



Forum of Federations
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Federalism: Its Principles, Flexibility and Limitations

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TABLE OF CONTENTS

Introduction	3
Federalism: Its Principles and Core Values	4
Distribution of Powers	5
Legislating and Administering	7
Asymmetric Federalism	7
Constitution or Supreme Law	8
Federalism and Accommodating National Diversity	9
Key Element of a Federation: The Practice	11
Conclusion	12
Appendix 1: The Distribution of Powers and Functions in Federal Systems: A Comparative Overview	13
Appendix 2: Contemporary Federations	19
Bibliography	21



Introduction

Gathered here today in Manila are people of different backgrounds, experts from across the globe, individuals with a wide variety of political views, languages, religions and traditions, all of whom share the conviction—perhaps the hope—that multi-tiered government and power-sharing among different entities can be an attractive option when a State is faced with complex national realities.

The pressures of globalization, combined with the challenge of reconciling diversity (ethnic, religious, linguistic or other) and forging national unity, have led a growing number of States to take a serious look at the federal political system - one combining a central government and a number of constituent / regional governments.

The goal of this presentation is neither to sing the praises of federalism, nor to claim that federalism is the only possible way to accommodate the national aspirations of the different groups and regions of the Philippines. Rather, it is to offer a broad overview of federal structure.

Essentially, I would like to cover three points:

1. First, the basic principles, philosophy and core values of any federal structure;
2. Second, the challenges, responsibilities and constraints involved in adopting a political system in which power is shared;
3. And finally, how some federal structures have managed to accommodate extremely diverse groups, including autonomous regions with separatist tendencies.



Federalism: Its Principles and Core Values

Let us begin by defining federalism or a federal political system. People often contrast “federal systems” with “unitary political systems” (i.e. systems with only one source of central authority). Federal systems are also often juxtaposed with very diverse modes of government or approaches to management. Some see little difference between “federalism and decentralization,” or “federalism and devolution,” or “federalism and subsidiarity.” Although there are similarities among these concepts, they should not be confused with one another.

Under the umbrella term “federal political system” there are several possible configurations, the most familiar of which are no doubt federations and confederations. I won’t go into all of the possibilities. Rather, I will focus on the form that is of most interest to us today: the federation.

When we speak of a federation, we are referring to a political system in which there is power-sharing. The government consists of at least two orders: a central or federal government and the governments of constituent units. Each order of government receives an allocation of financial resources tailored to their specific requirements. Sometimes the municipal level may also constitute a distinct order of government. So, not only does the federal (or central) government have its own constitutional jurisdiction, but also a second order of government is constitutionally recognized and exercises exclusive powers.

For instance, in addition to a federal government, Canada has provinces; Switzerland has cantons; Germany has *Länder*; the United States has different states; Yugoslavia, republics; and Spain, autonomous regions. Whatever the name, these are all entities that, like the federal government, have exclusive jurisdictions. These jurisdictions are defined by a constitution, not by another level of government. As a result, neither the federal government nor the governments of the various constituent regions are constitutionally subordinate to one another. The people directly elect each order of government.



Professor Ronald Watts has drawn up a list of structural characteristics distinctive to federations:

1. Two orders of government, each in direct contact with its citizens;
2. An official, constitutional sharing of legislative and executive powers, and a sharing of revenue sources between the two orders of government, to ensure that each has certain sectors of true autonomy;
3. Designated representation of distinct regional opinions within federal decision-making institutions, usually guaranteed by the specific structure of the federal Second Chamber;
4. A supreme written constitution that is not unilaterally modifiable but requires the consent of a large proportion of federation members;
5. An arbitration mechanism (in the form of courts or a referendum) to resolve intergovernmental disputes;
6. Procedures and institutions designed to facilitate intergovernmental collaboration in cases of shared domains or inevitable overlapping of responsibilities. (Watts, 2002, p.8)

Distribution of Powers

There is no a priori formula to determine which powers should be devolved to the federal authority and which to the regional authorities. In Australia, a constitutional committee study (1985) concluded that, certain jurisdictions such as defense, international policy, fiscal policy and some taxation areas, requiring strong federal management. Other jurisdictions can be and are conferred differently depending more on the distinct features of each country: the structure of its population, the strength of the regions, etc.

Despite this variation, there appear to be three general trends in the distribution of powers:

One common practice is to confer a list of exclusive powers on the federal government, leaving the residual powers to the constituent states (Pakistan).

A second approach involves identifying a list of jurisdictions pertaining to the federal and constituent states respectively, with an added clause according residual powers accorded to the federal government (Canada, Belgium)



The third trend is to draw up two lists only: federal jurisdictions and concurrent jurisdictions. All residual powers are left to the states. (The United States, Switzerland, Australia, Germany, Austria)

Simply put, residual powers confer legal authority on one of the two orders of government for all matters that do not appear among the items listed in the constitution. The primary goal of residual powers is to identify an authority in charge of new affairs for which a jurisdiction has not been determined. In cases where a federation has arisen out of an association of formerly independent communities it also provides a mechanism to underscore regional government autonomy. By according residual powers to constituent units, the new areas of jurisdiction are not seen as a means by which the government can centralize its power and thus threaten autonomy.

In practice, when areas of jurisdiction are not defined by the constitution, they are assigned to the most appropriate government. This is determined by legal judgment, normally handed down by a Supreme or a Constitutional Court.

Although each order of government usually has its own areas of jurisdiction, nothing prevents two orders of government from mutually exercising a given power. This is known as concurrent or shared jurisdictions. In fact, almost all federal countries make provisions for concurrent jurisdictions, particularly in legislative affairs. This is not surprising, given that cooperation and interdependence between orders of government are essential to any form of federal governance. In cases of conflicting legislation, the constitution determines which order of government will prevail.

Concurrent jurisdictions offer several advantages in federal structures. They introduce a degree of flexibility and innovation in the distribution of powers. For instance, the federal government may delay exercising its powers in an area that might eventually call for a strong federal coordination. Concurrent jurisdiction allows state governments to develop their own policies in the interim. The federal government might also decide to establish national standards in certain areas, leaving the states to develop services in the manner that best responds to the unique identity of each region. Concurrent jurisdictions also allow a federal government to temporarily occupy a state's jurisdiction when that state is unable to deliver a particular service. (Watts 2002)



Legislating and Administering

Until now, I've been discussing the distribution of legislative powers as if they are always accorded to the same order of government as executive powers. While that is generally the case in parliamentary systems, it is not the traditional procedure for presidential governments.

In parliamentary systems, both legislative and executive powers are usually conferred on the same order of government. This form of government offers the advantage, from an executive viewpoint, of being both responsible and accountable for the implementation of its own legislation.

Certain federations, however, have enshrined in their constitutions provisions separating executive and administrative responsibilities in certain fields of jurisdiction. This does not make these States any less federal. In Germany, for instance, the constitution makes provisions for the federal government to assume most legislative powers, while the *Länder* are in charge of implementing and administering legislation. Thus, from a legislative perspective, Germany can be considered very centralized, while it is decentralized in administrative terms. It should, however, be noted that the *Länder* are also involved in developing legislation through the *Bundesrat* the Chamber of the Regions.

Asymmetric Federalism

In most federal systems, constituent units are considered to be equal and have the same legislative powers. However, the constitutions of certain federations provide for an asymmetric division of powers in order to reflect the differences among their constituent units. These differences can be territorial, demographic, linguistic, cultural or religious.

There are two main forms of asymmetric federalism. One approach consists of increasing the federal government's authority in regions where the state's capacity to exercise legislative authority is less advanced or is temporarily undermined. In such cases, the federal government may take over until the state is in a position to exercise its authority. Such was the case in India where, for the first six years of the Union, the federal government assisted



certain less developed states until they were able to exercise their own legislative power.

The second, and more common, approach to asymmetric federalism involves giving one or several states more autonomy. The Malaysian system is one of the best illustrations of this approach. Although it has a highly centralized system of government, Malaysia has given the states of Sabah and Sarawak powers that normally fall under federal jurisdiction. These Bornean states have considerably more autonomy than the 11 other states in areas such as taxation (in particular customs and excise), immigration and citizenship, trade, transportation and communication, fisheries and several social affairs sectors. The aim of this approach is to protect the distinctive characteristics of the two states and their interests.

Constitution or Supreme Law

Regardless of the approach adopted, the constitution is the supreme legal instrument in any federation. It cannot be amended unilaterally. An amendment would require the assent of a significant number of the federation's component regions and, in certain cases, a majority of the population.

As previously mentioned, the constitutions of federal countries determine the division of legislative and executive powers, as well as the distribution of financial resources, to ensure that the various levels of government have real autonomy.

Normally, the constitution also provides for a supreme arbitration body empowered to resolve disputes and rule on litigious cases involving governments' constitutional powers.

Since most federations have concurrent jurisdictions. They also usually have institutions and mechanisms in place to coordinate relations among the different orders of government.



Federalism and Accommodating National Diversity

The vast majority of conflicts raging in the world today are domestic and involve national groups demanding better representation or greater autonomy in their respective states. Several of the world's 25 federations are multinational; countries within which national groups are demanding greater recognition and autonomy. Although federalism as a system of government has sometimes been successful in easing tensions and maintaining state unity, it has not always been able to meet the demands of national groups. To offer a true political space, federations need to be flexible.

As mentioned above, some federations have opted for the asymmetric form of federalism, thereby granting certain national groups true autonomy. The asymmetry varies from country to country with the division of powers being based on the realities of each federation.

Other federations have also adopted approaches based on the challenges they face. One such approach consists of redrawing state borders so as to better respect the ethnic make-up of each one. This was the case in Nigeria, which gradually grew from 3 to 36 states. The Swiss adopted a similar approach with the creation of the canton of Jura. The Republic of India has also created 3 new states carved out of the existing territory.

Sometimes, it isn't really a question of meeting the demands of one or more national groups, but rather it is a question of ensuring that the rights of all national minorities are protected.

In Bosnia-Herzegovina, for example, the Bosnian Serbs have the Republic of Srpska, and the Bosniaks and Croats have cantons in which either Bosnians and Croates constitute the majority, although some cantons remain mixed. However, authorities will still not declare territories or municipalities to be "ethnically pure." The federal government has therefore been given the responsibility of creating an Office of the Ombudsperson that is answerable to the federal parliament to ensure that the rights of national minorities are respected. The Office, which works closely with the Human Rights Chamber, is responsible for ensuring that the rights of Bosnian minorities are respected, regardless of where they live.



Another approach is to enshrine a corpus of fundamental civil rights enforceable by the courts in the constitution. Such was the case when Canada introduced a Charter of Rights and Freedoms during the 1982 patriation and amendment of its constitution.

At this dawn of a new millennium it seems that the idea of assimilating national groups has finally been abandoned. History has shown that a sense of membership in a national group is often stronger than affiliation to the State. As a result, the Nation State that so many have striven to build over the past few centuries is giving way to the multinational State.

Governments of such multinational States are increasingly recognizing the merits of demands related to linguistic, religious or cultural protection. They are also realizing that, far from threatening the stability of the country, the conferral of distinct powers on some national groups may actually lead to greater social peace.

Conflicts and negotiations are not about to disappear entirely; however, rather than taking place under tense conditions, they will be tackled by constitutionally recognized partners. As one of the leading experts in the field said, purely democratic federalism can quell nationalist fervour. (Will Kimlicka)

Several observers point out that federal structures have not entirely succeeded in crushing separatist movements and they probably never will. Representatives of separatist movements jockey for position on the political stage during elections. Some entities, such as Puerto Rico, Quebec and St. Kitts-Nevis, have held elections or referenda on the issue of separation. However, we should not forget that countries such as Canada, Belgium and Spain would probably not exist in their current form if they had not devised ways of sharing powers with their national groups.

Power-sharing or increased territorial autonomy give national groups more confidence. This confidence would be even greater if they were to become constitutional partners, thereby gaining legal guarantees and further autonomy on issues related to preserving their distinctiveness.



Far from leading to secession, federalism, if applied in a truly democratic fashion, can offer the political space needed to guarantee true regional autonomy.

Key Element of a Federation: The Practice

The above is an overview of the basic characteristics of federal political systems. These principles, however, are applied in extremely varied ways. The actual form of a federal structure depends on the political reality of the country and its social diversity.

There are no standard models or ideal structures. While some countries have constitutions, they are operating almost like Unitarian states. Adopting a federal constitution is not the only or sufficient step to establish a federal government. The practice is really what defines a federal state.

There are currently 24 federations worldwide, including the United States, India, Germany, Mexico, Spain, Brazil, Canada, Nigeria, Russia and Malaysia. In total, 40% of the world's population is governed through a federal system (see attached list).

Several elements can affect the structure of a federal political system. The number of constituent units, for instance, can have a significant impact on the dynamics of the system of government. Countries such as Russia, consisting of 89 republics, and the U.S.A., with its 50 states, will apply a structure different from that of Canada, which is made up of 10 provinces, or Australia, which has only 6 states. Similarly, the relative weight of each constituent state will depend on whether it is one of six, or one of eighty-nine.

Regional economic profiles can also significantly change the relative weight of constituent units and sometimes harm national unity. As a result, a number of countries have opted for forms of financial adjustment to guarantee their citizens a minimum acceptable standard of living.

As I mentioned earlier, the way financial resources, as well as legislative and executive powers are divided varies significantly from country to country. In Canada, for example, the government has both legislative and executive power. The system is different in Germany, where the federal government



legislates and the Länder implement and administer legislation. The same applies to the sharing of fiscal jurisdictions. In this case too, the models vary considerably; they are selected and configured to suit the specific needs of the country. For its own reasons, a federation may decide to give more power to the center while another will attribute the majority of the authority to its constituent units.

This is why the analogy between federal and decentralized nations can be erroneous. Some federations are highly centralized while others remain very decentralized.

Conclusion

Federalism is much more than a system of government. It is also a process of ongoing negotiations, an art of resolving conflicts, an approach based on compromise and cooperation. The Canadian scholar Thomas Courchene¹ may have been right when he described federalism, not as a power-sharing system, but as a process.

Nothing is ever established once and for all, since solutions to problems must be negotiated among constitutional partners and not imposed by a single central authority. That, in my opinion, is one of the greatest advantages of federalism.

What about the ideal model? I think that in order to entirely satisfy all parties, the federal structure must first and foremost be flexible and reflect the particularities of its constituent groups or regions. There are no patterns to follow. None of the 24 countries that have opted for a federal constitution has won the trophy for ‘best federation’. From them, however, we can learn tremendously. Learn from their successes – learn from their mistakes.

¹ Comments made by Thomas Courchene at a recent conference held in Porto Alegre, Brazil: “Fiscal Federalism in Mercosur: The Challenges of Regional Integration”.



Appendix 1

The Distribution of Powers and Functions in Federal Systems: A Comparative Overview

Source: "Comparing Federal Systems in the 1990's" - Ronald L. Watts



The Distribution of Powers and Functions in Federal Systems: A Comparative Overview

	Canada (1867)	United States (1789)	Switzerland (1848)	Australia (1901)	Germany (1949)	Austria (1929)	India (1950)	Malaysia (1963)	Belgium (1993)	Spain (1978)	Czechoslovakia (1968)	Pakistan (1962)
BASIC FEATURES												
Residual Power	F	S	S	S	S	S	F	S	F	FS*	S	S
Enumeration of State Powers	YES	NO	NO	NO	YES	YES	YES	YES	YES*	YES	NO	NO
Delegation of Legislative Authority	NO	NO	NO	YES	NO	NO	YES	YES	YES*	YES	YES	YES
SCOPE OF POWERS												
<i>Finance and Fiscal Relations</i>												
Taxation												
Customs/Excise	F	F/C	F	F	F	F	F/FS	F	C	F	F	F
Corporate	FS	C	F	C	C†	F	F	F	C	F	F	F
Personal Income	FS	C	FS	C	C†	F	FS	F	C	FS*	F	FS
Sales	FS	C	F	C	C†	F	FS	F	C	F	S	F
Other										FS*		
Equalization	F		F		FS				Sr		F	
Debt and Borrowing									F			
Public Debt of the Federation	F	F	F	F	F	F	F	F	F	F	F	F
Foreign Borrowing	FS	FS	FS	C	FS	F	F	F	FScr	FS	FS	FS
Domestic Borrowing	FS	FS	FS	C	FS		FS	FS	FScr	FS	FS	FS

Legend:

- F = federal power
- S = state (provincial/canton/Land/autonomous community)
- C = concurrent power (federal paramountcy except where denoted C which denotes provincial paramountcy)
- c = "Community" power
- r = "Regional" power
- * = 5 of the 17 sub-national orders of government retain residual powers, for the others the residual powers are federal
- † = asymmetrical application of powers
- ‡ = federal legislation in this field administered by the states



The Distribution of Powers and Functions (continued)

	Canada (1867)	United States (1789)	Switzerland (1848)	Australia (1901)	Germany (1949)	Austria (1929)	India (1950)	Malaysia (1963)	Belgium (1993)	Spain (1978)	Conchostomalia (1962)	Pakistan (1962)
International Relations												
Defence	F	FS	F	FS	F	F	F	F	F	F	F	F
Treaty Implementation	R(1)	F	F	F	FS	R(1)	R(2)	R(2S)	ScF	F	F	R(2)
Citizenship	F	F	F*	F	FC†	FS†	F	F	F	F	F	F
Immigration (into federative)	C	C	C	C	C†	F	F	F*	F	F	F	F
Immigration (between regions)					C†	F	F	C				
Functioning of Economic Union												
"Trade and Commerce"	F	F	F	F	C†	F	F	F	Sc	F	F	F
External Trade	F	F	F	C			F	F	Sr	F	C	F
Inter-state Trade	F	F	F	C			F	F				F
Intra-state Trade	S	S	S	S			SC	F*				
Currency	F	F	F	F	F	F	F	F	F	F	F	F
Banking	FS(3)	C	F	C	C†	F	F	F	F	F	C	FS
Bankruptcy	F	FS	FS	C			F	F	F	F		
Insurance	FS	FS	FS	C			F	F	F	F		FS

Legend:

- F = federal power
- S = state (provincial/canton/Land)
- C = concurrent power (federal paramountcy except where denoted C* which denotes provincial paramountcy)
- c = "Community" power
- f = "Regional" power
- * = asymmetrical application of powers
- † = federal legislation in this field administered by the states

This page:

- (1) = requires implementing legislation or consent of provincial or state governments
- (2) = requires consultation (non-binding of state governments)
- (3) = banking is exclusively federal but savings and credit unions are provincial
- * = cautious governments are free to set standards within the limits imposed by federal legislation



The Distribution of Powers and Functions (continued)

	Canada (1867)	United States (1789)	Switzerland (1848)	Australia (1901)	Germany (1949)	Austria (1929)	India (1950)	Malaysia (1963)	Belgium (1993)	Spain (1978)	Czechoslovakia (1968)	Pakistan (1962)
Transportation and Communications	S	FS	PS	FS	RC†	RS	FS	F	Sr	SF		
Roads and Bridges	FS	FS	F	RS	RC†	F	F	P	F	S		S
Railways	F	F	F	FS	RC†	F	F	F	Sr	SF		F
Air	FS	FS	F	C	F	F	F	F	F	F	C	F
Telecommunications	F	F	F	C	F	F	F	F	F	F	C	F
Postal Services	F	F	F	C	RC†	F	F	F	F	F	C	F
Broadcasting	F	F		C					Sc	F	C	F
Agriculture and Resources												
Agriculture	C	S	PS	SC	C†	PI	SC	SC*		S	C	
Fisheries	FS	S		RS	C†		RS	RS	Sr	S†F		FS
Mineral Resources	FS	S		S		F	RS	RS	Sr	F		
Nuclear Energy	F	RS	F	C	C	F	F		F	F		F

Legend:

- F = federal power
- S = state (provincial/canton/Land)
- C = concurrent power (federal paramountcy except where denoted C† which denotes provincial paramountcy)
- c = "Community" power
- r = "Regional" power
- * = asymmetrical application of powers
- † = fishing in inland waters
- ‡ = federal legislation in this field administered by the states

Note: Italics denote *de facto* distribution of powers and functions



The Distribution of Powers and Functions (continued)

	Canada (1867)	United States (1789)	Switzerland (1848)	Australia (1901)	Germany (1949)	Austria (1929)	India (1950)	Malaysia (1963)	Belgium (1993)	Spain (1978)	Czechoslovakia (1968)	Poland (1962)
Social Affairs												
Education and Research	S	S	CHS	S	S	RS	CS	P	S ₆	RS*	S	
Primary and Secondary Education	S	RS	CHS	RS	C**	F	PCS	P	S ₆	F		
Postsecondary Education	S	RS	CHS	RS	C†	RS	PCS	P	RS ₆			RS
Research and Development												
Health Services	SF	SF	S	RS	C†	C†	S	F				
Hospitals	S	S	C†	S	C†	RS	S	P	S ₆	RS*		
Public Health and Sanitation								PC	S ₆	S		
Labour and Social Services	F	RS	C†	C	C†	F	S	F	F	F	C	
Unemployment Insurance	RS		PC	C	C†	F	CS	P	F	F		
Income Security	SF	SF	C†	C	C	S	CS	C	S ₆	RS		C
Social Services	C	C	C†	C	F	F	C	RS	F	F		RS
Positions								RS				

Legend:

- F = federal power
- S = state (provincial/cantonal/land)
- C = concurrent power (federal paramountcy except where denoted C* which denotes provincial paramountcy)
- c = "Community" power
- r = "Regional" power
- * = asymmetrical application of powers
- ** = 6 of the 17 sub-national orders of government have jurisdiction over education and health
- † = enumerated as a framework legislation jurisdiction whereby the federal government may enact general principles only
- ‡ = federal legislation in this field administered by the states

Note: Italics denote *de facto* distribution of powers and functions



The Distribution of Powers and Functions (continued)

	Canada (1867)	United States (1789)	Switzerland (1848)	Australia (1901)	Germany (1949)	Austria (1929)	India (1950)	Malaysia (1963)	Belgium (1963)	Spain (1978)	Czechoslovakia (1968)	Pakistan (1962)
Law and Security												
Civil Law	S	S	F	FS	Ct	FS*	C	F	F	F		
Criminal Law	F	S	F	S	Ct	FS*	C	F				
Organization of Courts	FS	FS	S	FS	Ct	F	FS	F	F	FS*	C	FS
Internal Security (police)	FS	FS	S	SF	CtS	FS	FS	F	F	F		S
Prisons	FS	FS	S	S		F	S	F				
Other Matters												
Language	FS		S				FS	F	FS	FS		
Culture	FS		Ct					C	Sc	FCSa	S	
Aboriginal Affairs	F	F		C			FS	F				FS
Environment	FS	FS	Ct	FS	Ct	FS			Sr	C		
Municipal Affairs	S	S	S	S	S	S	S	FS	FSr	FS		

Legend:

- F = federal power
- S = state (provincial/canton/Land)
- C = concurrent power (federal paramountcy except where denoted C* which denotes provincial paramountcy)
- c = "Community" power
- r = "Regional" power
- * = asymmetrical application of powers
- † = federal legislation in this field administered by the states
- * = states may legislate in the fields of criminal and civil law if necessary to dispose of an item within the scope of their legislative competence (Article 15, paragraph 9)



Appendix 2

Contemporary Federations

Source: "*Comparing Federal Systems – Second Edition*" - Ronald L. Watts
(N.B. Since publication, 1 additional country has become
federalized. It appears in this appendix in italics.)



Appendix 2 - Contemporary Federations

Name (Constituent Units)

Argentine Republic (23 provinces + 5 regions + 1 national territory + 1 federal district)

Commonwealth of Australia (6 states + 1 territory + 1 capital territory + 7 administered territories)

Federal Republic of Austria (9 Länder)

Belgium (3 regions + 3 cultural communities)

Bosnia Herzegovina (2 administrative divisions)

Brazil (26 states + 1 federal capital district)

Canada (10 provinces + 2 territories + Aboriginal organizations)

The Federal and Islamic Republic of the Comoros (3 islands)

Ethiopia (9 provinces)

Federal Republic of Germany (16 Länder)

Republic of India (28 states + 7 union territories + 1 federacy + 1 associated state)

Malaysia (13 states)

United Mexican States (31 states + 1 federal district)

Federated States of Micronesia (4 states)

Federal Republic of Nigeria (30 states + 1 federal capital territory)

Islamic Republic of Pakistan (4 provinces + 6 tribal areas + 1 federal capital)

Russian Federation (89 republics and various categories of regions)

St. Kitts and Nevis (2 islands)

South Africa (9 provinces)

Spain (17 autonomous regions)

Swiss Confederation (26 cantons)

United Arab Emirates (7 emirates)

United States of America (50 states + 2 federacies + 3 associated states + 3 local home-rule territories + 3 unincorporated territories + 130 Native American domestic dependent nations)

Republic of Venezuela (20 states + 2 territories + 1 federal district + 2 federal dependencies + 72 islands)

Federal Republic of Yugoslavia (2 republics)



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