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Author(s): Douglas V. Verney

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# Federalism, Federative Systems, and Federations: The United States, Canada, and India

Douglas V. Verney  
*University of Pennsylvania*

*This article explores “federalism” as an abstract concept of political theory like liberalism and socialism, and “federation” as a descriptive term connoting a system of government. The term “federative systems” connotes the genus of which federations are a species. “Federalism” as a concept has important implications for comparative studies of federations such as the United States, Canada, and India. Canada and India began as quasi-federations and have gradually become federations. They are not based on federalism as a concept. The U.S. Constitution was not only the blueprint for a federation, but was inspired by a political theory we call “federalism,” a set of interlocking principles of government very different from the parliamentary tradition that Canada and India inherited from the United Kingdom. If these two countries wish to proceed beyond treating federation as the distribution of power, they will have to reappraise their parliamentary tradition and, in due course, evolve their own concept of federalism.*

## FEDERALISM AS A CONCEPT, FEDERATIONS, AND FEDERATIVE SYSTEMS

### *Federalism as a Concept*

The great “isms” of modern political theory, such as socialism, liberalism, conservatism, and nationalism, have two things in common: they are important concepts and they mean different things to different people. Theorists have spent much time analyzing them and offering interpretations of what they signify.

The American term “federalism,” which is increasingly being treated as a comparable “ism,” is no exception. It is an important concept; yet scholars disagree in their interpretation of the term. However, federalism is different from the other “isms” in two important respects. First, unlike the others, which originated in Europe after the French Revolution, federalism was invented by the framers of the U.S. Constitution in Philadelphia in 1787. Second, instead of becoming the province of political theorists, it was until recently left to be studied

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largely by those who examined the actual institutions of government.<sup>1</sup> Traditionally, therefore, the study of "federalism" has meant not so much the analysis of a concept as the study of federative systems, and those among them that are federations. "Federalism" is often treated as synonymous with "federation." One common example is the use of "federal" to describe actual federations like the United States and Canada, and to distinguish these federations from those that are "unitary," like France and the United Kingdom.<sup>2</sup>

We will use "federation" to describe actual systems of government. The term "federal" will be treated as an abstraction (i.e., we shall assume that federalism is a concept). The term will be considered, like socialism or liberalism, to be a subject for study as part of political theory. Like socialism and liberalism, federalism is based on a normative concept of human nature and social relations. Indeed, as developed in the United States as a set of principles, federalism was the forerunner of the assumptions underlying the post-1789 liberal state, with its emphasis on the liberty of the individual. Although there is some disagreement over the meaning of conservatism, socialism, and liberalism, there is general agreement that while they differ, liberalism lies somewhere between conservatism and socialism. The American Revolution was a triumph for liberal principles.

Treating federalism as a concept means that when we refer to the classical writers, such as K. C. Wheare and William Riker, we shall employ the term "federation" where they often used "federalism." We shall treat "federalism" like "liberalism." Thanks to the political philosophers, most people realize that "liberalism" is a concept and does not refer to a state or even a political party. However, there were no philosophers at Philadelphia, which may explain why the term "federalism" has been used much more loosely. Thus, the national government of the United States is often called the "federal government."

How is the political analyst to distinguish between supposedly "federal" systems such as the United States, Canada, and India? One way is to describe their actual systems of government as "federations." Thus, the United States, Canada, and India are all types of federation.

If, then, federalism is a concept, how is it defined in this essay? It is easiest to begin by defining American federalism. Whereas in federations like Canada and India, the emphasis is on the distribution of powers between a national government and several constituent governments, in the United States the distribution of powers is only one of a set of principles, such as limited government, checks and balances, the separation of powers, and what, after the French Revolution, became known as liberalism. American federalism comprises this set of principles.

Moreover, while in federations like Canada and India, the federation was

<sup>1</sup>Thomas J. Anton has noted that there is much empirical work on American federalism "but no widely accepted theory or theories that allow us to evaluate the significance of those details. Empirical studies of American federalism, in short, are descriptively strong but theoretically weak." See Thomas J. Anton, *American Federalism and Public Policy* (Philadelphia: Temple University Press, 1989), p. 2.

<sup>2</sup>Ronald Watts, for example, uses "federal system" where I use "federative system." See note 4.

treated simply as a means of making government more manageable in a large state, for several of the American framers, federalism was an end in itself. The American Constitution, more than other constitutions, came to be treated as a covenant.

Canada and India did not base their constitutions on federalism as a concept. Instead, they retained the Westminster parliamentary tradition, which they had inherited from the United Kingdom. However, British parliamentary government was designed for a unitary state, not for a federation. The Canadians thought they had resolved this problem by claiming to have invented a new form of government in 1867, which they called “parliamentary federalism.” Later, Australia in 1900, and India in 1950, adopted this form of federation.

In recent years, both Canada and India have begun to emphasize their federative rather than their parliamentary character. There is a growing sense that instead of forming the two pillars on which the political system rests, parliamentary government and federation tend, in practice, to be in conflict.

Below, we shall ask whether Canada and India, if they become less committed to the British doctrine of parliamentary supremacy, can look to the American Constitution and *The Federalist* for inspiration, or whether it might be necessary for them to develop their own concept of federalism, different from that of the United States.

### *Federations*

There has been some disagreement over which governments in the world are to be considered federations and which are not. At one end of the spectrum, there have been “quasi-federations” in which power lies with the national government, while the constituent governments are subordinate. At the other end, there have been confederacies (or confederations) in which the constituent governments have most of the power, and the confederate government is weak and subordinate. Are all of these to be considered federations? According to Wheare, they should not. He defined a federation as a system in which the relationship between the national and constituent governments, in law and in practice, is not subordinate but coordinate. Both orders of government are governed by the Constitution, which is supreme. Wheare’s definition is a sensible one.

Certainly the Americans, who invented the modern federation, have always distinguished their system from the Articles of Confederation that preceded it, and from the later southern Confederacy that fought the Civil War. In contrast to these confederate systems, the American federation is, as Riker argued, centralized.<sup>3</sup> The national government established in 1789 had powers over individual citizens which no confederacy had ever enjoyed.

Ronald Watts, having reviewed the works of Wheare, Preston King, Ivo Duchacek, and Daniel Elazar, has summarized the characteristics of federations with a number of propositions. Like the other writers, he has defined a federation in largely American terms. “The term ‘federation’ would refer to the specific form

<sup>3</sup>William H. Riker, *Federalism: Origin, Operation and Significance* (Boston: Little, Brown, 1964), p. 5.

of federal political system first invented by the founding fathers of the United States at Philadelphia in 1787, a form whose characteristics involve the following: (1) Two orders (not levels) of government; (2) A national government that deals directly with individual citizens; (3) A formal distribution of legislative and executive authority; (4) Revenue resources allocated between the two orders of government; (5) Some autonomy for each order; (6) Provision for the representation of regional views within the national policy-making institutions; (7) A written constitution; (8) A constitution not unilaterally amendable and requiring the consent of all or a majority of the constituent units; (9) An umpire (courts or referenda) to rule on disputes between governments; and (10) Processes to facilitate intergovernmental relations.<sup>4</sup> Unlike "federalism," a "federation" is a political institution; it is not a subject for political theory.

In his classic *Federal Government*, which first appeared in 1946, Wheare used the term "federation" for only four governments: the United States (the classical model for modern federations); Canada (which he thought began in 1867 as a quasi-federation); Australia (whose federation was more like the American than the Canadian had been); and Switzerland (with its unique conciliar brand of federation). Today, few scholars are quite so restrictive in their definition of a federation.

### *Federative Systems*

In addition to federations, there is a range of federative political systems, from quasi-federations to confederacies. Some writers would add to the list others (e.g., communities, leagues, and associate states). However broad the definition, the term we shall use to cover all of the political systems that fall into this broad category, and are not unitary systems like France, is "federative systems." In other words, there are many other systems which, if not federations proper, have certain federative characteristics that distinguish them from unitary states.

A number of American scholars make no distinction between federations and federative systems. They have broadened Wheare's classification of federations to include a great many of the world's political systems. Riker, for example, argued that any political system that allocated even one constitutional power either to the national government or to the constituent governments was federative.<sup>5</sup> Following Riker, a number of writers have argued in favor of using as broad a definition of federation as possible. In other words, quasi-federations and confederacies are all assumed to be federations in one way or another.

For our purposes, it is necessary to define these various forms of nonunitary government as "federative systems." They are the genus of which "federations" are a species. Federations form a much smaller category, a category in which the national and constituent governments have a coordinate not subordinate relationship.<sup>6</sup>

<sup>4</sup>Ronald Watts, "Contemporary Views on Federalism" (Paper presented at the Centre for Constitutional Analysis, Republic of South Africa, 2-6 August 1993), p. 11.

<sup>5</sup>Riker, *Federalism*, p. 5.

<sup>6</sup>A number of recent authors have made my threefold distinction, but have used different terminology. See, for example, Michael Burgess, "Federalism and Federation: A Reappraisal,"

Using this terminology, we can say that Wheare was interested in federations, while Riker was concerned with federative systems. Watts compromises, listing sixteen systems as federations. He includes Canada and India.<sup>7</sup>

In 1787, the Americans proved that it was possible to have a form of federation that was not a confederacy. The more centralized federation they invented was the first to have a coordinate relationship between the national and regional governments. It was based on a constitutional distribution of powers that allowed the national government to deal directly with individual citizens.<sup>8</sup> Canada and, in due course, India copied this invention.

If, then, we have a category (or genus) called “federative systems,” how is it related to what we are calling federations proper? The answer is quite simple. Among federative systems there is a spectrum of nonunitary systems, including quasi-federations and confederacies. But as Wheare pointed out, relatively few countries (among them Canada and the United States) are federations, a species of the genus “federative systems.”

We now have three terms:

1. Federalism: an abstract “ism” or concept like nationalism or socialism.
2. Federative systems: the broad term (the genus) used to describe actual systems which are to any degree federative, from quasi-federations to federations, confederacies, and beyond.
3. Federation: a species of federative system in which the powers of the regional governments are not subordinate to the national government (or vice-versa), in which the powers of the two orders of government are really coordinate—in practice as well as in the law of the Constitution.

### THE UNITED STATES, CANADA, AND INDIA

Now that we have distinguished federalism as a concept from federative systems (the genus), and federations (a species of federative systems), we need to explain the practical importance of these distinctions.

Quite simply, federalism in the abstract sense helps us to analyze and compare federations. The United States, Canada, and India are all “Anglo-American” federations, to use Elazar’s term.<sup>9</sup> Nevertheless, there are important differences

*Comparative Federalism and Federation*, eds. Michael Burgess and Alain G. Gagnon (Toronto: University of Toronto Press, 1993).

<sup>7</sup>In his “Contemporary Views on Federalism,” Ronald Watts entitles his important section 3 “The Concepts of Federalism, Federal Systems and Federation.” To take his analysis a step further, I confine the term “concept” to federalism, and use “federative systems” where he uses “federal systems.” We use “federation” in the same way.

<sup>8</sup>Recently, it has been argued that the American federation has been profoundly altered by the Supreme Court’s preference for persons over places (e.g., the states). See John Kincaid, “Constitutional Federalism: Labor’s Role in Displacing Places to Benefit Persons,” *PS: Political Science & Politics* 26 (June 1993): 171-177.

<sup>9</sup>Daniel J. Elazar, “International and Comparative Federalism,” *PS: Political Science & Politics* 26 (June 1993): 190-195.

between them. For one thing, while all three are multicultural and multiethnic, Canada and India have constituent governments in the hands of linguistic and cultural minorities. This has had an important influence on the nature of their federative structure: for example, in the recognition of the collective rights of minorities, whether Francophones in Canada or Muslims in India.

Canada and India are obviously different from the United States in their form of government. They are parliamentary systems rather than presidential/congressional systems. This also makes them different as federations.

However, there is another and less well understood difference. The United States was not only the first modern federation, but it also differed from its parliamentary successors by the fact that it was based on the concept of federalism. Although it would be going too far to call the American approach to federalism "ideological," there was from the start a commitment that has made Americans view federalism as an end in itself, not simply a convenient means of distributing power as it has tended to be in Canada and India.<sup>10</sup>

### *The United States*

The American federation was not based only on the ten propositions listed by Watts. The federation established in Philadelphia was inspired by a concept of federalism that meant much more than the replacement of the tradition of monarchy by the principle of popular sovereignty, and the substitution of written laws for the conventions of parliamentary government. Federalism consisted of a set of interlocking principles of government. In addition to popular sovereignty and a written constitution distributing powers between two orders of government, it also meant the separation of the legislative, executive, and judicial powers; checks and balances; and, in due course, judicial review. Above all, the framers believed in a political philosophy in which the powers of government are limited and the liberty of the individual is basic.<sup>11</sup>

Unlike the framers of later federations, the Americans were preoccupied with the need to limit the power of government, especially the new national government. They wanted to leave as much power as they could in the hands of the states and the people. This may seem surprising in view of our earlier description of their novel federation as centralized. In later years, the U.S. Constitution did not prevent an enormous growth in the national government's power. However, it was one thing to transfer certain powers from the states to the new national government, thus transforming the United States from a confederacy into a federation. It was another to opt for powerful governments, as did many later federations. The Canadian framers, by contrast, were less concerned with limiting government than deciding which order of government, the Dominion or the provinces, should wield power.

<sup>10</sup>But note the proposal of Samuel LaSelva that the Canadian federation should be viewed as based on moral principles, notably fraternity. See his "Federalism as a Way of Life: Reflections on the Canadian Experiment," *Canadian Journal of Political Science* 26 (June 1991): 219-234.

<sup>11</sup>The Declaration of Independence had been published in 1776, the same year as Adam Smith's *Wealth of Nations*, which became the bible of believers in the principle of *laissez faire*.

The adoption of the concept of federalism as a set of interlocking principles based on the liberty of the individual made the United States unique. Most other federations were reluctant to go beyond the propositions listed by Watts. They did not subscribe to the American set of principles, which became known as embodying the “American Creed” or “civil religion.” Nor did they elaborate a concept of their own.

### *Canada*

The Canadians did not think it necessary to invent a new form of government; they retained the British parliamentary tradition. They took a federation to mean the distribution of power between the national and the regional governments.

When Canada started out, it was not even a federation with coordinate governments. Canada’s provincial governments were subordinate to the national government, and the prime minister referred to them as “local governments.” Canada was what Wheare later called a “quasi-federation.”

Hence, while it is generally agreed that Canada today is a federation, we must enter a caveat. Canada began as a quasi-federation; from the start, it had a powerful national government.<sup>12</sup> Only certain enumerated powers were constitutionally distributed to the provinces. Even today, the government of Canada can still by law treat the provinces as subordinate entities, not as coordinate partners. For example, the provisions in the 1867 British North America Act permitting the reservation of bills by the lieutenant-governor for consideration by the government of Canada, and the disallowance by the government of Canada of provincial legislation, have not been repealed.<sup>13</sup> It is true that reservation and disallowance are now generally regarded as obsolete, but until these provisions are repealed, they can be invoked in an emergency (e.g., if the government of Quebec were suddenly to propose secession).<sup>14</sup>

These various provisions of Canada’s Constitution indicate that Canada has only gradually, and often painfully, been transformed from a quasi-federation into a federation with the ten characteristics noted by Watts.

### *India*

India is comparable to Canada in many ways. It started out in 1950 as a quasi-federation with a powerful national government (still called “the centre”), and with the distribution of certain powers to the states. It made no claim to being a

<sup>12</sup>But the new Dominion government was hardly independent. In its early years, the British government wielded power over the colony. This changed gradually. “Thus after 1873 no British government exercised its legal power to disallow (i.e., to veto) Canadian legislation under Section 56 of the BNA Act. After 1878 no governor-general used his legal right under Section 55 to reserve (i.e., refuse to sign) a bill pending the Monarch’s pleasure.” Douglas V. Verney, *Three Civilizations, Two Cultures, One State: Canada’s Political Traditions* (Durham, N.C.: Duke University Press, 1986), p. 144.

<sup>13</sup>Canadian Constitution Act (1867), Section 90.

<sup>14</sup>In an attached schedule as part of the negotiations leading to the Victoria Charter in 1971, Pierre Trudeau offered to abolish both reservation and disallowance in exchange for a charter of rights. The offer was withdrawn when the provinces insisted on a legislative override, in the Constitution Act of 1982, to sections of the Charter of Rights and Freedoms. Peter H. Russell, *Constitutional Odyssey: Can Canadians Be A Sovereign People?* (Toronto: University of Toronto Press, 1992), p. 89.



federation proper. Indeed, India is still in some ways not yet a federation. There are many ways in which Delhi can interfere in the states in a manner incompatible with the notion of India as a federation. For example, by a two-thirds vote, the upper house (the *Rajya Sabha*) may determine that Parliament shall for up to a year make laws in matters reserved by the Constitution for the states.<sup>15</sup>

However, like Canada, India too appears to be becoming more like a federation. The twenty-five state governments are becoming less dependent on “the centre.” It is true that under Article 356 of the Constitution, the government of India may, on the recommendation of a state governor, dismiss the chief minister and cabinet of a state and suspend the Legislative Assembly. It has done this on nearly 100 occasions, and in nearly all of the states, often for partisan reasons. However, an important step forward was taken in March 1994 when the Supreme Court of India passed a judgment restricting the Indian government’s right to dismiss state governments under Article 356.<sup>16</sup>

### *The Three Federations*

The United States, Canada, and India can therefore all be described as federations. To understand and compare them, we need to bear in mind the difference between federalism as a concept, federations as a species, and federative systems as the genus.

Because the United States began as a genuine federation based on a concept of federalism, we may call it a “federal federation.” But because Canada and India began as quasi-federations (i.e., as federative systems), and only with the passage of time became federations, they are not “federal federations” like the United States.

However, if Canada and India do decide to become federal, they may require a concept of federalism. Must their concept of federalism mirror that of the United States, with its set of interlocking liberal principles, or is “federalism,” like “liberalism,” a word with many meanings? Other countries that claim to be liberal democracies do not regard their liberal character as identical with American liberalism’s emphasis on the liberty of the individual. Canada and India may not need to be “federal” in the American sense.

Here we become involved in the political theory of federalism.

## THE POLITICAL THEORY OF FEDERALISM

We have argued that what has always distinguished the United States has been its commitment to the concept of federalism, and that even though Canada and India are now federations, they are not federations on the American federal model. The framers of the U.S. Constitution were imbued with a concept of government quite different from that of the parliamentary system. The Americans not only invented

<sup>15</sup>Indian Constitution, Article 249.

<sup>16</sup>*S. R. Bommai & Ors etc., etc. v. Union of India & Ors etc.*, S.C. 215-422, 21 March 1994.

the modern federation, but, in doing so, they were inspired by a theory of government that would later be intimately associated with the liberal state. This American theory was based on the liberty of the individual and its corollary, the market economy.

It is doubtful whether many Americans are aware of the fact that it is their concept of federalism as intimately associated with liberalism which makes their federation unique. Although Americans agree that their government is based on certain principles, these have not been seen to be interlocking and interdependent. Many have identified federalism with the distribution of power. They have not recognized that federalism is the concept on which everything else in their Constitution is based. The American concept of federalism, we argue, comprises all the principles of American government.

The political theory of federalism must be distinguished from the constitutional law and practice of federations. It is true that when scholars discuss the “theory” of American government, they often refer to the law of the U.S. Constitution as the “theory,” contrasting it with the actual practice of government. However, constitutional law is not theory. The political theory of federalism has often been confused with the law of the Constitution because the concept of federalism first appeared in the debates of the Constitutional Convention, debates that were dominated by lawyers, not by political philosophers. As a result, the significance of the concept of federalism as the basic set of assumptions (political theory) on which the framers built American constitutional law has often been underestimated, especially by European political philosophers.

So long as the term “federalism” was confused with “federation” and identified with the U.S. Constitution (as it was by Wheare), it was difficult for scholars outside the United States to theorize about federalism in general. Indeed, only in recent years, as more and more countries like Canada and India have slowly become more like true federations (and as some of their constituent governments have wanted even more autonomy), has it become necessary to treat federalism as part of political theory. Therefore, the study of federalism is having to be disentangled from the analysis of the U.S. Constitution and *The Federalist*.<sup>17</sup>

There is, therefore, a very practical reason for separating the abstract term “federalism” from the law and practice of federations: scholars in several countries are having to examine the concept of federalism as they reform the law and the practice of their federations. Will it therefore be different from the American approach with its emphasis on liberal principles?

### THE AMERICAN CONCEPT OF FEDERALISM AND AMERICAN LIBERALISM

We have suggested that the American concept of federalism is intertwined with

<sup>17</sup>As an example of scholars' dependence on the American model, see the first page in all four editions of Wheare's classic text: “The modern idea of what federal government is has been determined by the United States of America.” K. C. Wheare, *Federal Government* (London: Oxford University Press, 1946-1963).

what later came to be called the liberal state. While the various modern “isms”—conservatism, liberalism, socialism, and nationalism—came into use only after the French Revolution, federalism dates from the period prior to that revolution. At the time, it was of course an exclusively American phenomenon. Because the Americans were a practical people, trying to escape from the perils of confederacy, they thought of themselves as inventing a new mode of government, not a new political theory. Yet they were putting together a theory of popular government that has continued to attract the oppressed (and to offend elites) throughout the world.<sup>18</sup>

Indeed, only because the Americans rejected monarchy and aristocracy, and established a republic, were they able to base their national Constitution on the concept of federalism as a set of democratic principles. For American Tories (i.e., the monarchists who migrated to Canada to become Loyalists), there was no place for such principles as popular sovereignty, checks and balances, and limited government. As Tories, they favored tradition. When the Dominion of Canada was established, the Ontario Tories (now Conservatives) wanted to call it the Kingdom of Canada, and were quite unsympathetic to federalism.

If federalism accorded ill with traditional Toryism, it was no more compatible with socialism. Those socialists who chose communism after the Russian Revolution looked forward to controlling a central government and implementing national policies through the Communist party of the Soviet Union. Although constituent governments were established in due course, the central authorities in Moscow refused to allow the various Union republics to elect nonsocialist governments. Communists had little use either for genuine federalism or for parliamentary democracy.

Yet, even those social democrats who accepted parliamentary government had difficulty supporting upper houses; the social democrats in Canada, as elsewhere, tended to regard second chambers as bastions of conservatism, not as potentially federal institutions. They were never impressed by arguments that an upper house was necessary to represent the regions in a federation. Hence, scholars in Canada and India, in which conservatism and socialism have continued to play a role, are often lukewarm in their support of federalism as a concept, since federalism is associated with liberalism.

The United States has always been different from both of these countries, first because of its rejection of conservatism. Its federal Constitution expressly rejects the true conservative tradition by forbidding any state from becoming a monarchy. Canada, by contrast, has not only retained the monarchy but to this day has retained an appointed Senate.

India, while a republic, has not abandoned all of its imperial conventions. The

<sup>18</sup>A few years ago, it became fashionable among the more radical social thinkers (e.g., Theda Skocpol) to consider only the French, Russian, and Chinese revolutions as “real” (i.e., social) revolutions. The two seminal political revolutions, in seventeenth-century England and eighteenth-century America, were downplayed in favor of social revolutions whose political consequences were disastrous.

presidency is compared to the British monarchy. Governors, appointed by Delhi, are permitted to exercise considerable discretionary authority in the various states, especially during President's Rule when all state power is in their hands. Far from stressing limited government, public opinion in both countries favors strong cabinet government.

The United States is also different from Canada and India in its attitude toward socialism. Successive American administrations have been unsympathetic to social democratic governments in the United Kingdom, Sweden, and elsewhere. For the most part, Americans are in principle committed to free markets.<sup>19</sup> They are, both in principle and in practice, hostile to a centrally planned economy.

All this makes the United States very different from Canada and India. There have been social-democratic governments in four of the Canadian provinces, and Communist governments in three Indian states. To this day, there is a central Planning Commission in India.

What is the significance of this doctrinal difference between India and Canada on the one hand and the United States on the other? It means that if Canadians and Indians become interested in formulating a concept of federalism, they will have to incorporate a broader spectrum of political ideas than the U.S. Constitution with its commitment to liberal principles based on the rights of the individual. For example, many Canadians and Indians regard human rights not only as individual but also as collective. Americans may think that one can explain the conservatism of these countries by suggesting that their traditional elites have held on to power and have managed to retard progress toward the liberal state.<sup>20</sup> However, this is too simple an explanation. Canadians and Indians are simply not liberals in the American sense, and cannot adopt the American concept of federalism.<sup>21</sup>

This is apparent from their interpretation of federalism as a means rather than an end. In any discussion of federalism as a means or an end, Americans can readily think of federalism as an end in itself. However, where a country like Canada or India is not committed to liberalism, but retains traces of its conservative past and tolerates socialist governments, instead of federalism as an end, there is only a federation as a means. There is a big difference between the philosophy (or doctrine) of the American Creed (or civil religion) underlying American federalism, and the absence of such principles in countries like Canada or India. They share many of America's liberal values, but they are not committed to American liberalism.

Because most of them are only vaguely aware of their philosophical differences from the United States, Canadians and Indians may encounter some real problems as they gradually transform themselves from quasi-federations into federations influenced by federalism. Increasingly, the scholars among them are describing

<sup>19</sup>We say "in principle" because in practice the United States has often been protectionist. In defense and space research, the dominant role of the federal government has been taken for granted.

<sup>20</sup>See, for example, Robert Vance Presthous, *Elite Accommodation in Canadian Politics* (Cambridge: Cambridge University Press, 1973).

<sup>21</sup>See Gad Horowitz, "Conservatism, Liberalism and Socialism in Canada: An Interpretation," *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968).

their systems as federations and not as parliamentary systems; in so doing, Canadians and Indians are also beginning to realize that "parliamentary federalism" requires reexamination.

It is important for Canadian and Indian scholars to understand that American federalism consists of a set of interlocking (and "scientific" in the eighteenth-century sense) principles to promote limited government and individual liberty. These are principles very different from their own tradition of strong cabinet government.

Cabinet government has meant a belief in a government responsible to the lower house alone and supported by disciplined national parties. In the Westminster tradition, there has been no separation of the executive and legislative branches of government, no place for the checks and balances provided by a powerful upper house representing states or provinces, and no place for the state-based parties taken for granted in the United States.

When adopting the distribution of power in their constitutions, neither Canada nor India saw fit to question the British tradition of cabinet government responsible to the lower house of Parliament. In the absence of a powerful U.S.-style Senate, Canada (and to some extent India) has relied on meetings of ministers from the two orders of government to address intergovernmental issues. Because disputes between the two orders of government in Canada tended to be resolved by ministers from each order, the Canadian federation came to be known in the 1970s by that oxymoron "executive federalism."

It should now be apparent why it has been necessary to distinguish the three terms: federative systems (which include everything from quasi-federations to confederacies), federations, and the concept of federalism. From the start, the United States was never anything but a federal federation based on a set of interlocking liberal principles. Yet, although it was the classical model for all modern federations, later federations adopted only a few of its principles.

Canada and India took certain of these principles, especially the distribution of power, and attached them to their parliamentary systems. They assumed that in doing so, they were basing their constitutions on the "federal principle," to quote the preamble to Canada's 1867 British North America Act. However in practice, they were, at the start, not federations at all but quasi-federations, one of many federative systems.

### **CAN OTHER FEDERATIONS BECOME TRULY FEDERAL?**

The question that Canada and India may soon face is whether they can continue indefinitely without a thorough reappraisal of their parliamentary federalism. Evolution from quasi-federation to federation is one thing; transformation from a federation into a system based on the federal concept is quite another.

Although the modern American federation did not succeed without experiencing a civil war, the war was partly the result of an unwillingness on the part of the conservative southern states to accept the concept of federalism put forward in 1787; they clung to the pre-1787 notion of a confederacy. Remarkably, the

principles of the 1787 Constitution survived the war, and have remained intact (although they have perhaps been more honored in the breach, especially in recent decades, than in the observance).

If we are to understand the secessionist movements in Canada and India, we must examine not only the conflict between their present federations and the confederacy preferred by some secessionists, but also the incompatibility of the Westminster parliamentary tradition with the concept of federalism. The original parliamentary constitutions of the Canadian and Indian framers may prove to be outmoded. The question is: How are the principles underlying a genuine federation to be reconciled with the British parliamentary system embedded in their constitutions?

A few examples highlight the problems faced by Canada and India.

#### *Amending the Constitution: Canada*

Canada has been trying to amend its constitution for a long time, and it is having increasing difficulty doing so. Under the Westminster system, the British Parliament could change the British “constitution,” and Canada’s British North America Act, by a simple act of Parliament. The problem for a federation is that the powers of the states or provinces are guaranteed in the constitution through a *constitutional* distribution of powers. It therefore follows that the constitution cannot be amended by the national government alone; at least a majority of the constituent governments must concur with amendments. Colonial Canada was, as we have seen, not a federation. Because after 1867 the “Constitution” was Westminster’s British North America Act, the British Parliament was in law the body responsible for any amendments. In practice, Parliament acted whenever requested to do so by “Canada”—leaving the Canadians to decide who should put forward the request.

In 1867, the Dominion government believed that it spoke for Canada and that it even had the right to ask the British Parliament to amend the British North America Act without the approval of the Canadian Parliament. From 1871 onward, the Canadian Parliament objected to this procedure, but the convention that submissions to the Westminster Parliament would be put forward by both the government and the Parliament of Canada was not firmly established until 1895. Even so, proposed amendments were the responsibility of the national government and Parliament alone. The provinces were not consulted on the matter.

It took much longer for the provinces to establish their right to participate in the amending process. Consultation with individual provinces on certain issues began in 1907, but was limited. In 1930, the provinces successfully fought against the entrenchment of the Dominion government’s amending powers in the proposed Statute of Westminster (1931). However, there was no agreement between the Dominion and the provincial governments on an amending formula that would include the provinces. In 1981, Prime Minister Pierre Trudeau, a constitutional lawyer, could still argue that nothing in the constitution legally required him to have the agreement of the provinces if he wished to amend the constitution. He gave way in the face of pressure, and in the Constitution Act of 1982, the provinces

were given the constitutional right to be part of the amending process.

However, instead of having all amendments passed by a qualified majority of both houses of Parliament and all the provinces (as in the United States), the 1982 act required some important amendments to be passed unanimously. This decision effectively stymied further attempts at constitutional reform in 1987 (the Meech Lake Accord) and 1992 (the Charlottetown Accord).

### *Dismissing a State Government: India*

In addition to having an amendment formula involving the provinces or states, there is another characteristic of a federation: the national government cannot dismiss the government of a state or province except in an extreme emergency. One other indication of Canada's quasi-federation was that it took over thirty years after 1867 for the government of Canada to desist from this practice.

In India, dismissal by the government of India of state governments in the hands of opposition parties has been quite common.<sup>22</sup> Equally common has been the replacement by the Congress High Command of state chief ministers from its own party. It remains to be seen whether the 1994 judgment of the Supreme Court limiting the proclamation of President's Rule, with the consequent dismissal of a state government, will provide state governments with greater stability.<sup>23</sup>

### *Regional Representation in the Lower House*

Another characteristic of a federation was noted in *Federalist* 39. It was argued that the Congress combined two principles: the national and the federal. According to the "national" principle, representatives to the U.S. House were to be elected by the people of the several states. As a result, the House of Representatives was to be a partially "national" body elected by population, with House seats apportioned among the states by population.

The "federal" principle was used to give the states a role in the election of both the president and the Senate in order to modify the impact of representation by population. The Senate was therefore to be "federal" in that senators were to be elected by the state legislatures equally, and it was to be as effective a body as the House. These three characteristics of the American Senate (elected, equal, and effective) have inspired the demand of the western provinces in Canada for a "Triple-E Senate."<sup>24</sup>

In Canada, while the House of Commons is a "national" body, the Senate is not "federal." First, members are still appointed for life (that is, until they are seventy-five) by the governor general in council (in effect, by the prime minister of the day). Second, the appointed senators do not represent the provinces equally. Quebec and Ontario each have as many senators (twenty-four) as the four western

<sup>22</sup>See Amal Ray with John Kincaid, "Politics, Economic Development, and Second-Generation Strain in India's Federal System," *Publius: The Journal of Federalism* 18 (Spring 1988): 147-167.

<sup>23</sup>In the *Bommai* case (see note 14).

<sup>24</sup>Michael Lusztig, "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada," *Publius: The Journal of Federalism* 25 (Winter 1995): 35-50.

or four eastern provinces together. Moreover, the Senate is for the most part ineffective. It does not play the "federal" role envisaged by the American framers for their Senate.

An example from 1989 indicates the limitations of the Canadian federation. In that year, the prime minister was able to pass legislation through a hostile Senate by invoking for the first time a provision of the 1867 British North America (BNA) Act, which allowed the Queen to permit the appointment of eight extra senators. Many Canadians were surprised to discover that their Constitution Act of 1982 had not replaced the old BNA Act (now called the Constitution Act, 1867). Not everyone noticed that the provision allowing the prime minister to make the additional appointments demonstrated all too clearly that the upper house did not represent the provinces.

Even though India's upper house is for the most part elected, and by the state legislatures in the American pattern before 1913, its members do not represent the states equally. It is true that not all federations allow for equal representation in the American or Australian pattern, but few have as unequal a representation as the Indian upper house, whose 245 members represent the twenty-five states. Here the twelve largest states elect 195 members; the thirteen smallest states elect thirty-four. The president appoints twelve members, and the union territories elect four. Among the small states are four in which there has been much unrest: Punjab, Kashmir, Assam, and Nagaland. Indeed, these four have only nineteen representatives, compared to the twelve appointed by the president.

### *The Executive in a Federation*

*The Federalist* noted that the presidency would be both a national and a federal institution, elected by popular vote and also by an electoral college. In parliamentary systems like Canada and India, where there is collective responsibility, the prime minister and the cabinet take the place of the American president. They are elected as members of Parliament, with Parliament approving the nomination of one of its members as prime minister. The prime minister in turn appoints the ministers. The cabinet is therefore appointed, not elected. Admittedly, there is a convention in Canada that each province should have representation in the government (and in India the more important states), but this may be impossible if a province or state elects no M.P. (Member of Parliament) of the governing party. In their composition, the governments of Canada and India are not federal, except by chance.

The U.S. president plays a double role, that of head of government and head of state; however, these functions are separated in parliamentary systems. The head of state is a governor general or president. Because the composition of the cabinet is not federal, except by accident, one might expect the head of state in Canada and India to play a federal role. This is not so. Canadian governor-generals are appointed by the Queen on the recommendation of the prime minister; they are assumed to be parliamentary heads of state on the British and European model, with power in the hands of the cabinet.

In India, presidents are elected by an electoral college of both houses and all the



state legislatures. In principle, they would appear to be federal officers. In practice, however, although from time to time they do receive the chief ministers of the states and opposition leaders, their hands are tied: they are assumed to be parliamentary heads of state and to have no federal function.

Clearly, for the governor generals or presidents to play a federal role would mean restricting the powers of the prime minister and cabinet. Yet, without a role as heads of a federation, their position is greatly confined. Under present circumstances, neither country can go much farther in the direction of becoming truly federal without giving some thought to the role of the head of state in a federation.<sup>25</sup>

### **CONCLUSION: CONFLICT BETWEEN A PARLIAMENTARY SYSTEM AND FEDERALISM**

We have suggested that both Canada and India have slowly moved from being quasi-federations to becoming federations. However, they are very different from the federal federation of the United States.

It is by no means certain that these two countries, which have evolved from quasi-federations, can proceed much farther as federations. While it is widely assumed that the western provinces in Canada can be mollified by a Triple-E Senate, it is difficult to see how this can be reconciled with the notion of a cabinet responsible only to the House of Commons.

At some point, federalism runs counter to the parliamentary tradition of a strong cabinet government responsible to the lower house alone. No Canadian prime minister has been willing to discuss cabinet responsibility to both houses even as an option. The issue has not yet arisen in India.

There are three possibilities. The most unlikely outcome is the adoption of the liberal concept of federalism by Canada and India in place of their Westminster parliamentary tradition. The most probable is the insistence that their federations should somehow be made compatible with the existing parliamentary tradition of strong cabinet government.

The third is to recognize that because both the classical form of parliamentary government and the classical concept of federalism originated long ago, in the eighteenth century, it may be time to consider the possibility of something new. In 1848, the Swiss invented a new form of federation. Between 1866 (when they abolished their medieval Estates) and 1917, the Swedes evolved a novel form of parliamentary government in which the cabinet was not responsible solely to the lower house. In the twentieth century, the French modified parliamentary government in the form of presidential/parliamentary government.

<sup>25</sup>In my earlier work on forms of government, I did not deal with federalism or federations. See, for example, Douglas V. Verney, "Parliamentary Government and Presidential Government," *Parliamentary Versus Presidential Government*, ed. Arend Lijphart (Oxford, England: Oxford University Press, 1992).

There could be similar innovation by one or more of the parliamentary federations. There is nothing to stop a federation in crisis from inventing something new.<sup>26</sup>

<sup>26</sup>See Douglas V. Verney, "From Responsible Government to Responsible Federalism," *Canadian Constitutionalism 1791-1991*, ed. Janet Azjenstat (Ottawa: Canadian Study of Parliament Group, 1992), pp. 84-98 and "Are All Federations Federal? The United States, Canada and India," *Multiple Identities in a Single State: Indian Federalism in Comparative Perspective*, eds. Balveer Arora and Douglas Verney (New Delhi: Konark, forthcoming).