

## FEDERALISM \*

*Peter H. Schuck* †

Thank you very much. It is a great pleasure to be here, and I will say that only Hiram Chodosh could get me on a plane at 5:30 in the morning to come to Cleveland for less than a day. It is a great honor to be invited to participate in this program. Dean Korngold has put together a fabulous team here. I have seen it grow over time; I first visited the Frederick K. Cox International Law Center (“Cox Center”) probably four or five years ago and I have observed with admiration its development and programmatic expansion. The Cox Center is a very exciting venture, and I am glad to be able to participate in another of its symposia.

I am also very delighted to be on the panel with Chibli Mallat. Most of you have probably not heard him, but you will have the great pleasure of doing so. He is a wonderful speaker and a remarkable statesman in the Middle East, a man of great courage. Fortunately, because he is so knowledgeable about the Middle East, I can confine most of my examples to other systems—although the development of Iraq is obviously an occasion for rumination about federalism, so I will make some reference to it.

Let me begin with some conceptual clarification—at least I hope that it is a clarification; it sometimes turns out to be just the opposite. In any event, I want to define some key terms that I and the other speakers will be using today and some distinctions that we would do well to keep in mind.<sup>1</sup> The first term is “federalism.” In an earlier article, I defined it in a way that I think is useful, so let me just read from this: “By federalism, I mean a system that divides political authority between a nation-state and sub-national polities within its territory so that both the national and sub-national polities directly govern individuals within their jurisdiction, and that confers both national and sub-national citizenships.”<sup>2</sup> A second concept is “devolu-

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<sup>1</sup> The analysis that follows draws on Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195 (2000) [hereinafter Schuck, *Citizenship*]. See also PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* (2000) (discussing federalism in the United States in chapter three).

<sup>2</sup> Schuck, *Citizenship*, *supra* note 1, at 199.

tion”—the allocation of authority to sub-national units of government or to private actors. Federalism necessary entails some devolution, but there can be devolution without federalism. This can occur when a centralized polity adopts some form of “decentralized administration” (a third concept) without creating sub-national units of government. The United Kingdom (“U.K.”) is an example of a polity that has increasingly devolved authority to Scotland, Wales, and Northern Ireland. The U.K., however, is not a federal system in any important sense of the term. In contrast, the aptly-named Federal Republic of Germany devolves virtually all administrative authority to the *lander*, leaving relatively little at the national level. Federalism, as we shall see, comes in many different forms, combining discrete features in many different ways. Accordingly, we should not think of federalism as a single model, at least in its substantive manifestations.

A second important distinction is between nation and state. Our formally titled subject today is nation-building, but I think that what we really mean is state-building. The building of a state depends upon a sense of nationality—of peoplehood or special connectedness—within that state. But nationalities and states are often in conflict, and a federal system must regulate that conflict. When we advocate nation-building, then, I think that we are actually seeking to build the kinds of states that can contain those nations without suppressing them. Nations being collections of individuals who share some common commitment by reason of descent, language, culture, or some other form of “glue” that causes them to think of themselves as having a common destiny. In contrast, a state is a more formal, structural idea.

The title of this session, Rebuilding Nation-Building, suggests another necessary distinction—between nation-building and nation-maintaining. It is not enough to build a nation if the nation cannot be maintained. Today, enormous centrifugal pressures are tending to fracture nations. Russia is a particularly important example; Iraq is another. Although we talk about whether and how the new state of Iraq can be built, the reality is that there are at least three nations within Iraq—the Shia, the Sunni, and the Kurds—that must somehow be contained and integrated in a very creative way, about which Chibli Mallat will surely have more to say. The trick, then, is not just building a state in Afghanistan or Iraq, but maintaining it.

Having cleared away some of the conceptual underbrush, let me return to and expand upon a point that I mentioned earlier—that there are a number of different glues or bases of nationhood. Each of these glues operates in a rather distinct way, and their co-existence in one particular state structure makes for some very complex problems. Language, for example, is perhaps the most important glue in binding and building a nation but is often a source of great discord within a nation-state. Indeed, it is true of almost all of the glues that they can also, and inevitably do, create pressures

for state-destroying fragmentation. A second glue is religion. In Poland, religion constitutes what is perhaps the essential element of “Polishness,” of what constitutes it as a nation-state. A common sense of patrimony—the idea that the nation has a common past and a common future—is a third kind of glue. This common patrimony, however, can exist more in myth than in reality. Sometimes it is a result of prolonged dictatorship, as when Joseph Stalin created a sense of Soviet nationhood partly through force and partly because of his role in waging what Russians call “The Great Patriotic War,” World War II. We also know from cultural historians that a felt nationhood is often a product of self-conscious myth-making. Many traditions that are associated with nation states, like the U.K., are actually of relatively recent origin; they were designed partly in response to a particular historical contingency, but partly in a strategic effort by leaders to forge a sense of nationhood.<sup>3</sup>

A fourth kind of glue is constitutionalism. This can be true in several senses. A constitution is, by definition, the constituting instrument of a nation. But the political, military, and ideological struggles that almost always precede the adoption of a constitution—and that we see in Iraq today—can also build the cohesion, paradoxically enough, needed to sustain the national project. At the end of those struggles, a constitution can often become the symbol, indeed the metonym or actual representation, of the rule of law and of the nation.

The last kind of glue that I will mention, although there are of course others, is the importance of external threats—real, imagined, or contrived. This is very common. I conjecture that the sense of nationhood in the United States, while certainly strong before World War II, was magnified by World War II, by the cold war that followed, and perhaps now by the War on Terrorism. The external enemy is a very important part of nationhood in virtually all cases.

What are the *techniques* of nation-building? There are many, and I will just mention a few here. One technique is the subordination of an unpopular minority. In Turkey, for example, the repression of the Kurds has been an important part of the national identity. In the former Yugoslavia, Josip Broz Tito created a sense of Yugoslav nationalism that had never existed before and that, of course, does not exist anymore. In the United States, territorial expansion and conquest helped to fortify the sense of national “manifest destiny” as well as establish a territorial base for nationhood. Leadership, a subject to which I shall return at the conclusion of my remarks, is an indispensable technique of successful nation-building, one that can take a variety of forms. Sometimes, it is charismatic leadership,

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<sup>3</sup> See generally THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 1983).

sometimes dynastic leadership, sometimes military leadership, and sometimes moral leadership, as in the cases of Mahatma Gandhi and Jawaharlal Nehru in India, and Nelson Mandela in South Africa.

I now turn to federalism as a technique of nation-building. Federalism has an important historical dimension. If one looks across federal systems, one can see that they originate in four principal ways. The first is when a pre-existing colony decides to federate. Switzerland, for example, is a very successful federal system which consists of cantons that came together to form a federation. The same is true of the United States and the thirteen colonies. A second historical pattern is when a federal system is formed under imperial auspices. Australia is an important example of this, as is Canada. A third historical pattern is when an existing nation-state creates a federal system along cultural lines, as in the case of Belgium, or along political lines, as in the case of the United States when it expanded west to create new states. The fourth historical circumstance is military conquest. The Federal Republic of Germany is the product of the Allies' conquest; with a few exceptions, like Bavaria, the *lander* were not established along the pre-existing political boundaries of any particular pre-1945 polity in Germany. Instead, they were formed according to the patterns of Allied occupation and for a variety of administrative and military reasons that the Allies wished to institutionalize in the new federal system.

Let me now consider certain structural features of federalism. First, federalism bears an ambivalent, even paradoxical, relationship to nation building. The forces that prompt the creation of a federal system in the first place are the very forces that may impel disaggregation and prevent the nation, once established, from maintaining its unity and perpetuating itself. What are these underlying forces that are both conducive to the creation of a federal system and to its destruction? The most important, I think, is the underlying sociological pluralism or diversity of the civil society in which the political design decisions are being made. One tends to find in federal systems civil societies that are highly pluralistic to begin with, so it should be no surprise that those societies that are economically, sociologically, religiously and culturally diverse would seek to recognize those pre-existing pluralisms and embed them in a political structure designed to preserve them.

Secondly, political formations exhibit certain economies and diseconomies of scale.<sup>4</sup> Here, I want to emphasize the diseconomies of scale that, along with political and other considerations, may impel a polity to devolve power to smaller units. In the post-World War II period, political system-builders tended to emphasize the economies of scale—that is, the reasons for moving from a local to a national, or from a national to a super-

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<sup>4</sup> See generally ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* (1973).

national formation. Environmental protection and trade promotion are among these scale-related reasons. Since the fall of the Soviet Union, however, it has become all too clear that notwithstanding some economies of scale, their advantages are often exaggerated and mask the fact that smaller is often more effective or better or fairer as a structure of political governance.

Minority group demands are among the most important reasons for the establishing of federal systems. The desire for patronage, which is often an aspect of minority group demands, is another pressure favoring devolution through federalism. Indeed, it may be as important a factor as the underlying diversity of civil society, with which I began. Yet another structural feature that helps to explain the creation of federal systems in some areas and not in others has to do with the geographic distribution of populations in pluralistic societies. The fact that there are many members of particular religious or linguistic groups, or people with common economic interests, are clustered in particular regions within the larger polity tends to improve their ability to organize, bargaining power, sense of distinctiveness, and demands for self-determination.

The next question is: what can be devolved in a federal system? Let me suggest five categories, just by way of illustration. One is the control of physical resources. In Iraq, as Chibli Mallat will probably mention, the most important geophysical resource is oil, and the bitter struggle over the federal structure of Iraq will certainly pivot around the decision as to who gets which oil deposits and how revenue-sharing will work. The Kurds control a good deal of oil in the region around Kirkuk, the Shia in the south control the oil-rich area around Basra, and the Sunnis in central Iraq have little local oil. This may also lead to what international economic analysts refer to as "the curse of oil." That is, the oil is an extraordinarily rich resource for economic development, for patronage, and for a variety of other mechanisms of state-building, but it can also lead to political paralysis, civil war, and even invasion by outsiders. Control of physical resources, then, is a major stake in the political conflict over devolution and the construction of a federal system.

A second subject of potential devolution is control of culture or ethnicity. Here, the most important decisions have to do with the preservation of local languages, patterns of worship, and perhaps dress, as we see in the struggle in France over whether young women can wear the veil in public schools. A third thing that can be devolved in a federal system is the control of law or politics or other public functions. Indeed, when we speak of constructing a federal system, we are usually talking about the structural division and distribution of the center's legal and political authority. In most of those situations, however, what is really at stake is control of those things that I have already mentioned; the political structure often represents little more than the outcome of those struggles over resources, patronage, and

culture. Much the same is true of efforts to devolve control of military forces. Here again, Iraq is a very interesting example because one of the most momentous decisions that the state-builders there must make is whether the Kurds are going to be able to retain their own military force (the Peshmergas), as they are insisting—the Shia militias are also at issue—and how these military forces can be integrated with the national security forces that the Iraqi central authority is seeking to develop.

A final category of devolved power consists of miscellaneous concessions that the center can make to the sub-national units. Among the most important of these concerns control over the electoral systems that are established in a particular polity. This devolution, too, will be largely epiphenomenal, reflecting other social and political realities. One favors a particular voting system primarily based on one's assessment of how one wants political authority and these other resources distributed—although once established, the voting system can take on a life of its own, resisting change. Lebanon's system, for example, is based on a census that is now some seven decades old, one that is almost impossible to change because of political interests whose power would be diminished by reform. One hopes that the voting systems that are adopted in newly federalizing societies like Iraq will encourage democratic state-building patterns. An extreme example is the transitional electoral rules in Iraq, which required that a government receive a two-thirds vote of the legislature, a very unusual provision that was designed to ensure an unusual amount of coalition-building, consensus, and horse trading, which was thought to be necessary to sustain that government once it was in place.

It cannot be emphasized enough that each federal system is unique, the product of historical, political, and cultural circumstances that cannot simply be exported from one state to another. Having said that, one can identify some relatively—and I emphasize the word relatively—successful models of federalism to which we can look for some guidance about how to construct new federal systems. The main ones that I have in mind are the United States, Canada, Germany, Switzerland and India, but it is important to stress how tentative these judgments must be. Germany, for example, is experiencing an economic crisis that many believe is rooted in the federal system that the Allies imposed on it after World War II. In order to reform its economy, it may have to reform its federal system and give less power to the Bundesrat, which now can exercise a veto power over any kind of significant change in national policy. Similarly, India's federal system is very robust but threatens to undermine the nation's future through corruption, patronage demands, linguistic self-determination movements, and so forth.

Let me now move to the threats to the viability of federal systems. The first threat is that the structure of the federal system itself will reinforce existing social cleavages. Here, it is instructive to compare the federal systems of Canada and the United States. Speaking very generally, the federal

system in the United States tends to smooth over pre-existing cleavages, transcending and muting them, whereas Canadian federalism tends to exaggerate or reinforce the cleavages that produced the federal system in the first place. This is true as a constitutional matter, and it is true in some other respects as well. Perhaps the most important design decision in any federal system is whether, in making the kinds of concessions to the subunits that I discussed earlier, the polity adopts institutions that strengthen the always-present sources of disaggregation.

A second threat arises out of changing conditions that put a strain on the original bargain which produced the federal system. Here again, Germany is a good example; the center and the *lander* are now in the process of renegotiating the original bargain in order to deal more effectively with new global challenges to the German economy. A third threat is the unfortunately common pattern in which sub-national units oppress certain of their minorities, which often furnishes a pretext, if one is needed, for the national government or an external power to invade the sub-national unit. The American Civil War exemplifies the first pattern; there, the national government invoked the interests and rights of southern blacks as a *casus belli* against the slave states. Illustrative of the external invasion pattern is the Soviet Union's annexation of the Baltic States in the run-up to World War II. Even today, Russia exerts pressure against the now-independent Baltics and on one of its own regions, Chechnya, over their treatment of Russian minorities. In Canada, Quebec's discrimination against Anglophones, as well as francophone complaints in other provinces, have also tested the continuing viability of the federalist bargain.

As my time is just about up, let me quickly mention several additional points. First, gross inequalities among sub-national units may create strains on the federal systems, as the center tries to impose uniform nationwide standards while the more prosperous regions resist subsidizing the poorer ones. Growing political discord over the costs of integrating the relatively backward eastern *lander* into the Federal Republic of Germany illustrates this problem, as do similar problems in Spain, Italy, and India. Second, federalism can ease the path to nationhood, but it is epiphenomenal. That is, the existence and success of federalism in state-building reflects underlying political, social, cultural conditions. The extent to which a federal system has independent causal force once it is established is more difficult to ascertain. Third, everything about a federal system depends on its structural and operational details. These details go to the allocation of the particular powers, the protection of minorities, the voting systems that are established, the economic inequalities that exist and that are tolerated or perhaps even exaggerated by the federal system, the underlying pluralism of the civil society, and then the extent to which the federal system reinforces or transcends the preexisting differences.

The final point I want to make is that what matters most in the role of a federal system in state-building is the political culture of nationhood, and that the sources of this political culture of nationhood constitute a great mystery. A political culture is not something that can be designed, and not even something that we can fully understand—partly because it possesses an affective emotional component that is elusive, opaque, and historically conditioned by factors such as struggles against colonialism and other great national crises. Finally, and perhaps most centrally, political culture is a product of leadership, often charismatic leadership. This leadership may be highly constructive. Consider, for example, Mandela and his theatrical embrace of the Springbok soccer team. When he donned the team's green jersey, he became a symbol of racial conciliation at a time when national divisions could easily have pushed the other way and degenerated into a bitter civil war. At the other end of the state-building spectrum is Slobodan Milosevic, who exercised his leadership by perverting Tito's carefully balanced federal system into a machine of ethnic domination and genocide that destroyed not only countless lives but also any hope for a unified state.