmental activities and to act unilaterally with a high degree of autonomy in areas constitutionally open to them—even on crucial questions and, to a degree, in opposition to national policies, because they possess effectively irrevocable powers. Areal division of power. A third element that appears to be essential in any federal system is the internal division of authority and power on an areal basis Maass , what in the United States has been called territorial democracy. It is theoretically possible to create a federal system whose constituent units are fixed but not territorially based. There were premodern protofederations of nomadic tribes, and some observers have seen federal elements in nations constitutionally structured to accommodate social and political divisions along ethnic, religious, or even ideological lines. Nevertheless, no authentic federal system has existed without an areal basis for the federal division. Historically, when areal divisions of power have given way to divisions on the basis of functional interest, federalism has been replaced by pluralism. In modern democratic theory the argument between federalists and antifederalists has frequently revolved around the respective values of areal and functional diffusions of power. Theorists who have argued the obsolescence of federalism while endorsing the values used to justify its existence have generally based their case on the superior utility of pluralism Mogi , pp. Proponents of the federal-areal division argue that the deficiencies of territorial democracy are greatly overshadowed by the neutrality of areal representation of functional interests, and they argue further that any other system devised for giving power to these interests has proved unable to cope with the complexities and changes of interest endemic in a dynamic age while certainly limiting the advantages for local differentiation inherent in the areal system.

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Berkeley School Of Law Boalt Hall in that contains approximately page of notes across 26 different document. This means that the formatting here may have errors. This text version has had its formatting removed so pay attention to its contents alone rather than its presentation. The version you download will have its original formatting intact and so will be much prettier to look at. Limits on Judicial Power - Jurisdiction stripping and the prohibition on advisory opinions a Purposes i Ripeness and Mootness: Limits who can bring particular cases that can be heard by the courts b Interpretive limits c Congressional limits i Arguments for congressional authority to strip 1 It is Constitutional a Article III, Sec. Exceptions and Regulations Clause - "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make. He sought a writ of habeas corpus on the ground that the Reconstruction Acts under which he was arrested were unconstitutional. After hearing arguments in the case, but prior to announcing a decision, Congress withdrew its act conferring jurisdiction. Supreme Court had held that a presidential pardon had the effect of proof that one did not support the rebellion, so pardoned individuals could petition for return of property or compensation. In response, Congress passed statute stating that pardon was inadmissible as evidence in claim for seized property. Congress also required that if a court found a pardon was secured without an express disclaimer of guilt, such finding was to act as a bar to jurisdiction. The estate of the Respondent who was pardoned had received a judgment granting recovery from the Court of Claims. US argues that the statute requires dismissal of the case for want of jurisdiction. Statute Unconstitutional, not a proper exercise of congressional power. Exceptions and Regulations clause does not give Congress the power to direct the Court to make a particular decision. Separation of Powers Limit. Seattle Audobon Society 1 Held: Separation of powers considerations do not limit Congress from changing the law applicable to a set of cases pending in the federal court, so long as it does so by changing the background law rather than dictating to federal judges how they are to apply the pre-existing law. In response, Congress amended law to allow cases filed before the decision to go forward, if they could have been brought under the previous law. Petitioner attempted to resume prosecution of dismissed case. Court interpreted a statute, Congress revised the statute and created a new cause of action with a longer statute of limitations. Statute did raise an impermissible advisory opinion problem. Congress may pass retroactive legislation that affects cases still pending appeal. But a judgment "conclusively resolves the case" - Congress cannot allow case to resume once judgment has been rendered. This was an improper interference with separation of powers limits on legislative power. Addresses whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

Chapter 3 : Separation of Powers | Legislative, Executive, Judicial

It is true, as Gerken famously put it, that, absent enforceable constitutional limits on federal power, states and localities can still wield the "power of the servant."

Chapter 4 : Tenth Amendment Limitations on Federal Power

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Rather than using federalism to limit federal court authority, the empowerment view uses federalism to open the doors of both federal and state courts to those asserting federal, and especially constitutional, claims.