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## Jenna Bednar's *The Robust Federation: Principles of Design* (book review)

James A. Gardner

*University at Buffalo School of Law*, [jgard@buffalo.edu](mailto:jgard@buffalo.edu)

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# THE ROBUST FEDERATION: PRINCIPLES OF DESIGN

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 [ipbr.net/2009/09/robust-federation-principles-of-design.html](http://ipbr.net/2009/09/robust-federation-principles-of-design.html)

□ by Jenna Bednar. New York and Cambridge: Cambridge University Press, 2008. 219pp. Hardcover. \$85.00/£40.00. ISBN: 9780521878999. Paper. \$24.99/ £15.99. ISBN: 9780521703963. eBook format. \$20.00. ISBN: 9780511460616.

Reviewed by James A. Gardner, University at Buffalo Law School, State University of New York. E-mail: [jgard \[at\] buffalo.edu](mailto:jgard@buffalo.edu).

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Fueled by the Rehnquist Court's unexpected rediscovery of federalism as a constitutional constraint on American governmental power and by a recent global outbreak of constitution drafting, interest in federalism has exploded in the last two decades. Federalism is now a subject routinely studied by numerous disciplines utilizing a wide variety of investigative methods. In THE ROBUST FEDERATION, Jenna Bednar, a political scientist, approaches the subject using the tools of positive political theory. Bednar's objective is to extend and systematize the basic Madisonian insights about federal structures of governance, not so much in an elaborately formal or comprehensive mathematical model as in a set of clearly stated and interconnected principles of sound constitutional design.

Bednar's account begins with a review of the purposes that societies have thought, or might plausibly think, can most effectively be achieved by erecting a federal structure of governance. Madison, of course, thought that the main justification for federalism was its capacity to protect liberty through the institutionalization of intergovernmental competition for popular political allegiance. Consistent with contemporary scholarly thinking about federalism, Bednar expands Madison's list to include a wide variety of goals that she categorizes under the headings of military security, economic prosperity, and effective political representation (ch.2). Nevertheless, faithful to the Madisonian tradition, she approaches the distribution of governmental authority as "an instrument of public policy that can be calibrated for social benefit" (p.52).

Again consistent with Madison's structural analysis, Bednar argues that the main difficulty posed by federalism is that it inevitably creates incentives for various actors within the system to evade the desired allocation of authority, thereby undermining the system's potential to achieve its contemplated benefits. She identifies three families of potential transgressions: encroachment by the national government on state authority, shirking by states of their responsibilities to the union, and burden-shifting by some states to others (ch.3).

This leads Bednar to the heart of the book: an analysis of the "safeguards of federalism." These are the mechanisms that keep the system functioning properly and prevent it from collapsing into centralization or dissolving into decentralization, outcomes that by hypothesis are less capable of sustainably securing the desired social benefits than the moderately

decentralized but high-maintenance [\*669] structure of federalism. A universal, baseline safeguard of federalism, Bednar notes early in the book, is what she calls “intergovernmental retaliation,” by which she means the threat by governments of secession or dissolution of the federation (pp.11, 95). This is of course a blunt, costly, and risky strategy that is not likely to succeed very often or in very many circumstances. Bednar therefore catalogs and evaluates a variety of other safeguard mechanisms that federally organized polities have tended to employ. These include (1) structural safeguards, such as fragmenting national power and providing states a formal voice in national institutions of governance; (2) popular safeguards, by which the public exercises control directly over government officials; (3) political safeguards, mainly in the form of a party system that binds together officials throughout the system; and (4) judicial safeguards in the form of judicial review and enforcement of constitutionalized distributions of authority (ch.4).

The final chapters of the book turn to the question of how such safeguards may be introduced into federal systems so as most effectively to protect both the capacity of the system to achieve the goals for which it was designed and its long-term sustainability. Bednar argues that a well-designed federal system ought to make use of safeguards capable of thwarting each kind of transgression that a federal structure will predictably produce, a design goal she calls “coverage” (ch.5). In addition, she argues that safeguards ideally ought to exhibit the quality of “complementarity,” meaning that safeguards should be structured in a way so that the frequency with which they are invoked declines as their forcefulness increases. A well-designed system, she argues, ought to contain a mix of mild sanctions that are invoked frequently and harsh sanctions that are invoked infrequently (ch.6).

Finally, Bednar addresses complexities arising from the fact that sanctions for transgression of system parameters are ultimately invoked and applied by real actors operating under conditions of uncertainty and within incentive structures that may not lead to optimal application (ch.7). This produces some complex difficulties. A tendency toward underenforcement of sanctions can be addressed by creating redundant sanctioning mechanisms. On the other hand, sanction redundancy under conditions of imperfect information can give rise to other problems, such as sanctioning competition, leading to overenforcement and consequent deterrence of desirable behavior. Overenforcement in turn can make the system excessively rigid, biasing it in favor of the status quo and squelching the kind of innovation and system adaptability that may be necessary for it to endure over the long haul. A well-designed system, Bednar argues, must contain defenses against both underenforcement and overenforcement of sanctions, while simultaneously retaining a desirable (but not excessive) degree of system flexibility.

This is a tall order, and in a federal system, Bednar argues, the requisite delicate balance can be maintained primarily by the emergence of what she calls a “federal culture” (p.187). Such a culture, she explains, “is a valuation of the federation itself” (p.188) in which citizens “develop a more general [\*670] attachment to federalism, rather than to any one government” (p.189). This creates the conditions in which beneficial modifications to the initial allocation of governmental authority may be reliably recognized, and ultimately accepted as legitimate, by

the citizenry. "Democracy," she concludes, "when paired with a federal culture, provides the finely tuned system of safeguards that leads to robustness" (p.195). The beneficial mediation of such a culture, Bednar maintains, helps explain American resistance to the Alien and Sedition Acts in 1798 and Canadian constitutional repatriation during the 1980s.

Bednar has attempted a great deal in the book, with the result that her analysis is really two analyses. One is a fundamentally sound analysis pitched at a very high level of abstraction – so abstract, in fact, that it really applies to any and all institutions of governance. At this level, the model is sound and indeed unexceptionable. Politics have goals. Their governance institutions should be well-suited to achieving those goals. Institutional actors will inevitably have incentives to undermine or exploit the structure in ways that threaten it. Institutions must therefore contain mechanisms that safeguard themselves against failure or disintegration at the hands of exploitative actors. To be effective, these mechanisms must work together to cover the full range of foreseeable destructive behaviors, and some degree of complementarity and redundancy of safeguard mechanisms is desirable to secure the system against inadvertent dismantling. And since both the goals of the system and the environment in which it operates may evolve with time, it is desirable to institutionalize some mechanism by which the details and operation of the system may be adapted to take account of changed circumstances.

But none of this has anything to do particularly with federalism. The same analysis applies equally to unitary states or decentralized confederations, which also require mechanisms to maintain their robustness in the face of whatever potentially harmful incentive structures they may incidentally create. Indeed, the same could be said of nondemocratic forms of government such as monarchy, aristocracy, or autocracy, and of a wide variety of mechanisms in democratic states that disperse or channel power such as horizontal separation of powers, direct or indirect democratic representation, and so forth. All such systems, when well-designed, should achieve the goals of their creators, retain some degree of robustness and sustainability, make use of sanctions to enforce whatever allocations of authority they create, and respond successfully to changes in their operating environments.

When this abstract conceptual framework is applied to federalism, however, it is less successful. Many of the model's basic assumptions seem divorced from the reality of federalism as it is actually practiced. For example, Bednar's tidy model suggests that a well-designed system of federalism will allocate some sanctioning mechanisms to government officials, some to parties, some to courts, and some to the various state and national polities. In reality, however, there is often such extensive overlap among these groups that they are impossible to distinguish. Government officials are party leaders; parties influence the conduct of elected [\*671] officials; parties and elected officials can mobilize the citizenry; popular opinion can affect the outcome of judicial decisions; state polities and national polities have overlapping memberships; and so on.

Indeed, the real story of federalism as it has evolved in practice is much less one of clever constitutional design and enforcement than it is a story of outright collusion among constitutional actors to ignore, subvert, and opportunistically rewrite basic constitutional

allocations of authority. Political parties, which Bednar counts among the critical mechanisms for enforcing federalism's allocation of authority, have in fact long served as important brokers of opportunistic power swaps that are difficult to reconcile with the constitutional plan (Kramer 2000). The judiciary, an institution Bednar considers the most reliable for sanctioning transgressions of federal structures, has been anything but an enforcer of the federal scheme; in the U.S., federal courts colluded with Congress over sixty years to expand national authority enormously.

Because the game of federalism is not really played the way that Bednar's model contemplates, she overlooks a whole range of intergovernmental sanctioning mechanisms. Her conception of "intergovernmental retaliation" is artificially narrowed to include only cases of threatened secession or dissolution. Although such threats are clearly the nuclear weapons in any system of planned intergovernmental rivalry, in actual federal states governments generally develop elaborate palettes of actions by which they may influence policies and practices adopted by other levels of government. These actions, which stop well short of threatening to destroy the whole edifice, include selective forcible resistance, retaliatory taxation, boycotts, public complaints, lobbying, bribes, policy trading, back-channel diplomacy, and many others (Gardner 2005b, Nugent 2009). And because institutional actors have access to such a wide range of options, they can and do deploy them in ways that are sensitively calibrated to the larger political context.

Few of these enforcement mechanisms, moreover, are expressly contemplated by the constitutional design. Indeed, the lesson of federalism in the United States, Latin America, and virtually anywhere it is practiced is the evident weakness of constitutions to constrain distributions of power. Institutional actors in every federal system have diligently developed extraconstitutional workarounds to redistribute power and authority in ways driven not by constitutional distributions, but by contemporary political imperatives. Bednar argues that a well-designed federal system will build in a capacity to permit adaptation when it is strongly needed, but in practice adaptation is easy and continual, not difficult and episodic; it is indeed the norm rather than the exception.

In the end, Bednar does seem to acknowledge these realities, but deals with them by producing the deus ex machina of "federal culture." When citizens themselves become socially and politically committed to federalism because they understand and come to desire its benefits, she argues, then and only then will federal structures reliably be observed. This is true, but it is also descriptively wrong and very likely [\*672] impossible. Americans know nothing about federalism (McGinnis and Somin 1999), but more importantly they have no reason to care about it (Devins 1999). What institutional actors of all stripes want is government satisfaction of their present policy preferences. Madison's great insight was that federalism would permit satisfaction of at least some kinds of popular policy preferences whether or not Americans were committed to it as an institutional structure.

Like Bednar, Madison was right on his own assumptions, but insightful as he was, Madison's crystal ball was badly clouded. He failed to foresee the rise of political parties, nor did he anticipate the great changes in behavioral incentives associated with the introduction of

democratic forms of governance (Gardner 2005a). And of course hugely powerful modern political forces such as nationalism and identity politics did not even exist when the U.S. Constitution was adopted. Bednar wants to correct Madison's oversights in ways that are consistent with his insights, and this is a worthy project. But like her role model, she has not accounted for the extraordinarily complex interactions that federalism creates between institutional structures and the social and political contexts in which they are embedded. Indeed, the practice of federalism around the world is generally so local, idiosyncratic, and context-driven that one wonders whether the comparatively blunt tools of positive political theory are especially well suited to describe it, much less to predict its operation in ways that usefully illuminate questions of constitutional design.

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