

## II. The Benefits & Dangers of Federalism

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While it is doubtful that any State...would argue that it is wise policy to allow students to carry guns on school premises, ... the theory and utility of our federalism are [here] revealed, for the States may perform their role as laboratories for experimentation to devise various solutions.--Justice Anthony Kennedy, concurring in United States v. Lopez (1995)

Federalism is the most important political device for the regulation and accommodation of the world's most burning and devastating conflicts. Without some form of federalism, the conflicts in Northern Ireland, in the Middle East ... [and elsewhere] will not go away.--Thomas Hueglin, in Rethinking Federalism (1995)

This seminar will examine federalism as a system of governance, with particular attention to the United States and Canada -- including protections for indigenous peoples. In the final weeks we will turn to recent experience in Europe and beyond. As the quotations above suggest, the benefits of federalism might seem to apply rather widely across human societies; however, the limits of these benefits and their costs also deserve careful analysis.

In our exploration, we begin with a widely accepted definition: Federalism is the form of governance in which (1) two levels of government rule the same land and people; (2) each level has at least one area of action in which it is autonomous; and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere. For those governmental systems, which profess to be democratic, one might add another point: (4) each level of government has powers, which are delegated directly to it by the people.<sup>1</sup> The study of federalism excludes "loose associations" of governments, such as NATO, and such "unitary governments" as France.

However, we will explore some intergovernmental patterns that lie at the border of federalism -- in particular, the relationships between Native American tribes and other US governments; and the patterns that have evolved between First Nations, the provinces, and the central government in Canada. In the final four meetings of the course, we will take the principles and cautions derived from experience in these two federal nations and explore their relevance in other regions. Depending on your interests, these might include

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<sup>1</sup> The three-part definition is found, for example, in William Riker, Development of American Federalism, 1987, p. 13; the fourth is added by others, such as Daniel Elazar; see his Exploring Federalism, 1987, ch.1.

the evolving “federalist system” of the European Union and regions with significant internal tensions – such as Northern Ireland, China/Hong Kong, Mexico/Chiapas, Afghanistan, and Iraq – where federal systems, carefully designed, might be a route to reducing suspicion & violence, encouraging economic growth, and perhaps enhancing liberty.

### **Federalism and the Purposes (and Dangers) of Government**

A "government" is usually defined as the institution that holds a monopoly of legitimate coercive force within a defined territory. Such an agency of human power offers great potential advantages to its citizens, and great dangers too. Those who prefer a federal system of governance (in contrast to a unitary government) generally argue that this plan reduces the dangers while increasing the benefits. Thus a federal system may be helpful in encouraging and preserving **individual liberty**, since citizens who feel aggrieved can appeal to more than one "final" authority, and they may also be able to move to a different state or province. Federalism may also provide a route to **community autonomy**, a value emphasized by groups of native peoples in the US and Canada, by the leaders of francophone Québec, by Sri Lankan dissidents, and elsewhere; and thereby it may help a strife-ridden nation become a **peaceful society**. Moreover, a federal system may encourage active involvement by citizens, thus nourishing **participatory democracy**.

Federalism also encourages each state or province to devise its own strategies for **economic development** -- strategies which may be more effective (because they are based on a closer understanding of local culture, resources and skills), and which, through the variety of different strategies tried by different states and provinces, may produce innovative programs whose success can then be emulated by other regions & nations.

A federal system may have a similar advantage in other fields -- for example in trying distinctive strategies to undertake stem-cell research, to obtain prescription drugs, to treat those who are dying, and generally in the field of **social services**. As Justice Kennedy suggests in the quotation above (he is borrowing from Woodrow Wilson and Justice Brandeis decades earlier), states may serve as important "laboratories for experimentation".

Yet perhaps the benefits are overstated, and some disadvantages may be lost to sight. For example, will the devolution of responsibilities in a federal system sacrifice values of **equality** and **social justice**, because of differences between rich and poor regions? Will those values and others be diminished when states and provinces are given more power, because citizens of these limited regions may be less tolerant of minorities in their midst? (The history of the U.S. South and the treatment of native peoples by Canadian provinces offer sobering examples.) Will states and provinces compete against each other in destructive ways, undermining the economic-development strategies of all?

Moreover, it might be argued that states and provinces often lose their capacity to take a broad view of social issues because individual industries and groups have undue influence there (influence that is lessened when action is pushed up to the national level); those who study the role of tobacco in North Carolina, or mining interests in Montana and British Columbia, may wonder if devolution and deference to localized sentiment will be mainly a route to warped social values and diminished democratic vitality. So James Madison's concerns in *The Federalist* -- about the dangers of narrow interests controlling policies in small republics -- may still apply.

An alternative approach is provided by those who prefer loose confederation or complete separation, who find the benefits of federalism too modest, when applied to their distinctive polities. In Québec, and Northern Ireland, and some of the original 13 American colonies, would loose confederation or independence be preferable, they ask, so each geographic area can develop its own trade policy, its own language and schooling requirements, its own racial or race-neutral laws?

In the seminar, we will want to match reality against the rhetoric from these several sides. So we should ask: Under what conditions can a federal system better achieve one or all of the broad goals listed above (and others we might add), if certain services and regulations are shifted downward to the provinces, states, and other subdivisions? What are the alternative forms and strategies of devolution that might be used, and what are the benefits and problems of each, as we look closely at various fields (education, health and welfare, for example; highway safety; water pollution & wetlands; economic-development strategies by states, either going it alone and through inter-state cooperation)? What trade-offs should be considered, and how can we identify and then act strategically to achieve acceptable compromises among such contending deeply held values as individual self-interest, community cohesion, and equal opportunity? Under what conditions is a unitary government, or a loose confederation, likely to provide a higher level of net benefits, measured by the values listed above, than a federal system?

### **Readings:**

Hamilton, Madison and Jay, The Federalist Papers (Rossiter, ed.: 1961 or later edition). You need not purchase, since the required essays from this book are in the course packet; but in book form this is a valuable source, especially for those who will do future work in law or political theory.

Michael Whittington and G. Williams, eds., Canadian Politics in the 21st Century (2008) – you should purchase; copies will be on the Gov 81.24 shelf.

### **Weekly Schedule**

- Overview, with two court cases -- on gun control & medical marijuana -- and several newspaper articles
- Federation or confederation? – battles at the Founding
- The victory of “centralized federalism” & recent conflicts in the courts
- Fighting the Feds and reaching beyond: tensions and opportunities in welfare, health and education
- State innovation, economic development, & ethical conflicts
- Canadian federalism: early hopes & evolving tensions
- Canada & Québec: federalism with special status? or 1 of 10 equal provinces? or an independent nation?
- Community traditions, individualism, & capitalism: conflicts and strategies in Native-American nations
- The rights of Aboriginal Peoples: the Canadian case

### **Organization of the Seminar & Requirements**

1. Seminar meetings will include some chunks of lecturing (15-20 minutes) by the instructor, but most of each session will be devoted to discussion, framed by student oral reports and papers. Personal computers may not be used during class meetings.

2. Members of the seminar will write eight brief papers. Each paper should be on a topic related to the week's reading; you may respond to one of the syllabus questions or construct your own argument. Maximum length for each paper is 250 words (*not more than one page*): double-spaced, using type size and margins approximately like those in this syllabus (not this size—or this size!). If you have an oral report or a debate in any week, you may write your paper on the same topic (though you need not do so). Send your paper via email. I will review the papers before class, and they will help to shape seminar discussion. The essays will not be given precise letter grades, but they will be returned within a few days with comments. (Late papers will be noted, & they may have to be disregarded in planning for the week's discussion.)

3. Each member of the seminar will give two oral presentations (8-10 minutes in length), usually on the topics noted in the syllabus below. Some reading beyond the required materials may be needed in preparing these reports. In preparing these reports, you should assume that all of us have read the assigned materials; do not devote much of your 8-10 minutes to restating what is in the week's readings. You should consider the oral reports as opportunities to sharpen your skill in making verbal presentations: **practice beforehand, and refer only modestly to your notes while giving your report.** These presentations will be evaluated (though not precisely graded), and I will send you written comments. *Clarity and pace of presentation, eye contact, strategies of emphasis and humor and irony, as well as analytical content,* should all be kept in mind as you prepare and give your report (based on past experience, it is clear that your audience will find it **very helpful if you provide 1-3 pages of handouts**; these might include an outline of your talk, and perhaps one or two charts, or quotations from the documents or people you are discussing).

4. On occasion, we will use role-playing and debates, in order to explore important issues and to capture some interpersonal aspects of policy conflict and innovative strategies. I will attempt to balance the number of debates and oral reports assigned so there is rough equity in the demands on the time of all seminar members -- across the semester as a whole. I have no objection if any pair of class members wish to exchange debate or oral-report dates; but to do so, you both must send me emails, confirming the exchange, at least one week before the first "exchanged" assignment.

5. Each member of the seminar will write a 10-12 page paper (double-spaced). You may choose any topic in the field of federalism. Please confer with me as you work on your paper topic and let me have a 2-3 page description of your main argument, so I can offer reactions to your plans. Of course, I'd be glad to meet with you in my office, to discuss your topic as you go forward -- before or after you complete the description. You may, in your paper, draw upon essays you have written in other courses; in that event, add a footnote that explains the relationship between the two papers, and let me have a copy of your earlier essay.

6. In determining final grades in the seminar, class participation counts for 30%, weekly papers 30%, oral reports and debates 20%, and the final paper, 20%. There is no final examination in the course.

### **Seminar Topics, Readings, and Questions**

#### **Overview, plus two Supreme Court decisions on Federalism, & related articles**

In our first meeting, I will ask each of you to introduce yourself – where you are from, what your main interests are in relation to the theme of federalism and the tensions between *liberty, equality & other basic rights*, and anything else you believe may be of interest to us. Then I'll take 15-20 minutes to go through the syllabus, noting the basic approach in the seminar, describing briefly the issues for each week, and responding to questions as we go through the course plan. The main readings are two court cases. In every federal system, the courts – and especially the members of the Supreme Court – have a crucial function, for they patrol the boundaries between the effort of the national government to determine policies for *all* the nation's citizens, and the tendency of state officials to resist, so that *they* can decide upon policies and programs for *their own* citizens. The two cases below introduce this theme, which will have continuing importance in the course. As you know, eight one-page papers are required in the seminar.

**1. U. S. v. Lopez (1995)** – majority opinion by Chief Justice Rehnquist, and dissent by Justice Breyer. The vote was 5-4. Read marked portions closely (marked paragraphs total about seven pages).

This is a landmark case, in which the U. S. Supreme Court blocked Congress from some important interventions in areas that are usually associated with state and local control. The U.S. Constitution does permit the federal government to regulate commerce that crosses state lines.<sup>2</sup> But can this “commerce power” be extended to permit Congress to enact a law forbidding the carrying of a gun in a school zone? A five-member majority of the Court said “No!” and the Congressional 1995 statute was null and void. Four justices argued that the new federal law should be constitutional under the Commerce Clause.

>Which side do you find more persuasive? Is gun-related violence in and around schools a part of commerce, in your opinion, as well as a social problem? Is it part of an interstate pattern or purely local? Be prepared to discuss the strengths and weaknesses of Rehnquist's and Breyer's arguments -- and perhaps to defend your own position -- when we meet on the 6<sup>th</sup>. (If you are not used to reading court opinions, you may find this tough going; but when we meet, we will discuss any puzzles that need clarifying; also, feel free to send me a note before the 6<sup>th</sup> if you wish.)

>And what of the basic question imbedded in judicial review – Is it acceptable, in a democracy, for appointed judges to block policies favored by elected federal and state officials? If so, under what conditions in your opinion?

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<sup>2</sup> Article I, section 8 of the U.S. Constitution gives Congress the power to “regulate Commerce... among the several States.”

**2. Alberto Gonzales v. Angel Raich (2005)** – read both opinions carefully (about nine pages). In this case, ten years later, the membership on the Supreme Court was unchanged but the feds won. In focusing on the legality of “medical marijuana,” the Court again confronted the same general issue – the line between national power and state autonomy in a federal system. But now Rehnquist and two of his allies from the Lopez case were thrown into dissent, arguing unsuccessfully that the states must be allowed to serve as experimenters and innovators. Yet for six of the nine members of the Court, the reach of federal power under the Commerce Clause extended even to local marijuana plants grown on one’s back porch.

>Are you persuaded by Justice Stevens’s careful analysis or by Justice O’Connor’s vigorous plea? Is O’Connor correct in arguing that Raich is “indistinguishable” from Lopez?

>If you wanted to maximize *individual liberty*, what outcome would you favor in these two cases? What alternative goals might you consider in deciding the case?

The readings also include a few recent examples of state & provincial initiative – in the fields of health insurance (Massachusetts and beyond), water supplies (in the Great Lakes), climate change (California, four Canadian provinces, and ten Eastern states), and film production.

You can read these mainly as illustrations of the important role that states and provinces can play in meeting their citizens’ needs (and demands). Such initiatives can also provide lessons as to the pros and cons of various directions for public policy.

You may have questions about the wisdom of some of these programs. For example, should the eight states and two provinces in the Great Lakes basin be allowed to prohibit other regions with large water needs from buying water from this “outside” source? And what – if anything – could be done to reduce the “destructive competition” seen in state efforts to attract film studios? In this regard, is the film industry different from other fields in which states compete, such as auto manufacturing plants?

“439,000 more get health coverage,” Boston Globe, Aug. 20, 2008

“The Massachusetts Way,” New York Times, Aug. 30, 2008

“Can It Happen Here?,” N.Y. Times, Aug. 11, 2008 (Paul Krugman)

“Mass. Health Plan Wins Waiver...,” N.Y. Times, October 1, 2008

“Small Business...” N.Y. Times, July 10, 2008

“A Little Less to Worry About,” N.Y. Times, Aug. 8, 2008

“Congress Passes Great Lakes Protection Plan,” N.Y. Times Sept.24, 2008

“U.S.-Canadian Group Plans to Curb Emissions,” N.Y. Times, Sept. 24, 2008

“Ten States with a Plan,” N.Y. Times, Sept. 25, 2008

“Jitters are Setting In for States...,” N.Y. Times, Oct. 12, 2008.

## **Federation or Confederation? – battles at the Founding**



A. T. Mason & G. E. Baker, eds., Free Government in the Making, 1985, 131-41.  
The Articles of Confederation (1777; 1781)

The Constitution of the United States of America; read marked sections closely.

Mason & Baker, 217-18, 222-24. CR37

The Antifederalists: Richard Henry Lee of VA (October 1787); Robert Yates of NY [Brutus], 1788 (10p).

Alexander Hamilton and James Madison, The Federalist Papers (1787-88): #1, 10, 39, 51 & 78

Mason & Baker, 276-84.

Debate: federalist (*Madhavi Menon*) vs. anti-federalist (*Nathan Bruschi*), with the rest of us as interested citizens ready to be persuaded. 8 per side, followed by 2 responses from each side, and then by reactions from the populace (thrown fruit not permitted).

Questions (which we are likely to discuss on the 8th; you may write your brief essay on **any one issue** raised by these questions, though **you are not limited to this set**):

1. In reviewing The Articles of Confederation, note particularly how the executive and judicial powers were allocated, and also the central government's powers as to taxation and regulating commerce. Compare the Articles limitation of "expressly delegated" powers to the wording of the 10th Amendment; which wording would you prefer & why?

2. At the Philadelphia Convention of 1787, Edmund Randolph proposed that the delegates adopt the *Virginia Plan*: the number of representatives from each state in the national legislature would vary with the state's population. Those from states with smaller populations countered with the *New Jersey Plan*, which would give each state the same number of representatives. The conflict was resolved via the *Connecticut Compromise*. Is it possible to make a *principled\** argument in favor of equal state representation in the Senate, despite great differences in population? (*\*that is, an argument not based simply on "political necessity" in order to win approval of the Constitution*).

3. In Federalist #39, Madison argues that "the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only" and leaves to the states an "inviolable sovereignty over all other objects."

How would Lee and Brutus respond? Do you agree with Madison or with those critics?

4. Why was Madison concerned about state encroachments on individual rights? (See biographies of Madison, and consider why Madison left Virginia to attend college in NJ.) What strategies did he use in seeking a bill of rights? Should he have been pleased with the Bill of Rights as adopted by Congress in 1789? Compare the phrasing of Article I, sec. 9 of the Constitution and Amendments I-X.

5. What is your reaction to the anti-federalist fears regarding re-election of national legislators, the "necessary and proper" clause, and the power of the president? In your opinion, were their concerns in one or more of these areas warranted? Note for example Richard Henry Lee's comment that "... men who govern, will in doubtful cases, construe laws and constitutions most favourable for increasing their own powers...".

6. Why was the assertion of judicial review in Federalist #78 viewed as "breathtaking"? Can you make a reasoned argument that the power claimed in #78 could have been held elsewhere or distributed more widely, rather than being held "monopolistically" by the Supreme Court?

## **The victory of “centralized federalism” & recent conflicts in the courts**

### *The Hamilton-Marshall victory:*

Mason & Baker, 295-99.

Hamilton on the Whisky Rebellion.

Chief Justice John Marshall’s opinions in Marbury v. Madison (1803) and McCulloch v. Maryland (1819).

### *Forty years of conflict:*

Introductory note (3p)

Mark Tushnet, A Court Divided, 2006, 20p.

Bob Woodward and Scott Armstrong, The Brethren, 1979

National League of Cities v. Usery, 426 US 833 (1976)

Garcia v. San Antonio MTA, 469 US 528 (1985)

United States v. Morrison, 529 US 598 (2000)

Lawrence v. Texas, 539 US 558 (2003)

Ellis Katz and Alan Tarr, Federalism and Rights, 1996, introduction, and essay by Dorothy Beasley

“Florida Gay Adoption Ban is Ruled Unconstitutional,” N.Y. Times, Nov. 26, 2008

Jameson Doig, “Judicial Independence in the United States? -- Complexities and a Sometime Thing,” 2008

Papers: all. (It will be helpful if those whose last names begin with M-Z write on issues that relate to Qs #6-10 – while A-L write on issues linked to Qs #1-5.)

Oral report (10-12'): What was Chief Justice Marshall's strategy with regard to federalism, and what was the impact of his major decisions in this field? Are you inclined to endorse the strategy Marshall used, or – if you had been a member of the Court at the time – do you think you would have opposed him?

Debate on Garcia: You can emphasize different points & raise additional issues, if you wish; you are not strictly bound to the arguments made by members of the Supreme Court, though you should not refer to information that would have been unknown in 1985. 8' initial statement from each side, then rebuttals (2' per side) & questions. Generally, debates should be timed for 8 minutes per side. Distribute brief outlines if you believe they would be useful.

Oral report on strategies for “overturning” Supreme Court opinions that undermine state sovereignty: Using Gonzales v. Raich as the example, the report should describe the efforts of a lobbying group, the Marijuana Policy Project, to add to the number of states that approve the use of “medical marijuana” and to replace opponents to that option with supporters, in Congressional races. You may want to concentrate on the 2008 election, a banner year for the Project.

### Questions

1. Antifederalist Robert Yates warned that any sitting group of Supreme Court judges could “mould the government into almost any shape they please.” What light does Marshall's opinion in McCulloch, compared with the views of the opinion-writers in Lopez and Raich, cast on this issue?



2. Could a “court-packing” plan win your support – perhaps as a way to ensure that elected officials are not shackled by a resisting Court as they create policies to meet new conditions? What are the pros and cons of a plan like that proposed by FDR?

3. Some critics of the Supreme Court have argued that the justices are unprincipled – often making decisions based on their sense of widespread public sentiment (or on “the election returns”), and at other times relying mainly on their own personal values -- rather than on a thoughtful assessment of what the Constitution requires. It might be argued that Tushnet embraces this view (see pp. 10 and 30-31, for example). Does he, in your opinion? What light does the Woodward reading cast on this issue? Based on the readings thus far, what do you think about this concern?

4. In National League of Cities v. Usery, the Court majority concluded that "there are limits upon the power of Congress to override state sovereignty," that the 10th Amendment protects the states' "ability to function effectively in a federal system," and that a 1974 Congressional wage & hour law was, by these standards, unconstitutional. Note Rehnquist’s interpretation of the 10<sup>th</sup> Amendment. Based on a close reading of the amendment, do you agree with his view? Why or why not? What do you think of Brennan’s argument that the states are protected via the way members of Congress are chosen?

4a. Relying on Federalist #31, John Marshall's opinion in Gibbons, and other sources, Brennan dissented. Is his argument for relying on "the political process and not...the judicial process" persuasive?

4b. As states take on additional duties (e.g., highway-safety training and affirmative action), is the kind of historical evidence used by Brennan less persuasive? Do Congressional mandates -- of the kind endorsed by Brennan – seriously undermine the ability of states and cities to set their own priorities in using scarce dollars (as California argued in this case)?

4c. In Stevens’s dissent, note his distinction between “the policy I prefer” and “the policy that is constitutional.” As you read the cases for this week and later sessions, can you identify other opinions in which it is clear that the writer is not relying mainly on his or her personal values in deciding what the Constitution requires or forbids?

5. Nine years later, Garcia overruled NLC. Why? Note Justice Blackmun’s rationale, linked to a state’s right to engage in "unorthodox or unnecessary" activities -- as he *reduced* state autonomy; also, his argument that “the political process” is the main protection for the states provided by the Constitution. Compare the dissent by Justice O'Connor, employing Federalists #17, 45 and 51, and Marshall's McCulloch. In your judgment, is Blackmun or O’Connor more persuasive?

6. In Lopez and Morrison, the Court majority has provided some consistency in its interpretation of the Commerce Clause. But is it the wisest interpretation? Evaluate the criticisms leveled by the dissenters in these two cases.

7. Reading Kennedy’s opinion in Lawrence v. Texas (2003) closely, do you spot an unusual level of hostility toward an earlier Court majority (which included two justices still on the Court in 2003)? Why do you think he wrote so sharply?

8. Gonzales v. Raich and Lawrence v. Texas seem inconsistent with the Lopez/Morrison theme of deference to the states. What do you think might be the reason(s) for the apparent inconsistency? What is your opinion of Scalia’s argument that changes in policy should be obtained through legislative action, not judicial edicts? (In

your essay, you may bypass these questions and instead explain which side you favor in one or more of these cases.)

9. Only ten state constitutions include an explicit "right to privacy" protection. Based on experience in those states -- note especially the Florida opinions -- would you favor adding that clause to *all* state constitutions? What are the pros and cons?

10. State voters and legislatures have taken a variety of actions regarding the rights of same-sex couples (mostly to limit their rights), as have Canadian provinces (mostly to equalize their rights with those of other couples). As Katz and Tarr point out, state *courts* also have an important role -- illustrated by the decision in Florida in late November 2008. What is your view of Judge Lederman's opinion, overturning a Florida law now more than 30 years old; from the standpoint of a democratic regime, is the decision defensible?

11. Where do you come down on the issue of electing vs. appointing judges? And what do you think of Stuart Taylor's argument (fn.49 in the Doig paper) that Supreme Court justices are driven far more by their political affiliations than by the values in the Constitution?

### **Fighting the Feds and Reaching Beyond: tensions and opportunities in welfare, health and education**

Marc Landy & Sidney Milkis, American Government (2004), 177-187 & map.

"States Funds... Are Drying Up," New York Times, Dec. 15, 2008

"Illinois is Trying... But the Most Corrupt State Is ...," N. Y. Times, Dec. 14,

Shapiro v. Vivian Thompson, 394 US 618 (1969) and Saenz v. Roe, 526 US 489 (1999)

Paul Posner, "The Politics of Coercive Federalism," Publius: the Journal of Federalism, v. 37 (May 2007), 390-409.

No Child Left Behind (2001)

Passage of the NCLB Act

"Just the Facts for NY Parents" (2002)

"States fight No Child Left Behind," USA Today (2004)

L. Uzzell, "... The Dangers of Centralized Education Policy," Cato Policy Analysis (May 2005)

Impact of NCLB in Massachusetts and Utah (2005)

"Next round begins," Christian Science Monitor, Jan. 2007

"Pros and Cons..." About.com, 2008

U.S. Dept. of Education, "Stronger Accountability", 2008

Summary: Reauthorization, 2007

"PA Earns Grant for Early Childhood Initiatives"

Physician-assisted suicide total

Washington v. Glucksberg, 521 US 702 (1997)

State of Oregon, Death With Dignity Act: second year's experience + two forms & the 1997 Act

Gonzales v. Oregon, 1126 S.Ct. 904 (2006)

Summary of Oregon's Death With Dignity Act, 2007

Washington State:

Coalition Against Assisted Suicide, statements, Jan. & Sept. 2008

“Doctor-Assisted Suicide Faces Vote...,” New York Times, Oct. 31, 2008.

“Assisted suicide backers raise millions...,” The Olympian, Nov. 2, 2008.

“Washington voters approve...,” Seattle Times, Nov. 5, 2008.

“Washington becomes 2<sup>nd</sup> state...,” AMNews, Nov. 24, 2008.

Montana: “Montana Court Decides Terminally Ill Patients...,” Medical News Today, Dec. 8, 2008

Jenna Yauch, “When Home is Where the Hurt Is,” Dartmouth Law Journal, Spring 2008, 217-234.

Papers: all (Those whose last names begin with M-Z might tackle issues that relate to the *first* half of the readings -- above the dash line -- while A-L write on issues raised in the *second* half of the readings.)

Debate: in favor of the current provisions of the No Child Left Behind law, plus the changes proposed by President Bush in January 2007; in opposition, and in favor of letting the states use their own preferred educational & testing strategies. You should, in addition to the readings above, check the web for related materials. (8 minutes per side, then two minutes for rebuttals)

Oral report: analyzing recent & current state efforts to grapple with the “physician-assisted suicide” issue. You should explore developments in two or three states and see if you can explain the (perhaps surprising) disconnect between support for PAS in the polls (as, in California) and the difficulty that proponents of the “Oregon innovation” have had in gaining passage of similar bills in California and other states.

Questions:

1. In the past 40 years, there has been a “silent revolution” in many states, which had long suffered from divided responsibility, with several officials elected state-wide, often for short terms; that traditional pattern tended to result in conflict among those elected officials, and sporadic policy efforts, often dropped after a year or two. The ‘revolution’ mainly focused on expanding the power of the governor. The chief executive’s term has been increased by Constitutional amendment from two to four years, and the governor has been given the power to appoint the attorney general and other major state officials. Many states have also given the governor the power to appoint members of the state judiciary, who previously stood for election. Does your home state have two or four-year terms for the governor? Are judges appointed or elected? What are the pros and cons of each approach? Where do you think Madison and Hamilton would come out? Where do you come down on these issues?

1. Economic downturns and corruption are recurring problems in most states. How effectively has your own state grappled with these issues in the past decade?

2. While the states have regained some independent power since the 1980s, there are important exceptions. For example, the states cannot set residence requirements linked to welfare benefits (and thus insulate their treasuries from the “welfare magnet” effect); see Shapiro (1969), affirmed in 1999 by Saenz. Consider this argument: “Either the states should be permitted to set any reasonable residence requirements as a condition of receiving benefits, or we should have one package of welfare benefits that all states agree to. The National Governors Association might take the lead in setting uniform

levels, perhaps adjusted for the regional consumer price index." Do you agree? Do you find Chief Justice Warren's analysis persuasive?

3. Although the past two presidents had been state governors and favored protecting state power, the influence of the national government has increased in recent decades, as Posner shows. What are the main reasons for this development? Do you agree with Posner that this has had important detrimental effects? What might be done to reverse the trend?

4. Some argue that state power has been eroded by George Bush's initiatives in the field of education. What, in your view, are the major strengths and weaknesses of No Child Left Behind? For example, is the emphasis in the law on reading and math the best approach, or does it undercut essential education in the arts, history, and other areas? And are the critics (e.g., some Utah legislators) correct or not, in attacking the law as undermining the principles of federalism? (NCLB was not reauthorized in 2008, and the Obama Administration is expected to modify the NCLB approach significantly.)

5. Note the difference between the sources of innovation in NCLB and in early childhood care & education? Is this division between federal and state initiative desirable? Is it understandable?

6. Does Justice Kennedy's opinion in Gonzales v. Oregon make sense to you? Do you agree with Justice Thomas that the Supreme Court in this case "beats a hasty retreat" from the majority position in Raich?

7. Do you favor permitting each state to set its own policies in the area of PAS, or would you prefer a uniform national law (which might set standards, for example, like Oregon's – or perhaps block *any* use of PAS, similar to the current laws in many states)?

8. State laws to aid battered women have taken a variety of forms. Jenna Yauch's article illustrates how, in this field, various states have served (in Justice Kennedy's words) as "laboratories for experimentation." Where does your state stand on the issue of preventing batterers from learning the location of their previous victims?

### **State innovation, economic development, & ethical conflicts**

David Osborne, Laboratories of Democracy, 1988

Ben Franklin Technology Partners, History..., 2008 update

#### Stem Cells

Aaron Levine, "State Stem Cell Policies..." 2007

National Conference of State Legislatures, "Stem Cell Research,"

#### Regional Strategies for Econ. Development: the role of public authorities

Jerry Mitchell, Public Authorities and Public Policy, 1992, 1-11.

Port of Los Angeles and Port of Miami, summary information

J. W. Doig, Empire on the Hudson, 2001

#### New challenges to state & local policies

"Justices Uphold Taking Property..." New York Times, June 24, 2005.

Susette Kelo v. City of New London, U.S. Supreme Court (June 23, 2005), majority opinion by Justice Stevens, dissent by Justice O'Connor.

American Planning Assn., "Supreme Court Decision..." June 2005.

Statement of the Penna. Chapter of APA, August 2005.  
“States Curbing Right to Seize Private Homes,” New York Times, Feb. 21, 2006.  
“More states limit eminent domain,” New Mexico Business Weekly, Dec. 2006  
“Legislature Fails to Override” [Delaware], June 2008.  
Castle Coalition, “Enacted Legislation Since Kelo,” fall 2008

Papers: all. (There will be some advantage if those whose last names begin with M-Z write on issues that relate to the *second* half of the readings – on public authorities, Kelo and related concerns – while A-L write on issues in the *first* half of the readings.)

Oral report: discussing state activities in the field of stem-cell research. (Include CA and perhaps one or two other states; concentrate on the theme stressed by Osborne and problems you see there, rather than on the morality of such research.) If President Obama removes all restrictions on federal funding, is there still an important role for decentralized centers under state initiatives?

Oral report: on the pros and cons of partially independent public authorities. For example, what (if anything) should be done about the problem of “democratic accountability”? You should look at one or two general critiques of public authorities – for example, Donald Axelrod, Shadow Governments, 1992, as well as other chapters in Mitchell’s book.

Oral report: discuss the trade-offs involved in the eminent-domain debate. Also, what would you recommend as the optimal policy for a state?

#### Questions

1. After analyzing innovative efforts by several states in the 1980s, Osborne concluded that the primary orientation for state executives must be to achieve economic growth, equity, and environmental protection by “changing the structure of the marketplace.” What does he mean? What are the pros and cons of this strategy, compared with other options? Is this approach illustrated by the BF Partnership (recently retitled Ben Franklin Technology Partners)? (If you wish, you may also draw on experience in your own state.)

2. Some observers believe that a variety of state efforts in the stem-cell field will help to ensure early “break-throughs”; others are doubtful, arguing that “pork-barrel” politics are likely to undermine the possibility of scientific advances. Based on your knowledge of political behavior in other policy areas, what is your view?

3. One way to reduce political interference, when long-term planning and large capital investment are needed, is to create a “public authority” insulated from interference by elected officials. Jerry Mitchell describes this approach, its possible advantages in advancing economic development and other policy goals, and the “democratic” concerns raised by insulation from the public. *Port* authorities have been especially active in pursuing economic development, as the brief information from the LA and Miami ports suggest. The story of the Port Authority of NY&NJ illustrates the strengths and limitations of the public-authority device: For 30 years, the agency was led by one career official – Austin Tobin – who was generally able to block politicians and others who opposed the PA’s preferred projects, including JFK Airport, the massive Bus Terminal and the World Trade Center. When Tobin was replaced, political pressure eroded -- though it did not entirely stop -- the agency’s economic-development activities in the NY-NJ region. What is your view of the pros and cons of the public-authority device?

4. The Kelo opinions suggest some puzzles: For example, Justice O'Connor argues against permitting states and their local governments to act independently (with CJ Rehnquist agreeing); yet in other cases both have strongly favored the states. What explains their apparent switch, i.e., their willingness to straight-jacket the states here? Also, Justice Stevens, who endorsed federal policies that undercut state innovation in Gonzalez v. Raich, and dissented from the majority rulings in Lopez and Morrison, is in this case a defender of state and local power; what explains his varying positions?

5. Some have criticized the new Congressional restrictions relating to eminent domain (Sec. 726, enacted in 2007), as unwisely limiting state and local action to redevelop cities. Do you agree? Also, some have criticized the bill as an attack on the basic values of federalism; what do you think?

### **Canadian federalism: early hopes & evolving tensions**

Whittington and Williams, eds., Canadian Politics in the 21<sup>st</sup> Century, 2008, xi-xii, 3-10, 21-22, and table on 377.

Map, and population table.

Note the dates of admission to Canada, running from 1867 to 1949 (Newfoundland) and 1999 (Nunavut); and the sharp differences in population, which determine representation in Parliament.

Francois Rocher, "Dividing the Spoils: American and Canadian Federalism" (2000) *British North America Act of 1867* (BNA Act; now Constitution Act, 1867), and *Constitution Act, 1982--Part I, Canadian Charter of Rights and Freedoms*; both reprinted in Michael Whittington & Glen Williams, eds., Canadian Politics in the 21st Century, 362-376. Read especially carefully (in the 1867 Act) the sections on exclusive powers given to the provincial legislatures and (in the 1982 Act) – the limitation on mobility rights in Section 6(3) (note contrast with US after the Shapiro case); protection of affirmative-action laws in Sections 6(3) and 15(2) (contrast with US, see readings below); and section 33, which permits legislatures to suspend many individual rights (see readings below)

Whittington & Williams, 78-101 (Garth Stevenson)

Whittington & Williams, 108-132 (Glen Williams)

"When the smoke clears..."(on regional disparities), Calgary Herald, July 19, 2008

"Canadian Leader Shuts Parliament to Avoid No-Confidence Vote..." New York Times, Dec. 5, 2008; and "Conservatives Appointed as Senators in Canada," New York Times, Dec. 23, 2008

Whittington & Williams, 186-222 (Radha Jhappan)

Peter Hogg, Constitutional Law of Canada, 2008, 859-870.

J. Doig, "What Roles for the Judiciary in Aiding 'Vulnerable People'? – Contending views in the American and Canadian Supreme Courts"

Papers: all. (Those whose last names begin with A-L might write on issues raised by Jhappan, Hogg and Doig, while M-Z write on issues raised in the other materials.)

Oral report: on attitudes in Alberta and the other Western provinces toward federalism and decentralization. (See web sites for Alberta, British Columbia, etc., plus web sites for Stephen Harper of Alberta, leader of the Conservative Party and currently prime minister of Canada.)



Debate: "The United States would benefit from adoption of a federal law which permits states to suspend specific federal statutes for a two-year period, in order to experiment with policies now deemed in violation of federal law." The affirmative side should identify 5-6 areas in which the proposed federal law would permit this experiment -- and let the rest of us know what those areas are. The negative can attack the principle of the override and/or its application to the areas proposed. (See Question #8 below.)

#### Questions

1. What are the main differences between the US and Canadian constitutions, regarding "residual powers"? What lessons did the U.S. Civil War provide to Canadian constitution-makers, with reference to federalism? And why did the central government find -- even before the end of the 19th Century -- that its power, vis-à-vis the provinces, was slipping away?

2. How do you assess the rights and limitations found in the Charter? Do you prefer the US approach, in such areas as mobility rights and affirmative action? And regarding hate crimes?

3. What, in your opinion, are the political implications of the shifts in population and economic strength described in the readings?

4. As set forth in the 1867 Act, the Senate of the Canadian Parliament is comprised of individuals *appointed* by the federal government (formally, by the Queen), and each senator serves "for life" (actually, until age 75). Only the House of Commons is composed of those who stand for election. Compare the selection process for the Senate in the USA and in Canada; what are the pros and cons of each method?

5. Do the meetings of the "First Ministers" provide a useful alternative to the US system for representing the states with small populations -- i.e., an elected US Senate plus the work of the National Governors Association? What are the advantages of each approach?

6. In recent decades, Alberta and British Columbia have joined Quebec in arguing for greater provincial autonomy -- in trade policy and use of natural resources, in negotiation with aboriginal groups, and in other areas. What factors have led to this increased conflict between the West and the federal government? Note the number and relative size of major actors in contest in Canada (compared with the US): are numbers and size a significant explanation for the relative weakness of the central government?

7. Critics of the Charter have argued that it is anti-democratic, since the Charter allows the courts to block the policies voted by the provincial legislatures -- for example, as to the rights of non-citizens, women's rights, and gay rights. Was the Dickson Court, in your view, too active in undermining legislative powers? Where do you come out on the general issue of "courts vs. the people"?

8. Many Canadian commentators have concluded that, on balance, Section 33 is a positive element of the Charter (see Jhappan and Hogg), while Americans are inclined to emphasize the danger to individual rights. Why the different views? Can you make a case for experimenting in the US with a state law suspending (or "overriding") federal laws and state/federal constitutional guarantees -- as a way to encourage policy innovation? If so, what are some of the arenas to which it might be extended -- those that involve medical marijuana? English-only laws (as, Arizona in the 1990s)? limits on welfare benefits for new arrivals and on job opportunities for non-citizens? Or, as could occur in Canada, suspending search & seizure constraints? Perhaps any US override should be limited to one or two years rather than the Canadian five?

## **Canada & Québec: federalism with special status? or 1 of 10 equal provinces? or an independent nation?**

Whittington & Williams, 312-337 (McRoberts on Québec).  
Supreme Court of Canada, Reference re Secession of Quebec, 1998  
Hogg, 142-155 (on the Secession Reference & what followed)  
Office québécois de la langue française, history and mission  
Stacy Churchill, “Minority Francophone Youth and the Future, Diversité, 2008  
Alain-G. Gagnon and R. Iacovino, Federalism, Citizenship, and Quebec, 2007  
Marc Chevrier, “Our Republic in America,” 2001  
Supreme Court of Canada, Chaoulli v. Quebec, 2005  
“The Tories get a little culture shock...,” Globe and Mail, Sept. 29, 2008

Supplementary readings: si je me souviens bien: As I Recall (ed. by John Meisel, Guy Rocher, Arthur Silver), 1999, esp. chapter 6; Jeffrey Simpson, Faultlines, 1993 (chapters on Lucien Bouchard, 270-311, and Leon Dion, 312-352); Will Kymlicka, ed., The Rights of Minority Cultures, 1995, chapters 4, 5, 8-12, 17; Gagnon, Québec, 2004, chapters by Beauchemin, Gagnon, Lajoie and McAndrew.

Papers: all. (Those whose last names begin with M-Z might write on issues that relate to language issues and below, while A-L write on issues in the *first* half of the readings.)

Debate: “In view of the distinctive and influential culture of the great majority of its citizens, Quebec should be permitted to leave Canada if at least 55% of the province’s voters favor that position. The hurdles placed in the way of secession by the SCC and the federal government are unreasonable and should be removed.”

Oral report: Chaoulli has been criticized by some close observers as one of the worst decisions by the SCC in the past three decades – as equivalent perhaps to the (infamous) Lochner decision (US, 1905) and the decisions in the early 1930s blocking FDR’s plans. Why are those comparisons made? What in your view are the strengths and weaknesses of Chaoulli?

### Questions

1. On balance, do you believe the 1982 Charter has undermined the prospects that the nation of Canada can survive. What are the main arguments on each side?
2. Some observers, especially from Quebec, argue that Canada “needs to move [further] toward decentralization”? Do you agree, or do you more inclined to favor the sharply different position of Garth Stevenson?
3. If you were advising officials in Québec on the steps needed to achieve independence, what kinds of negotiation would you advise, based on the Supreme Court’s 1998 opinion and other factors you believe are important?
4. If Québec were independent, what kinds of association would be compatible both with maintaining her sovereignty and with encouraging the economic vitality of the new nation and her neighbors? Would there be free movement across the borders, for jobs and residences? a common currency (like the euro)? common welfare and environmental laws?
5. If Québec were to secede, should those living in parts of Québec be offered the opportunity to leave the new nation and stay in Canada? If so, to whom would you offer

this opportunity (anglophones where they form a large majority, as in parts of Montreal? Members of Aboriginal groups? others?), and why?

6. An authoritative report a few years ago concluded that emigration of anglophones has increased since Québec has pressed its French-dominant language policies. Is this emigration a cost that the Québec government should be willing to endure? Are there ways to stem the tide which should be considered by Québec officials (a question for M. Boucher)?

7. It seems surprising to many that francophones in Québec may be more inclined than Canadians outside Québec to want to eliminate borders between the US and Canada. Can that position be reconciled with the widely felt concern among francophones that Quebecois language and culture can only be protected if Québec has control over immigration and language policy in the province?

### **Community traditions, individualism, & capitalism: conflicts and strategies in Native-American nations**

The Cherokee Nation v. State of Georgia (1831), John Marshall

Samuel Worcester v. State of Georgia (1832)

Vine Deloria and Clifford Lytle, American Indians, American Justice (1983), 1-45, 126-132.

Santa Clara Pueblo v. Martinez (1978): opinion of Justice Thurgood Marshall, and dissent by Justice Byron White

W. Dale Mason, "Tribes and States: A New Era in Intergovernmental Affairs," Publius, 1998, 111-130.

N. Bruce Duthu, American Indians and the Law, 2008, 16-37, 190-216.

"Indian Tribes See Profit in Harnessing the Wind for Power," New York Times, October 10, 2008.

Papers: all (A-L might concentrate on the first half of the readings, while M-Z focus on the rest).

Debate: on the Martinez case. Was it correctly decided? One side for the Santa Clara Pueblo; another for Julia Martinez. Eight minutes per side, with two minutes for rebuttal. (Your analysis need not be limited to the arguments summarized in the 1978 Supreme Court opinions, but you should not draw on developments after 1978.)

Oral report (10-12 minutes) on the questions raised in #5 below.

#### Questions

1. In his 1831 opinion, Marshall suggests that Indian tribes might best be viewed as "domestic dependent nations.... Their relation to the United States resembles that of a ward to his guardian." In Worcester, in 1833, he declares that the treaty rights of the Cherokees, made with the United States, carry the clear implication that the Cherokee nation is "capable of governing itself." Are Marshall's positions in conflict? Can one draw from Marshall's opinions in the two cases a satisfactory set of principles for connecting US-Indian relationships?

2. In what ways do US/Indian relations meet the qualifications of federalism as laid out at the beginning of the syllabus? How do the plenary power of Congress and the trust doctrine complicate your answer? In what spheres are Indian nations truly autonomous?

3. Do you believe that the "standards of a democratic society" should, on balance, have led the Supreme Court to support the claim of Julia Martinez against the tribe? Or is the reasoning of Justice Thurgood Marshall more persuasive?

4. In your opinion, should the states have control over gambling policy within their borders? What are the arguments, pro and con, when tribal reservations are involved?

5. To what extent, in the current period, are American Indians more autonomous than states from national-government control? And in what ways less?

6. Assume that you favor the Tribal Sovereignty and Economic Enhancement Act: what strategies do you think might be effective in obtaining passage in Congress? What resources are available to pursue these strategies?

### **The rights of Aboriginal Peoples: the Canadian case**

David Taras & Beverly Rasporich, eds., A Passion for Identity, 2001, 37-53 ( J.R. Miller), and 146-151 (Cora Voyageur).

Bradford Morse, "Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States," 1998

Grand Council of the Crees, Sovereign Injustice: Forcible Inclusion of the James Bay Cree into a Sovereign Québec, 1995, map, introductory letter, & 1-7, 32-33, 399-402.

"Québec and the Cree Nation Sign Historic Agreement", October 23, 2001; and recent developments

"Native leaders band together ... with China," Globe and Mail, Sept. 29, 2008.

Papers: all (A-L might concentrate on challenges facing the Cree and later readings, while M-Z focus on the first half of the readings)

Oral report on the special rights of native peoples, in harvesting fish and other food sources: you might focus on the Sparrow test under section 35, as developed by the Supreme Court; the arguments of native peoples and of non-native fishers on this issue; and recent tensions. See for example Regina v. Powley, Ontario Court of Appeal (Court File C344065), Feb. 23, 2001; and R. v. Marshall, Supreme Court of Canada, 1999 Can. Sup. Ct., Lexis 81 (Nov. 17, 1999).

Oral report: on the questions raised in #5 below.

#### Questions

1. Are aboriginal rights well protected by sections 15 and 35 of the Charter? Does the "unique form of dual citizenship" (Whittington) available to First Nation members add in any important way to this protection?

2. What was the impact of the Supreme Court decisions in Sparrow, Guerin and other cases on the legal relationships between the Canadian government and Aboriginal peoples?

3. Why did aboriginal leaders react negatively to the process and the outcome of the Meech Lake Accord? How do they view sections 16-23?

4. Do you agree with the Cree brief, or should Québec's majority be able to decide the issue?

5. Note the contrast with Bill C31 in the essay on Cara Voyageur; is that legislative approach to resolving the issue better or worse than the U.S. reliance on the courts?

More generally, how does the autonomy of American Indians differ from that of Canadian Aboriginal peoples?

6. Do you agree with the Cree brief in *Sovereign Injustice*, or should Quebec's majority be able to determine the issue? What principles underlie your position?

7. In Canada as a whole, what system of Native representation might best be used to avoid fragmenting the political strength of Native Canadians?

### **To be decided after class discussion.**

In these four class meetings, we will focus – at least in part -- on the lessons from our discussion of federalism thus far for the resolution of current national and regional problems, in *other* parts of the world. We should select 3-5 cases, treating them via individual & team research and oral reports, combined with brief readings on the cases chosen.

Among possible areas: **the European Union**, as it has evolved toward and perhaps away from a “true” federation; **Northern Ireland**, looking in particular at the April 1998 proposal by George Mitchell; **Iraq** (see for example the proposal by Joseph Biden); **Afghanistan**; **Mexico & Chiapas**; **Hong Kong & China**. Short papers: one due, either week; we should aim for about half the papers in each week.

Oral reports and debates on the topics chosen will be decided by the instructor, in collaboration with seminar members scheduled to pursue each topic. Readings will be chosen in collaboration as well.

***Topics chosen by class vote: Spain, the EU, and Afghanistan.***

### **Federalism in Spain**

Beramendi and Maiz, “Spain: Unfulfilled Federalism,” 2004, 123-149.

Map of Spain + Population and GDP of regions

Spanish Constitution of 1978 (excerpts)

Moreno, “Ethnoterritorial Concurrence & Imperfect Federalism in Spain,” ca1994, 6-11.

Agranoff, “Federal Evolution in Spain,” 1996, 393-396.

Bermeo, “Conclusion: The Merits of Federalism,” 2004, esp. 461-469, 474-477.

(drawing on studies of Canada, Spain, India, Nigeria & 8 other countries)

Papers: on Spain

Oral reports: on what happened in the first years after the Constitution was adopted; on “Europeanization” and its impact on federalism in Spain.

Questions

1. William Riker has noted that some federations illustrate “keeping together federalism.” Does this approach apply to Spain in the 1970s? Did the new constitution, in your opinion, meet this goal?

2. What characteristics of Spain did the drafters of the 1978 document believe were especially important, when they opted not to craft a unitary government?

3. Is the asymmetry found in Spain's federal system similar to that of Canada in relation to Quebec? And/or similar to Canada/First Nations?

4. Do you agree with the statement, “The goals of the Basques and the Quebecois are largely the same, though their methods differ”?

5. What is your view, based on recent weeks in the course and perhaps your own experience, of the generalization that “when federalism and nationalism are combined, the political system will never” be stable. Cf. Bermeo’s comment that “federalism helps to perpetuate ‘the very cleavage it is designed to manage’”.

6. Is the Spanish federation “imperfect” as some observers argue, or is it “nearly perfect”, using the standards found on pp. 2-3 of the syllabus?

7. Under what conditions is political decentralization likely to be “fundamental” to achieving liberty and democracy, as one of the readings suggests? What light does the Spanish and American Indian experience throw on this question?

## **European Union**

Two maps

Nugent, The Government and Politics of the European Union, 2006, 48-56.

Hueglin, “From Constitutionalism to Treaty Federalism,” 2000, 138-153.

Bolick, “European Federalism: Lessons from America,” 1994, 8-15, 29-30, 40-50.

Schmidt, “European ‘Federalism’ and its Encroachments on National Institutions,” 1999, 29-36.

“The European Union’s week from hell,” The Economist, Oct. 11, 2008, p. 69.

“Impairing Europe, Gibe by Gibe,” New York Times, Feb. 14, 2009.

“Blueprint for EU army to be agreed,” Telegraph, Feb. 18, 2009.

Papers: A-K should write on the EU

Oral reports: on the rise and fall of the EU Constitution; on food-safety regulation in the European Union.

### Questions

1. In your view, has centralization in the EU now reached its likely maximum level? What do you think of the argument that “treaty federalism” may be a better model for close cooperation elsewhere in the world than the “old model” of federalism?
2. What are the advantages and drawbacks of a written constitution for the EU?
3. Would a unified security policy for the EU be desirable? Is it feasible?
4. Are you inclined to favor adding “functional representation” in the EU, as described by Hueglin?
5. Do you agree with the criticisms set forth by Vivien Schmidt – for example, on the erosion of executive power within the member states?
6. How do the problems of maintaining national culture and identity differ, when comparing EU countries with the situation faced by the Quebecois?
7. Are the concerns expressed by Clint Bolick well founded, in your view?
8. What is meant by the “democratic deficit”? How serious a problem, in your opinion, is such a deficit for the EU? Note Hueglin’s suggestion that, in the EU, “citizens become clients” who must either accept the results of “executive fiat” or engage in civil disobedience.



## European Court of Justice

Nugent, Government and Politics of the EU, 2006, 293-310.

The Court of Justice of the European Communities (composition and jurisdiction)

Shapiro, "The US Supreme Court and the European Court of Justice Compared" (2006), 195-219.

Eckhard Kalanke v. Bremen, 1995

Molinari, "The Effect of the Kalanke Decision on the European Union," 1997, 1, 6-15.

Papers: L-Z should write on the ECJ

Oral reports: affirmative-action issues in the EU, in comparison with the United States.

### Questions

1. What roles do References for Preliminary Rulings play in the European Court of Justice? Is this type of action included within United States Supreme Court's jurisdiction? Does this strengthen or erode the federal system of the European Union?
2. Are the ECJ's one-judge per member-state and term-limit policies preferable to the system that exists in the United States for the U.S. Supreme Court?
3. Do you agree with the ECJ decision in the *Barber v. Guardian...* and the *Commission v. Germany* cases (discussed in Nugent)? Should the ECJ be able to block national policies in such areas as pensions and the ability of individual countries to set food standards?
4. Do you agree with decision in the Kalanke case? Can the Bremen Law on Equal Treatment for Men and Women in Public Services be reconciled with Articles 2(1) and 2(4) of Council Directive 76/207?
5. In the wake of the Kalanke case, some commentators (e.g., Molinari) have been skeptical as to whether this decision will actually affect sex-equality laws of various member states of European Union. Do you agree with this assessment? Does the E.U. have other tools to force its member states to comply with ECJ decisions?
6. In view of the EU's relative youth, some commentators have suggested that the ECJ will play a similar role to that of the U.S. Supreme Court during the early years of the United States. And perhaps similar to the role of the Supreme Court of Canada since 1982. Are these comparisons reasonable, or is there something different about the E.U.'s structure and the historical situation that changes the relationship of the ECJ to the rest of the E.U. government?

## Federalism in Afghanistan?

CIA, Afghanistan Social and Economic Statistics

Two maps – ethnic groups and provinces

Schetter, "Ethnicity and the Political Reconstruction of Afghanistan," 2003

Adeney, "Constitutional Design and the Political Salience of 'Community' Identity..." July 2008

Lister and Nixon, "The Place of the Province..." 2007

Jalali, "Afghanistan: Prospects for Nation Building," 2007

Rand, "Women and Human Security: The Case of Post-Conflict Afghanistan," 2007

Papers: A-K should write on Afghanistan; L-Z on themes and issues that cut across two or more countries/regions we have discussed.

Oral report: on prospects for federalism in Afghanistan: What are the major issues and sources of conflict in developing a permanent government in Afghanistan? Should the Afghans follow the highly centralized model provided by President Karzai? Or should they follow recent trends calling for the inclusion of all ethnic groups and warlords – including the Taliban?

Questions

1. Schetter's argument runs counter to much of the later materials included in the readings. However, after reading those, do you think he is wrong, in suggesting that a federal system be created – but in a way that does not reinforce ethnic labels -- and that warlords might be given the responsibility of provincial governors?
2. What level of centralization is appropriate in Afghanistan? Should regional governments be based on ethnicity, perhaps following the pattern suggested on one of the maps? How would the rights of “minority” citizens in each province be protected against the power of local commanders who have often been abusive (see Lister & Nixon)?
3. Is there a way to integrate the warlords into governments in the various regions? Are there incentives the central government can offer? Conversely, can the central government enforce its policies should the warlords refuse to join the regional governments? (Note that a few warlords have been members of Karzai's cabinet [Adeney].)
4. Do you think that affirmative action or quotas would work on a national level? A regional level? Is an ethnic quota the appropriate solution?
5. Is it reasonable to think of the Tajiks, Uzbeks, Hazara, and other minority groups as requiring special protections and rights like the Basques or the Quebecois? Is this a useful strategy toward developing a stable government?
6. Are women in Afghanistan a vulnerable group requiring special protections and privileges? If so, who would provide and enforce these rights? A judiciary? A central government? Can you imagine a correlation between protection of women's rights and increased federalism?