

INTRODUCTION

WHY WE NEED A THEORY OF FEDERALISM

In the mid-nineteenth century, two-thirds of the world's landmass was governed by imperial edict. In the early twenty-first century, according to many political theorists, this same proportion of the world is governed by federal arrangement. Indeed, some theorists claim that the proportion could be much higher. Writing in 1994, the late Daniel Elazar estimated that well over 100 of the 180 recognized sovereign states, encompassing some 80 percent of the world's population, live within polities that either are formally federal or utilize federal arrangements.¹ Elazar's list of federalist countries, moreover, includes many of the world's most attractive and stable democracies—Switzerland and the United States, two of the oldest political regimes in the world, as well as Canada, Australia, and Germany. In addition, the European Union is often said to be an emerging federal system.

Those who write about federalism, moreover, often advance expansive claims about its virtues. Federalism, it is said, serves as a bulwark against tyranny and is essential for the creation and maintenance of democracy in geographically large or ethnically diverse political entities.² It maximizes the extent to which the political system can reflect the preferences of the individuals who live within it.³ It produces a political system leading to a higher level of economic efficiency within society than any other system.⁴ According to Elazar, it is directly ordained by the Almighty.⁵

In light of its prominence as a governing arrangement and of the many and varied benefits advocates claim for it, one might expect there to be a vast and robust theoretical literature on federalism. Yet there is not. There is certainly no shortage of scholarship about federalism—in fact, there has

been a deluge of it in recent decades—but virtually none of it presents a theory of the subject.⁶ The towering exception is William H. Riker's classic *Federalism: Origin, Operation, Significance*.⁷ But David McKay has rightly observed, “[N]o one has come up with a theory of federalism that is remotely as ambitious or as powerful. . . . Riker's theory remains, almost forty years later, the *only* theoretical perspective on the subject worthy of that name.”⁸ Of the scholarship that has followed, one part consists of legal analysis that attempts to clarify the division of labor once boundaries have been drawn in particular federal systems or to chart the varying shifts between the center and its constituent parts. Another catalogs the political and economic advantages that result from federal regimes. From here, it is a short step to prescriptive literature that argues in favor of federalism on the basis of these advantages, and with the next short step, one arrives at prescriptive literature that uses the defense of federalism to mask the advocacy of particular substantive goals that in themselves do not flow from federalism at all.

At all these steps, scholars have claimed a bewildering variety of attributes for federal systems, many of which contradict each other. Some of these claims are stated in the form of general propositions, such as “Federalism protects linguistic minorities,” “Federalism increases political participation,” or “Federalism fosters economic efficiencies.” But many—if not almost all—of these discussions have only one or two examples in mind. Perhaps Swiss federalism protects linguistic minorities, but American federalism does not. Perhaps Canadian federalism increases political participation, but Australian federalism does not. One problem with such claims is that they are like aphorisms; each is likely to be matched by its opposite. Another problem is that they often spring from vaguely defined emotional attachments. Despite the alleged tough-mindedness of political scientists, U.S. Supreme Court justices, and legal scholars, their treatment of the subject remains mired in sentimental attachment to the idea of federalism, replete with appeals to nostalgia-driven sentiments, the bromides of high school civics, and conceptual confusion.

Of course, inventive theorizing is far from absent in discussions of structural arrangements for complex societies—on the contrary, postnationalist scholarship has produced an impressive array of theories about structural arrangements for organizing complex societies. But these theories have tended to focus on structures other than federalism. Rawls begins with a

unified society behind his veil of ignorance and proceeds to discuss constitution making, legislation, and administration from this same perspective.⁹ Devotees of participatory democracy, such as Amitai Etzioni¹⁰ and Michael Sandel,¹¹ and those of deliberative democracy, such as John Dryzek,¹² Joshua Cohen,¹³ and Jürgen Habermas,¹⁴ take a similar approach. They envision a unified polity in which people participate or deliberate, and while their theories often incorporate local, subordinate governments, they tend to ignore federal arrangements. Arend Lijphart, famous for challenging political theorist Robert Dahl's contention that cultural homogeneity is a prerequisite for stable government, argues that heterogeneous societies can achieve stability but that the operative cause is not federalism but consociational arrangements, such as proportional representation.¹⁵

This book is our effort to remedy the surprising lack of theoretical writing about federalism. Here, we offer our general theory—or at least a preface to a theory—of federalism: what federalism is (chapter 1) and why it is used (chapter 2). We then contrast our theory with the few other theories that have been offered, specifically those associated with process federalism, fiscal federalism, and positive political theory (chapter 3). The theory is then applied to the American situation (chapter 4), partially as a test of its validity and partially because this situation is so important and so widely discussed. For the same reasons, we then use our theory to analyze American constitutional doctrine regarding federalism (chapter 5).

Before proceeding further, however, it is perhaps necessary to clarify what we mean in this context by the term *theory*. A theory of federalism is a general account of the structural arrangement of dual levels of government, one that goes beyond simple description of a particular federal system, a paired comparison of two or more federal systems, a legal analysis that seeks to formulate workable rules for defining boundaries and providing a convincing rationale for them once they have been drawn, or a historical analysis that traces changes in the relationship between central state and constituent units. Such discussions are useful and necessary in defining and describing particular federal systems or the differences among them. But a theory should do something more; it should link together the component parts of a concept into an integrated whole, to show how they fit together. Thus a theory of federalism should provide a general rationale for federalism—a general explanation for why federations are established, why some succeed, and why some fail.

To be more precise, we need to define the operative terms in our characterization of theory as a general account. By the term *general*, we mean a characterization that applies in any situation and at any time. A theory of what makes human beings reliable, for example, would tell us what confers on any person the quality of reliability. The statement “Fred isn’t reliable” would not count as such a theory; it may be sufficient, as a practical matter, for someone who needs to deal with Fred, but it is specific to one situation. Many discussions of federalism are at exactly this level of specificity: depending on the context, the United States is federal, the United States is not federal, the United States could not be a democracy if it wasn’t federal, or the United States is committed to federalism by its Constitution. We want to advance a characterization of federalism that tells us what makes any nation federal or nonfederal.

Generality, of course, is a relative thing. While we can speak of people in general as being reliable or unreliable, this is not a useful term to apply to two-year-old children. Similarly, the term *federal* can be applied generally, but only to the range of modern nation-states. Attempting to incorporate very different political regimes, such as the Roman Empire or medieval France, into a theory of federalism would place on the terminology excessive demands that would serve no useful purpose. The term *federal* is generally used, in legal and political science scholarship, as a contrast to a unitary or fully centralized or integrated nation-state, and that is the way we will use it in this book. Thus we will advance a characterization of federalism that applies to all modern nation-states, but we will not attempt any higher level of generality.

When we use the term *account* in our characterization of theory, we mean a systematic examination of the subject that is connected to the overall structure of analysis in one or more academic disciplines, which in this case are law and political science. The statement “People become unreliable when their feelings are hurt” is certainly a general one, but it fails as a theory because it is not connected to any analytic structure. It is more properly characterized as a maxim or a pragmatic observation. To make it theoretical, one would need to invoke an analysis of human behavior, such as Freudianism or rational actor theory. One could then say that the reason people are unreliable when their feelings are hurt is because they are reenacting their Oedipal anger against their father or because they can maximize their self-interest by retaliating each time another person threatens to

impair their interests. Similarly, to say that federalism protects liberty or secures the rights of geographically based minority groups is not a theoretical statement but a pragmatic one. For such assertions, a theory of federalism must provide an analytical framework that is connected to some overarching conceptual approach to modern government.

The conceptual structure that we invoke in our discussion of federalism is that the legal and political system of a modern state is essentially a product of its inhabitants' sense of political identity.¹⁶ We do not attempt to argue this point, since we are offering a theory of federalism only, not of government in general. Rather, we assume the centrality of political identity and rely, for support, on the work of a wide range of scholars who argue for this position, including Max Weber, Hannah Arendt, Alfred Schutz, Robert Dahl, Anthony Giddens, Alain Touraine, and John Rawls.¹⁷ Our discussion, then, is grounded on the general idea that actors in the political realm are strongly motivated by their sense of affiliation and commitment to the larger structures that dominate that realm.

The approach thus deployed is rather catholic but stands in opposition to some major theories of the modern state. First, we reject Marxism, which treats identity as an epiphenomenon of economic class. But our structure does not necessarily reject neo-Marxism, which identifies ideology, not physical force, as the primary bulwark of the status quo.¹⁸ Second, we reject structuralism, systems theory, and related approaches, since we grant a central role to human beings and human attitudes. But this does not preclude reliance on particular insights from these approaches, as found in the work of Giddens and Habermas.¹⁹ Third, we reject rational actor theory, because we treat identity or meaning, not self-interest, as the primary motive of human behavior, although we do not deny that self-interest can serve as one component of identity formation.

One final introductory point worth mentioning is our own normative stance. Because of the reverence federalism seems to engender, particularly in the United States, our decidedly unromantic perspective on the subject and our doubts that federalism is of any use or even exists at present in the United States may convey the impression that our book is an attack on federalism in general. This is not the case; our primary purpose is to understand the subject at a general level, not to attack—or defend—it. As the following discussion will show, we recognize that there are many circumstances where federalism provides an essential means of compromise if

a political entity is to remain intact and fulfills a variety of subsidiary functions. Yet we cannot join the encomiums that treat federalism as an essential protection for liberty, nor do we regard it as a gift from the Almighty. In thus parting company with some of federalism's fervent supporters, however, we have been guided by a general theory of the subject, not by an a priori hostility.