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Learning from Laurier About American Constitutional Federalism

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Americans and Canadians have very different views about the “constitutional politics” of federalism. Both countries feature “constitutional federalism” regimes, where the federal principle is judicially enforced. However, Canadians seem to favour a “strategic” understanding of federalism, according to which provincial autonomy will be preferred, even when federal intervention might be constitutionally available; in contrast, Americans tend to embrace a “tactical” understanding of federalism, according to which state/provincial autonomy is only asserted when a particular policy will not or cannot be implemented at the federal level. As a result, many Canadians prefer a regime where these policies are decided in Quebec City, Edmonton, or Vancouver rather than Ottawa, even if a momentary federal majority might allow their views to prevail nationally. Americans, in contrast, tend to adopt a “tactical federalism” where states’ rights are asserted only when current majorities in Washington are unfavourable. As a means of demonstrating these differing understandings of federalism, I will revisit Laurier’s principled insistence on provincial autonomy on language issues, despite the harm to western Francophones, in order to show how this attitude stands in sharp contrast to the American experience. It highlights the need for judicial doctrine to match each country’s different constitutional politics.

The comparative approach to constitutional design and interpretation is often used to import useful ideas, proven beneficial elsewhere, where drafters or judges find them appropriate for domestic application. Prominent examples are the American Bill of Rights, one of the framework documents used in crafting the Canadian Charter of Rights and Freedoms, and the Canadian principle of reasonable and proportionate limitation on guaranteed rights, used in crafting and interpreting the post-apartheid South African constitution.

Constitutional federalism, rather, must be grounded on a decision to preclude elected governments from choosing to act outside of their assigned jurisdictions, even if a current political majority so desires.

Study of significant doctrinal *differences* with other nation's constitutional regimes can also be useful and insightful to better understand the normative foundations of *our own* constitutional structure. Complex jurisprudence developed by supreme courts to police the legislative powers allocated to federal or state/provincial governments, and application of this jurisprudence to Twenty-first Century challenges, is enhanced by a rigorous analysis of these normative foundations. Comparative study assists in revealing these foundations.

Any inquiry into constitutional federalism must begin with an understanding of why a state is federal rather than unitary. I put to the side an efficiency argument that the creation and administration of certain policies are best left to sub-national levels of government. This is, of course, true, but even in the epitome of centralized government – France – a citizen of Marseilles concerned about the details of garbage collection does not need to consult the National Ministry of Sanitation in Paris. As with the relationship between provincial/state governments and local and regional governments, efficient solutions can be crafted by ordinary legislation. Constitutional federalism, rather, must be grounded on a decision to preclude elected governments from choosing to act outside of their assigned jurisdictions, even if a current political majority so desires.

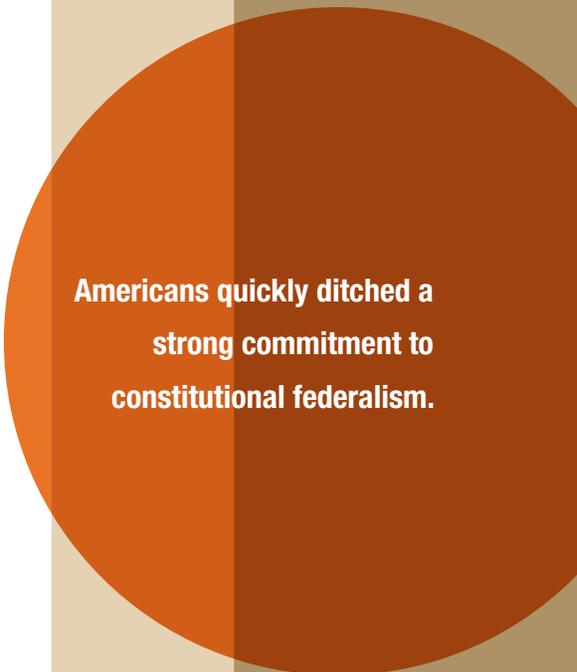
Theory suggests several reasons why constitutional drafters might impose a federal regime on elected officials. To secure initial constitutional ratification, perhaps drafters needed the support of powerful state leaders who did not aspire to national power, and these leaders demanded entrenched guarantees that their own political power would continue. (Some suggest this explains Australian federalism; the lack of such guarantees clearly explains anti-Federalist concerns of New York Governor George Clinton.) Another reason is ideological: a tightly-constrained federal government precludes myriad redistributive social policies that can be defeated within states or provinces by the exit of the affluent or mobile corporations to other jurisdictions.

The original normative theory for both American and Canadian federalism was grounded in another theory, based on the demographics of our nations at their founding: heterogeneous populations with distinctive regional homogeneity (among those eligible to vote). At its most basic level, the citizens of New England, New York, the mid-Atlantic, and the South feared that a national government would create public policies with which they fundamentally disagreed (particularly the South and particularly over slavery). Citizens were content to allow public policy for those in other regions to be set by their own state legislatures, in return for their own control of local policy. Likewise, this was the animating theory behind support for the British North America Act by Cartier and Langevin on behalf of the Quebec *Bleus* and Brown on behalf of the Upper Canadian Grits. *Les Bleus* feared an English majority in a Canadian Parliament governed with representation by population, and secured constitutional guarantees that placed under exclusive provincial

control “those questions which we did not want the fanatical partisans of Mr Brown to deal with,” while the federal Parliament would deal with “the settlement of the great general questions which will interest alike the whole Confederacy and not one locality only.”¹ Brown and other Upper Canadian opponents of Macdonald, in contrast, accepted the scheme to preserve the ability of predominantly Anglophone/Protestant Ontario to make its own decisions on social and religious matters without having to navigate the expected federal coalition between Macdonald and Cartier.

Americans quickly ditched a strong commitment to constitutional federalism. Beginning early in U.S. history, and rupturing entirely with the end of slavery after the Civil War, Americans who had invoked principles of state autonomy to oppose federal policies with which they substantively disagreed tended to ignore principles of state autonomy when their views were dominant in Washington. The idea of “strategic federalism” – that federal majorities should abstain from legislating on issues, leaving it to states to adopt diverse public policies, even when the federal majority is in one’s favour – seems to violate common sense of Americans historically ingrained in “tactical federalism” – the assertion of state’s rights only when the national majority is against you.

The father of American tactical federalism might be James Madison. Prior to the Constitutional Convention of 1788, Delegate Madison drew on his unhappy experience in the special-interest-driven Virginia legislature to favor a federal veto of state laws. Significantly, he argued that federal disallowance would not only prevent states from thwarting legitimate federal power (the official explanation for the disallowance power in the BNA Act), but also to prevent states from “oppressing the minority within themselves.”² By the Second Congress, Representative Madison of Virginia’s 5th district, in opposition to Treasury Secretary Alexander Hamilton’s proposals to create a national bank, argued that the Constitution did not expressly grant this power to Congress, and rejected Hamilton’s broad interpretation of the Congress’ constitutional power to make laws “necessary and proper for the carrying into Execution of the foregoing powers.” Secretary of State Madison’s interpretive turn changed again when he returned to ascendance in Thomas Jefferson’s administration, arguing that the Treaty Power authorized the government to execute the Louisiana Purchase despite no specific authority for such legislation. (The Privy Council rejected similar claims for Canada’s government.) During his final two years of Jefferson’s presidency, Madison supported the creation of a second national bank.



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1. Arthur I. Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Toronto : University of Toronto Press, second edition, 1997), 40.
2. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 117.

Canadians recognize their diversity and prefer a host of issues to be resolved provincially, even if their favoured policies might not be adopted elsewhere.

Perhaps the best known American example of the tactical use of constitutional politics to preserve state autonomy was the resistance of southern states to the Civil Rights movement. A notable and then-controversial act was President Eisenhower's dispatch of federal troops to Little Rock, Arkansas, to enforce the constitutional rights of African American schoolchildren to attend desegregated schools. Yet just over a century earlier, the roles were reversed: faced with popular and official resistance in northern states to the return of fugitive slaves – a “right” guaranteed to slave-holders in the Constitution — Congress provided that federal marshals would be employed to capture and return escaped slaves. Presidents Fillmore and Pierce ordered federal troops to enforce the constitutional rights of slave owners. And just as the United State Supreme Court affirmed the primacy of federal law over states' rights claims in the Little Rock incident, the antebellum Court reversed efforts by state courts to frustrate the return of fugitive slaves.

More recently, a states' rights perspective that animated many conservative Republicans during the ascendancy of liberal Democrats beginning with Franklin D. Roosevelt melted away when the Reagan and Bush administrations could adopt politically popular conservative policies. Even more recently, when President Obama sought to admit Syrian refugees, Republican governors objected to placement within their states, claiming the power to determine their own immigration policy; liberals were outraged at this assertion of states' rights (doctrinally baseless in light of Congress' plenary power over immigration). However, faced with fears that President-elect Trump will deport undocumented non-citizens living peacefully within American borders for years, some Democratic governors have promised sanctuary; conservatives are outraged at this “lawless” assertion of states' rights.

Not so in Canada, where The Federal Idea has been and remains strong. Canadians recognize their diversity and prefer a host of issues to be resolved provincially, even if their favoured policies might not be adopted elsewhere. Of course, Cartier and Langevin, fearing the English majority in a population-based federal legislature, feared English control of religious matters and civil institutions. The real test came later, when the opposition Liberal Party was under the leadership of Wilfred Laurier.

One of the most important events in Canadian history was the controversy surrounding the Manitoba Schools Act, originally passed in 1890. When Manitoba's demographics shifted from approximately sixty-fourty English-French to a population where Anglophones exceeded eighty percent, Manitoba's legislature halted public funding for denominational schools, instead providing for a single system of public schools, where instruction would be in English (and where prayers would follow the Protestant rituals). After their successful challenge to the statute in the Supreme Court of Canada was reversed by the Privy Council (infamously reasoning that Francophone Catholics were not “prejudicially affected” because they were still free to send their children to English-language schools and it was their own religious

views that led them to be “unable to partake of the advantages which the law offers to all alike”), Franco-Manitobans turned to the Canadian Parliament. The Conservative Prime Minister, Sir Charles Tupper, introduced legislation to overturn the Manitoba statute. However, the legislation was blocked by Laurier as Leader of the Opposition. Laurier maintained his unwillingness to support federal override legislation upon his election as Canada’s first French-Canadian and Catholic Prime Minister.

Laurier was so committed to avoid undermining the principle of provincial autonomy that he was prepared to accept Manitoba legislation that ended French Canadian dreams of a bilingual and bicultural western Canada. His federalism was strategic. For Laurier, the threat of improper intervention into the autonomy of the province of Quebec, by a Parliament where French Canadians would always be a minority, was real, having prevailed in a hard-fought battle to persuade Conservative Prime Minister John A. MacDonald not to use the disallowance power to overturn a Quebec statute settling the expropriation of Jesuit estates that included a provision permitting the Pope to approve the allocation of funds among Catholic Church entities. The need to adopt a strategic federalism had been already apparent to Laurier when serving as the Liberal Opposition leader. Explaining to an old friend, a leading journalist from his hometown, why he had acquiesced in legislation for the Northwest Territories that did not require bilingual government, he wrote:

There was no other solution for this question. I wish you would point out the necessity for the people of Quebec province to maintain inviolate the principle of local autonomy. There are circumstances when it may tell against us, but it is the only protection that we have under the constitution, and if we want to apply it in our own behalf we must be careful to apply it also when it is contrary to us[.]³

This landmark event in constitutional politics illustrates how Canadian constitutional values follow from the demographic and structural differences identified above. Many Canadians perceive of themselves as being in a permanent minority in national politics (Quebecois, western social democrats, prairie pro-energy/ pro-development conservatives), but with a strong probability of having their views of public policy reflected in legislation passed by their provincial government. Absent judicially-policed federalism, these Canadians would not be able to stop national majorities from imposing their will on them. Thus, the notion of strategic federalism remains vibrant in Canada today. To be sure, Canadians differ on details of their federalism, but the nuanced views of Quebec and non-Ontarian English provinces remain in the camp of “strategic” rather than “tactical” federalism. For example, the

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3. Joseph Schull, *Laurier: The First Canadian* (Toronto: MacMillan, 1966), 241.

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Supreme Court of Canada’s reasoning in the *Securities Reference*, wherein the justices recognized that primary jurisdiction over securities is provincial rather than federal, had nothing to do with the substantive regulations to be imposed; such a debate about principle, rather than substance, almost never happens in the U.S. (In emphasizing Laurier’s views on language rights and provincial autonomy I must not be understood as denying that other factors played in the advent of a Canadians’ embrace of “strategic federalism.” Rather my purpose is to contrast these views with the typical American view.)

What can Americans learn from Laurier? Liberals in California and conservatives in Texas are largely unprepared to accept that “there are circumstances when it may tell against us.” When liberals like the late Senator Edward Kennedy favour national health insurance, it is not because each state cannot jurisdictionally regulate health care and not really to ensure that his constituents in Massachusetts are not inhibited from enacting socially progressive health schemes because of fear of a race-to-the-bottom by neighbouring states. (Ironically, under then Governor Mitt Romney, Massachusetts adopted just such a scheme in spite of no signs of cooperation from New Hampshire, where the license plates still read “Live Free or Die.”) Rather, Kennedy wants federal legislation to preclude the minority of Texans who need government health care from being denied an essential service because of the majority preferences of their fellow Texans. Likewise, pro-business conservatives who enacted federal legislation to preclude state court tort litigation did so to preclude the minority of citizens in Illinois or California from being harmed by what they believed was inefficient and anti-business state laws.

History leads back to doctrine. Canadian constitutional politics require an arbiter of federalism (the Supreme Court), and they require a doctrine that prevents federal laws not falling within the powers assigned by s. 91, “however important it may seem to the Parliament of Canada that some such policy as that adopted ... should be made general throughout Canada...”⁴

A study of the comparative federalisms of Canada and the United States reveals important differences. Americans favour federal laws not only when states are jurisdictionally incompetent or politically incompetent (due to race-to-bottom concerns) but also simply when it seems to Americans that it is important that the policy “should be made general throughout the United States.” Coherent constitutional doctrine should reflect this constitutional politics.

4. Board of Commerce Act, 1922, 200-01