

Teaching & Learning Guide for: Federalism: Contemporary political philosophy issues

Michael Da Silva

University of Southampton

[Note: This is the accepted manuscript for a forthcoming piece in *Philosophy Compass*.]

This guide accompanies the following article(s):

Michael Da Silva, 'Federalism: Contemporary political philosophy problems.' *Philosophy Compass* 17(4) (2022) pp. e12820, <https://doi.org/10.1111/phc3.12820>.

Author's Introduction

Many works in political philosophy assume that states are unitary entities with final decision-making resting with a single level of government. This simplifying assumption – which is sometimes offered as a substantive claim that authority is indivisible and so must rest with one level of government – can be justified in some contexts but does not reflect political realities in many states. 'Federalism' is a contested concept but minimally refers to a doctrine promoting the division of final decision-making powers in a governance unit among at least two entities (most often federal and provincial governments). It is a basic constitutional fact in countries like the U.S.A., Canada, Australia, and India. It may also describe the structure of the European Union and is often invoked in debates about E.U. law. Federalism implicates core philosophical concepts, including the nature of authority; structures the everyday lives of the at least 40% of individuals who live in 'federal' systems, thereby implicating other basic issues, most notably including distributive justice; and purports to both serve as a standalone constitutional principle that should decision-making federal states and to have implications for other concepts, like democracy. While a theory of federalism capable of accounting for all empirical developments claiming to fit under the banner (and discussed in detail in other disciplines) have proven difficult to identify, greater clarity on the concept and its implications can help illuminate basic philosophical concepts and guide analysis of applied issues.

Author Recommends:

Karmis D. & Norman, W. (eds.). (2005). *Theories of Federalism: A Reader*. Palgrave MacMillan.

This remains one of the best collections of readings in the philosophy of federalism. It contains excerpts from many historical and some recent theoretical works on federalism. If one does not use the text directly, it is a good source for identifying works you may want to assign in full, like those by Will Kymlicka, Richard Bellamy, and Ferran Requejo.

Diamond, M. (1973). *The Ends of Federalism*. *Publius*, 3(2), 129-152.

This is a classic work of political science/theory by a leading scholar of federalism setting out some reasons one may adopt a 'federal' approach to governance.

Weinstock, D. (2001). *Towards a Normative Theory of Federalism*. *International Social Science Journal*, 53(167), 75-83.

This is a more recent overview of some ends that federalism may seek to fulfil and provides some desiderata for a more general philosophy of federalism. The larger volume of the *International Social Science Journal* in which this piece appears is devoted to federalism and contains several other excellent articles. Works by the likes of Daniel Elazar and Ferran Requejo could easily appear on this list.

Levy, J.T. (2007). *Federalism, Liberalism, and the Separation of Loyalties*. *American Political Science Review*, 101(3), 459-477.

This is the definitive contemporary account of the 'bulwarks' view of federalism under which federalism seeks to protect against central tyranny. It also provides compelling reasons why federalism should only divide powers among two levels of government, providing an entry into discussions of whom can possess powers.

Norman, W. (2006). *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State*. Oxford University Press.

This is a book-length analysis of federalism's relationship to nationalism. Like many works in the philosophy of federalism, it focuses primarily on its relationship to the goal of maintaining stability in multinational democracies. Like many works on nationalism, it is primarily focused on secession. While the philosophy of federalism would do well to focus on other purported ends of federalism and more prosaic issues than secession, Norman's work remains a landmark in the philosophy of federalism.

Fleming, J.E. & Levy, J.T. (eds.). (2014). *Federalism and Subsidiarity*. New York University Press.

This collection is volume LV of the American Society for Political and Legal Philosophy's NOMOS series. It contains a series of target essays and responses pieces that also constitute substantive contributions to ongoing debates. The volume contains work by both philosophers and philosophically-informed theorists and lawyers, including discussions of dual federalism, subsidiarity, and municipal authority.

Watts, R.L. (2008). *Comparing Federal Systems* (3rd ed.). McGill-Queens University Press.

This classic is one of the best comparative federalism textbooks. It provides a helpful introduction to the empirical and conceptual issues and challenges. Scholars and students would benefit from reading it. Theorists should account for its insights.

Palermo, F. & Kössler, K. (2017). *Comparative Federalism: Constitutional Arrangements and Case Law*. Hart.

This is, perhaps, the best of the more recent comparative federalism texts. It summarizes the field's key findings and distinctions and presents useful case studies.

Bednar, J. (2009). *The Robust Federation: Principles of Design*. Cambridge: Cambridge University Press.

This book is a touchstone on the political economy of federalism. It features in ongoing work in philosophy, politics, and economics and highlights how those fields intersect in federalism studies. It provides excellent insights into the rationality of federal choices that challenges some dominant theoretical accounts of federalism.

Popelier, P. (2021). *Dynamic Federalism: A New Theory for Cohesion and Regional Autonomy*. Routledge.

This legal theory text has thorough analyses of competing theories of federalism. It argues that 'federalism' is essentially contested but also offers principles for assessing theories and a new account that aims to fulfil those principles better than alternatives.

Online Materials:

Library of Congress, The Federalist Papers

<https://guides.loc.gov/federalist-papers/full-text>

The United States Library of Congress hosts *The Federalist Papers*, a series of essays by Alexander Hamilton, James Madison, and John Jay (under the pseudonym Publius) defending the 1787 version of the U.S. Constitution. That constitution is a landmark in the development of federalism. The essays remain among the most influential arguments for federal governance. Indeed, the leading journal of federalism, *Publius*, shares a name with its author (though both the Founding Fathers and the journal also have Roman influences). One can also purchase better edited versions of the papers.

Andreas Føllesdal. (2003/2018). Federalism. Stanford Encyclopedia of Philosophy.

<https://plato.stanford.edu/entries/federalism/>

This is the preeminent existing encyclopaedic analysis of federalism. It provides a useful analysis of core issues and helpful background. It is more historical than the Philosophy Compass piece to which this guide is a companion and emphasizes different aspects of analysis (thus dividing the terrain differently). One could read this excellent entry together with the present work to orient oneself in the field.

50 Shades of Federalism

<http://50shadesoffederalism.com/>

This is a series of essays by experts in comparative federalism. The brief essays can help philosophers get a sense of the key issues and findings in empirical studies and introduce neophytes to the leading scholars in empirical fields. A section devoted to 'theory' essays presents accounts with which philosophers should grapple.

International Association of Centers for Federal Studies (IACFS)

<https://iacfs.org/>

This is the website for an association of research institutes devoted to the study of federalism. It contains links to the institutions and publications.

Sample Syllabus:

The article to which this guide is a companion is structured around core questions in the philosophy of federalism. One can adopt its structure as a framework for a course in the philosophy of federalism using works cited under each framing question.

This section offers one alternative structure for the beginning of a course. It is designed to provide a framework that one could adopt directly, inspire still other approaches to a course, and offer still further readings one could adopt. Given that 'philosophy of federalism' may not be offered in many universities, it is also designed such that one could pick out modules for classes on adjacent concepts.

Federalism implicates several disciplines and is often a topic of semester- or even year-long classes in law and political science. Philosophical courses that seek to provide descriptively adequate accounts of federalism and its implications should also consult relevant passages of a comparative federalism textbook, like those above. It would be fruitful to teach contemporary works in tandem with classics, like Immanuel Kant's *On Perpetual Peace* or *The Federalist Papers*, to provide background context.

Another approach could structure a course around a subject or issue. Further to those noted below, one could design a course/section around which entity should possess powers over a particular subject, like immigration policy or healthcare.

What is Federalism? What is It For?

What makes a system of governance 'federal?' Why might someone adopt such a system? What are the costs of doing? This session will introduce the central questions of federalism, an overview of different forms of governance that claim to be federal (federations, confederations, consociations, leagues, etc.), and reasons why one might adopt each (e.g., epistemic, democratic, or subsidiarity-based reasons). It will introduce historical and empirical considerations to discuss later.

Da Silva, M. (2022). Federalism: Contemporary political philosophy issues. *Philosophy Compass*, 17(4), e12820.

Weinstock, D. (2001). Towards a Normative Theory of Federalism. *International Social Science Journal*, 53(167), 75-83.

Stepan, A.C. (1999). Federalism and Democracy: Beyond the U.S. Model. *Journal of Democracy*, 10(4), 19-34.

Watts, R.L. (1998). Federalism, Federal Political Systems, and Federations. *Annual Review of Political Science*, 1, 117-137.

Federalism and Democracy: Experiments in Living and Epistemic Considerations

*One classic argument, often attributed to J.S. Mill, holds that federalism is justified because its mix of federal and local control permits both state stability and local 'experiments in living' that provide a means of identifying 'better' lifestyles. This class explores whether this is best understood as an epistemic, prudential, or directly moral argument, whether any version supports federal governance as claimed, and, if so, whether it supports particular visions of federalism. It proceeds through a mix of exegetical readings, recent philosophical work on experiments in living, and a legal case study. If time permits, I recommend the following in tandem with relevant passages from the original Mill texts, namely *On Liberty* and *Considerations on Representative Government*. Karmis and Norman have a good excerpt from 'Of Federal Representative Governments,' which is chapter 17 in the latter.*

Anderson, E. (1991). John Stuart Mill and Experiments in Living. *Ethics*, 102(1), 4-26.

Muldoon, R. (2015). Expanding the Justificatory Framework of Mill's Experiments in Living. *Utilitas*, 27(2), 179-194.

Robson, G. (2021). The Rationality of Political Experimentation. *Politics, Philosophy & Economics*, 20, 67-98.

Manor, A.R. (2021). Moral Polycentricity versus Epistemic Polycentricity. *Social Theory and Practice*, 47(2), 351-375.

Tyler, C and Gerken, H. (2022). The Myth of the Laboratories of Democracy. GWU Law School Public Law Research Paper No. 2021-46. Available at SSRN: <https://ssrn.com/abstract=3902092> or <http://dx.doi.org/10.2139/ssrn.3902092>.

Federalism and Democracy: A Numbers Game?

One argument for federalism holds that it ensures that those most affected by a decision get to make it. This is a 'democratic' argument for federalism. This class contrasts this 'most affected' principle with an 'all affected' principle in democratic theory and their implications for determining the proper locus of final decision-making authority within states. It thereby interrogates the relationship between federalism and democracy, touching on issues on whether federalism properly allocates vote shares.

Weinstock, D. (2001). Towards a Normative Theory of Federalism. *International Social Science Journal*, 53(167), 75-83.

Goodin, R.E. (2007). Enfranchising All Affected Interests, and Its Alternatives. *Philosophy and Public Affairs*, 35(1), 40-68.

Abizadeh, A. (2021). The Scope of the All-Subjected Principle: On the Logical Structure of Coercive Laws. *Analysis*, 81(4), 603-610.

Abizadeh, A. (2021). Counter-Majoritarian Democracy: Persistent Minorities, Federalism, and the Power of Numbers. *American Political Science Review*, 115(3), 742-756.

Federalism and Democracy: The Case of Governance Units

Federalism traditionally focuses on allocating powers between federal and provincial governments (or regional authority and states). This class focuses on whether this focus is justified by examining whether the principles selecting federal authority should also apply to other units, like cities.

Levy, J.T. (2007). Federalism, Liberalism, and the Separation of Loyalties. *American Political Science Review*, 101(3), 459-477.

Weinstock, D. (2014). Cities and Federalism. In Fleming, J.E. & Levy, J.T. (eds.). (2014). *Federalism and Subsidiarity*, 259-290. New York University Press.

King, L. (2014). Cities, Subsidiarity, and Federalism. In Fleming, J.E. & Levy, J.T. (eds.). (2014). *Federalism and Subsidiarity*, 291-331. New York University Press.

*Note: Those interested in cities in particular and/or interested in contrasting federal and global governance could benefit from placing these works in conversation with King's more recent King, L. and Blake, M. (2018). Global Cities, Global Justice? *Journal of Global Ethics*, 14(3), 332-352.*

Purported Federal Principles 1: Subsidiarity

One common principle justifying provincial powers in federal systems is the subsidiarity principle, which holds that powers should rest at the most local level possible. However, some theorists contend that subsidiarity is a rival to, rather than principle of, federalism and/or does not appear in many federal states. Others suggest subsidiarity is independently implausible. This class surveys such claims.

Føllesdal, A. (1998). Subsidiarity. *Journal of Political Philosophy*, 6(2), 231-259.

Barber, N. (2018). Subsidiarity. In *The Principles of Constitutionalism*, 187-218. Oxford University Press.

Cahill, M. (2017). Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach. *International Journal of Constitutional Law*, 15(1), 201-224.

Latimer, T. (2018). Against Subsidiarity. *Journal of Political Philosophy*, 26(3), 282-303.

Da Silva, M. (2022). Subsidiarity and the Allocation of Governmental Powers. *Canadian Journal of Law and Jurisprudence*, Forthcoming.

Purported Federal Principles 2: Loyalty

*Does federalism require 'loyalty' and thus cooperation between a federal entity's constituent units? If so, what does this entail? This class seeks to understand whether federalism requires loyalty and what that would mean. This topic could also be fruitfully combined with the judicial review section as some proponents of the loyalty principle claim that it not only requires judicial review but also requires that other governance units try to resolve their conflicts **before** seeking any such review.*

Gamper, A. (2010). On Loyalty and the (Federal) Constitution. *Vienna Online J. on Int'l Const. L.*, 4, 157-170.

Gaudreault-Desbiens, J.-F. (2014). Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty. *Constitutional Forum*, 23(4), 1-19.

Da Silva, M. (2020). Federal Loyalty and the 'Nature' of Federalism. *Review of Constitutional Studies*, 24(2), 207-240.

Federalism's Architectural Plumbing: The Case of Judicial Review

Any theory of federalism must attend to a host of basic institutional questions. One of the most prominent questions concerns whether federalism requires judicial review. This class examines whether federalism itself requires judicial review. It does so by examining the role that judicial review can play in managing diversity and/or protecting human rights in federal states, such as the U.S.A. and Canada. A similar class may focus on questions concerning the separation of powers more broadly. Richard Bellamy's aforementioned work remains an excellent starting point for that analysis.

Stone, A. (2008). Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review. *Oxford Journal of Legal Studies*, 28(1), 1-32.

Goldsworthy, J. Structural Judicial Review and the Objection from Democracy. *University of Toronto Law Journal*, 60(1), 137-154.

Stone, A. (2010). Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law. *University of Toronto Law Journal*, 60(1), 109-135.

Delaney, E.F. (2022). The Federal Case for Judicial Review. *Oxford Journal of Legal Studies*.
<https://doi.org/10.1093/ojls/gqab043>.

Note: These legal theory works engage with Waldron, J. (2006). The Core of the Case against Judicial Review. Yale Law Journal, 115(6), 1346-1406, but can be read independently in class if needed.

Seminar/Project Ideas:

(1) One exercise that is fruitful in comparative federalism classes (which I first saw in a joint undergraduate law/graduate political science course taught by Johanne Poirier

and Christa Scholtz) assigns students to a country and asks them to look up and report back on how their country treats the issue. Students can, for instance, be asked about how their state allocates particular social policy powers, what bodies have powers in a state, or whether judicial review exists in that state. Students can be assigned to a country individually or as a group. This could be adapted to a philosophy course with an interdisciplinary focus if students were asked to reflect on the conceptual implications of their findings. If paired with a call to look up outcomes (e.g., poverty or mortality rates), the exercise could illuminate the philosophical implications of institutional design questions or invite reflection on questions about what counts as a federal entity or even as a philosophical question.

(2) For a more traditionally philosophical assignment, assign students to take different positions on who should possess final decision-making authority over a subject (immigration, healthcare, etc.) and debate the issue using assigned readings. You may construct a fact pattern and do a mock legal debate (moot) to ground analysis. A 'judge' could be assigned to resolve the debate, drawing on claimed principles of federalism. One interesting variant would be a general debate on who should have power over a subject (e.g., healthcare) followed by a second debate on an issue in that domain (e.g., who should decide where to locate a vaccination centre). This could not only challenge intuitions and highlight how principles apply in different contexts but could also raise discussions of which principles should apply when – and whether federalism itself concerns allocating authority over only subjects or also issues.