

The Social
and Political
Foundations of
Constitutions

Federalism and Its Discontents: The limits of New Institutionalism

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

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Executive Summary

- In the last couple of decades comparative federalism has grown into a dynamic academic subfield. Partisans of federalism committed to the virtues of divided political authority among orders of government no longer monopolize this field: current thinking acknowledges both the promises and the pitfalls of federalism.
- Some exponents of comparative federalism examine whether federalism matters for democratic participation, representation, and accountability. Others seek to know if federalism matters in terms of its capacity to represent and accommodate territorially based ethnic, cultural, and linguistic differences in divided societies. Another perspective analyses the implications of federalism for public policy and governmental effectiveness. Most of the new generation of scholarship follows variants of what is known as New Institutionalism in the social sciences, typified by a shared analytical emphasis on institutional arrangements which distribute political power among political and social actors.
- Theoretical advances in comparative federalism have coincided with the growth in the supply of federalism. From post-conflict Iraqi federalism to the decentralist teachings of the World Bank in the developing world, comparative federalism has found increasingly vibrant applications in practice, particularly in the writing of federal constitutions for post-conflict societies.
- Yet problems emerge when the analytical findings of New Institutionalism are given an immediate applied role. Analytical social science is about the search for generalizable (but probabilistic) explanations driven by the use of deliberately reductionist analytical perspectives aiming to isolate the causal relationship between certain proposed variables. Applied social science, on the other hand, is about 'solving' practical political problems through the use of a diverse theoretical and conceptual toolkit. The process of translating the teachings of an analytical perspective into a prescriptive blueprint is thus not an automatic one.
- In its applied form, New Institutionalism prescribes instant constitutional solutions which fail to account for the more problematic uncoded factors. This means that extra-institutional factors that may have played a role in the success (or failure) of federalism are likely to be underappreciated in prescriptions of federalism. What is needed is a holistic view which places federal institutions/constitutions among a number of structural long-term factors. An even-handed evaluation of the promises and pitfalls of federalism is likely to temper the zeal for instant institutional/constitutional engineering.

Federalism and Its Discontents:

The limits of New Institutionalism

Comparative federalism, New Institutionalism, and exporting federalism

Federalism — the vertical division of political authority among orders of government — has experienced a remarkable comeback in recent decades. From the margins, the study of federalism has moved to the dynamic centre of scholarly inquiry, connecting literatures that had remained separate from one another. Political scientists with comparative and international interests in federalism now work with sociologists, economists, constitutional philosophers, and lawyers. The analytical framework of New Institutionalism — through its emphasis on institutional/constitutional arrangements distributing political power among political and social actors — has played an important role in exposing the common ground across the scholarly goals. Students of comparative federalism now exchange ideas across various disciplines and areas of study. The interaction of different substantive, theoretical, and methodological perspectives within the study of federalism has led to an intellectually vibrant subfield which examines a number of diverse issues surrounding federalism.

One such line of inquiry for students of comparative federalism is whether or not federalism matters for democratic participation, representation, and accountability. Others seek to know if federalism matters in terms of its capacity to represent and accommodate territorially based ethnic, cultural, and linguistic differences in divided societies. A third line of inquiry analyses the implications of federalism for public policy and governmental effectiveness. These various strands of comparative federalism literature strive for objectivity in their treatment of the promises and pitfalls of federalism. Over time, the subfield's earlier normative preference for Jeffersonian small government has been replaced by a commitment to analytical scholarship. Contemporary federalism scholars influenced by the teachings of New Institutionalism tend to be more even-handed in their approaches than previous generations of federalism researchers whose work was often informed by a normative attachment to the merits of divided political authority. New Institutionalism has brought in a level of conceptual and theoretical clarity to the subfield, whilst allowing scholarly links to other areas of study informed by similar perspectives. Put differently, the study of federalism is no longer monopolized by a collection of federalism partisans.

Comparative federalism now studies varied phenomena — both in the industrialized and the developing world — such as power-sharing arrangements among ethnic/religious/linguistic groups, democratic accountability in multilevel settings, public policy effectiveness, and economic performance. In analytical terms, scholarly focus has been on how political authority is divided, shared, or dispersed among two or more orders of government. One of the main practical advantages of this shared analytical emphasis on institutional arrangements is the relatively easy operationalization of research designs across cases. Aided by comparable institutional benchmarks (and readily available public data), we increasingly see comparisons across a large number of cases — although the scholarly goals are often delimited to exploring the relationship between a small number of causal factors (i.e., between so-called dependent and independent variables). Feasibility of comparative research design has made possible analysis of the relative importance of institutional/constitutional factors across a large number of cases. Such reach and range in comparative goals would have been impossible without a shared analytical framework. But this, of course, does not provide the entire picture.

From the appointment of judges to the Supreme Court of Canada to the formation of the Swiss cabinet, federalism in the industrialized world relies a great deal on custom and informal practices that have established themselves over the long-term. In addition to the prevalence of informal practices that accompany — and sometimes trump — institutional/constitutional procedures, the workings of federalism can only be captured once uncodified factors like ethnicity, language, demographics, culture, and class structure are brought into the picture. Over the long-term, federal constitutions of the industrialized world have come to interact with such structural factors, creating political dynamics that cannot be reduced to formal constitutional provisions.

That is why the constitutional provisions establishing the Canadian federation with the British North American (BNA) Act in 1867 are not sufficient to understand how Canadian federalism has come to work. The BNA Act gave the federal government the right to legislate for ‘peace, order and good government’ (in policy areas it sees fit); the act also gave the executive the power to overturn and postpone legislation under the ‘disallowance’ and ‘reservation’ provisions. Other things being constant, all this indicates a clear centralist bias in the Canadian Constitution. Had Canada today been a strongly centralized federation with a dominant federal executive, we would have all the answers: it is the Constitution. Yet, Canada has taken a different path from that intended in 1867 and is now one of the most decentralist federations of the industrialized world.

The demographic impact of having a sizeable francophone population controlling the province of Quebec added something to Canadian federalism that an institutional/constitutional perspective would have overlooked. As Quebec sought to safeguard the French language and Roman Catholicism through provincial autonomy, this blazed a trail for other, less culturally distinct provinces to follow, subsequently leading to comparatively strong provinces over the long term. The existence of Quebec and its political weight meant that certain extra-constitutional doctrines, such as the ‘compact theory’ envisaging Canada as a union between two founding nations, also came to

play a role in the workings of Canadian federalism. Another structural factor, in this case the vast geography of the country, meant that provinces had no option but to shoulder most of the day-to-day running of politics. What the Constitution says, therefore, on its own is an insufficient guide to the workings of Canadian federalism. Scholars of comparative federalism committed to analytical goals are, of course, aware of the partial and short-term picture institutions/constitutions give, but somehow these incomplete sketchings from the industrialized world end up being prescribed to divided societies of the developing world as federal cures for all political, economic, and social ills.

Devising federal constitutions for post-conflict societies is now a growth industry for students of comparative federalism with entrepreneurial predisposition. There is demand, so the teachings of New Institutionalism could be repackaged into supply. This imprudent jump from the analytical to the prescriptive is partly due to the current pressures on the social sciences to be ‘relevant’. As a high-priority political issue, there are also (public and private) funding opportunities to support post-conflict institutional engineering for deeply divided societies. For some students of comparative federalism, this creates incentives to underplay the harder-to-operationalize uncodified aspects of federalism. Another casualty is the long-term view. As new federal constitutions are devised, emphasis tends to be placed on getting the formal institutions right. Scholarly reflection on the potential impact of long-term structural factors, prudence, and an even-handed consideration of both the promise and pitfalls of federalism are not the ‘deliverables’ that are attractive to politicians, bureaucrats, and research grant agencies. From Bosnia-Herzegovina to Iraq, many post-conflict societies consequently became trial patients for constitutional shock therapies.

Analytic social science and the lure of policy relevance

Social scientists’ desire to be relevant can sometimes lead to the adoption of short cuts from the analytic to the applied. There is nothing wrong in expecting academic research to generate dividends for the society at large; after all, a lot of public money is

spent on research and society deserves to benefit from this. But the benefits of analytic social science are diffuse, long-term, and not necessarily problem-specific; yet politicians, bureaucrats, and grant agencies all want concrete, problem-specific, short-term 'deliverables'.

It is difficult to dismiss demands that (often publicly funded) social science research done by dusty dons in ivory towers should now start delivering practical dividends, but there is an assumption behind this that requires some unpacking. Calls for more applied research assume that the insights of analytical social science automatically deliver on real-life political puzzles as well. However, this is not as straightforward as it may seem to some.

First of all, the intellectual goals of analytic and applied social science do not point in the same direction. Analytic social science is about the search for generalizable (but probabilistic) explanations for political and social phenomena driven by the use of deliberately reductionist (and therefore by definition descriptively incomplete) analytical perspectives. Other factors are held constant in order to isolate the analysis of a causal relationship between a small number of variables. The proposed causal relationship, the literature review on existing analyses, the theoretical reasoning, the research design, and subsequent findings are then subjected to peer review. Applied social science, on the other hand, is about 'solving' practical political problems through the use of the theoretical and conceptual toolkit the disciplines have accumulated. There is no peer review since the work is not driven by a desire to contribute to the scholarly canon on the matter by proposing certain causal relationships between isolated dependent and independent variables. Whereas analytic social science is generalist in its outlook, applied social science is problem-driven, relying on the ad hoc mix of theories and concepts backed by a firm grasp of the idiosyncrasies of the political context.

The very nature of scientific theorizing relies on emphasizing certain general explanatory factors through an analytic framework that brings an intellectual order to an array of otherwise unrelated outcomes. By definition, this is an intellectual exercise aimed at presenting a stylized reproduction

of political and social phenomena by focusing on the generalizable and relegating the idiosyncratic to the background. Most social scientists are of course aware that our theories are idealized, reductionist half-pictures providing probabilistic explanations.

Yet the nature of applied social science puts a premium on the projection of certainty as politicians, bureaucrats, and research grant agencies look for concrete prescriptions. Policy relevance privileges those who can project technocratic expertise at the expense of those who transparently admit the probabilistic and incomplete state of our knowledge. In this context, works that feign confidence and certainty (while sweeping inconvenient theoretical/methodological/substantive/normative issues under the carpet) seem to have a better chance in conveying a sense of technocratic expertise to those who finance research projects.

Taking the short cut from the analytic to the applied comes with another potential problem: political and moral responsibility. Applied social science plays up its technical expertise. Yet such emphasis on methods and techniques obscures the fact that there is often a political choice in policy relevance. For example, do we want more income equality with lower economic growth, or more inequality with higher growth? Politicians have electoral accountability, bureaucrats follow the political will, but for academics things are different. Political prescriptions inevitably include a hierarchy of political goals and choices among different political priorities (even if these are buried amidst technical-sounding prescriptions). This might sound like a pedantic rehashing of the basics of democratic politics, but decisions that have a direct bearing upon the well-being of individuals and communities should be taken by those who can be held accountable for their behaviour. The outsourcing of politics to the expertise of neutral third parties (in this case academia) inevitably results in circumventing the very nature of political accountability in modern representative democracies. The scholarly quest towards unearthing generalizable patterns and subjecting one's findings to peer review is one thing; offering institutional engineering as a technocratic expert without accountability is another.

When the applied guides the analytic

The enthusiasm some students of comparative federalism have for prescribing federal institutions/constitutions also presents a challenge to social science methodology. Other than a postmodern minority, most contemporary students of comparative federalism use broadly positivist research methods and language. But no one seems to have taken issue with the ease and frequency of the short cuts from the analytical to the applied, and the potential methodological problems this creates for the reliability and validity of analytic social science itself. The porous separation between the analytic and applied challenges one of the foundational principles of positivism, which holds that there are political and social patterns that exist independently of the observer.

New Institutionalism emphasizes institutional/constitutional arrangements which distribute political power among political and social actors in a federal system. As an analytic framework, this is a stylized reproduction of political and social phenomena aimed at exploring the relationship between a small number of causal variables which is assumed to hold across various federations. The findings which then go through peer review are often probabilistic and incomplete, yet there is a belief that the workings of federalism will be gradually unearthed through scholarly exchange and inquiry. When constitutions modelled on the federations of the industrialized world are prescribed to divided societies of the industrializing world, as social scientists we are violating the positivist tenet separating the observer from the observed.

One example of this pattern is the export of continental European-style federal boilerplate constitutions to new federations of the developing world. This is a much neater model than trying to capture the workings of (common law inspired) Anglo-Saxon federalism through the examination of the bewildering complexity of custom and informal practices, as well as uncoded factors like ethnicity, language, demographics, culture, and class structure. The clearly written and codified formal structure of (Roman law inspired) European federalism is easier to export — at least in procedural terms.

But one of the foundational principles of positivism in the social sciences is, of course, an assumption that there are social facts independent of the observer waiting to be unearthed. The short cut from an institutional/constitutional framework of analysis to an institutional/constitutional prescription quite simply influences the nature of the observed by increasing the supply of new federations designed through the prioritization of institutional/constitutional factors. The more new federations are born out of short-term constitutional shock therapies, the more analytic comparative federalism will end up playing catch-up with its imprudent sibling prescribing federal constitutions with abandon.

Uncodified factors and the *longue durée*

In the late 1950s, the French historian Fernand Braudel outlined what came to be known as the *longue durée* approach to social sciences and history.¹ Braudel called for a holistic history examining large-scale social factors and long-term patterns, rather than the more common historical oeuvre isolating specific events and emphasizing the leading personalities involved in them. Emphasis on long-term patterns across time inevitably came with an interest in macro factors that accounted for these. It was the uncoded social, political, and economic structures which provided longevity.

While it might initially appear unrelated to the concerns of comparative federalism, Braudel's approach is in many ways the most appropriate to evaluate the success (or failure) of federalism: formal institutions/constitutions are part of the story but are not sufficient on their own to explain the workings of federalism, which requires a holistic long-term evaluation taking into account the effect of uncoded social, political, and economic structures.

If we were to judge Belgian federalism in light of the current constitutional tinkering, the simultaneous creation of territorial regions and non-territorial communities might appear as illustrious examples of institutional engineering. But in a few decades time, historians might very well be studying Belgium's very long process of divorce, highlighting how deep social and economic divisions between the halves of

the country remained during the ups and downs of institutional/constitutional redesign. Although Belgium might defy these challenges in the long term, one lesson remains: an evaluation of federalism cannot be reduced to the constitutional provisions dividing federal and provincial jurisdictions, or the number of seats provinces are allocated at the upper house of parliament, or the procedure for constitutional amendments.

In constitutional politics, Andrew Reynolds advocates a comparable holistic approach — but this time with an intellectual debt to clinical medicine and without an emphasis on long-term structural factors. The holistic approach in medicine takes into account various causal factors, the interaction between these factors and their timing, further consequences of the cures prescribed to ailments, while acknowledging the potential unknowns. Altogether these can create causal patterns that cannot easily be reduce down to an isolated relationship between a dependent and an independent variable: ‘Like medicine, constitutional therapy must be about more than treating particular ailments, considered in isolation. Therapy, whether medical or political, must consider the patient as a whole.’² But when it comes to the prescriptions of applied comparative federalism, the long-term holistic view is underplayed in the dominant constitutional models exported to new federations.

Students of comparative federalism committed to scholarly analytical goals have an innate understanding of how federalism in the industrialized world has evolved over the long-term, leading to informal practices which have come to be

part of the day-to-day functioning of federal systems. Furthermore, branches of analytical comparative federalism examine how federal constitutions acquire their working dynamics from interaction with uncodified factors like ethnicity, language, demographics, culture, and the economy. There is, thus, an awareness of the incomplete state of our knowledge and the probabilistic nature of our theories of federalism. Those who hold holistic long-term views also recognize the importance of factors beyond federalism. In addition to obvious factors like free and fair elections, freedom of expression, and economic development, other structural factors play a key role: a functioning system of rule of law that protects life and property, the impersonal application of such law by the courts, and a sizeable middle class that can act as the main stakeholder of the new federal order, and who can help minimize the disruption of politically connected speculative wealth creation that economic liberalization and political democratization frequently produce in the short term.

Yet the lure of policy relevance can sometimes lead to the repacking of various analytical findings into constitutional/institutional prescriptions which project a false sense of confidence and clarity. True, many post-conflict societies around the globe are in immediate need of federal solutions that could provide quick paths to reconcile unity and diversity. In these cases, one does not have the luxury of long-term scholarly reflection of course. But there is a real risk of oversell (and subsequent disappointment) when we put all our eggs in the institutional/constitutional basket and expect immediate results from constitutional engineering.

Notes

1. Fernand Braudel (1958) ‘Histoire et sciences sociales: La longue durée’, *Annales. Économies, Sociétés, Civilisations* 13(4): 725-753.

2. Andrew Reynolds (2005) ‘Constitutional Medicine’, *Journal of Democracy* 16(1): 60.



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