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In the spring of 1995, Oxford University was just beginning to give final examinations to the first students to undertake tutorials in a course titled "Soviet and Post-Soviet State and Law." Soviet law had been studied for decades at Oxford, but post-Soviet law was new and attracted only a trickle of students. They studied under the extraordinary Professor Bernard Rudden of Brasenose College. At the examination, copies were provided of the then-brand new 1993 Constitution, part I of the Civil Code, and Professor Butler's collection of *Basic Legal Documents*.

Oxford examinations take the form of writing several essays from a list of topics. Here is one of the most important of the topics offered: "'The new Constitution of the Russian Federation has achieved neither separation of powers nor a balance of powers.' Discuss." Students would have understood that coded language to ask for descriptive and normative evaluations of both horizontal power structures; that is, between branches of the federal government, and vertical power structures, between federal and regional governments. What would a good answer have looked like in the spring of 1995?

Well, any able student could identify a variety of hortatory and prescriptive provisions in the text of the Constitution, some scattered legislation, and a few judicial opinions. The better students might have concluded that, on its face, the Constitution's super-presidential system did not seem to separate or balance power particularly well in either a horizontal or a vertical direction. Dangers lurked in ambivalent language and yet-to-be-used levers of power. But, the very best student would have continued. She would have observed that the question asked what had been *achieved*, not what the mere text of the new Constitution had *described*. Her essay would have included an assessment of the effects on federalism and the separation of powers of an emerging party system, a history of regional claims to sovereignty and autonomy, and the *de facto* weakness of federal power in the mid-1990s to demand blood and treasure from regional powers like Mintimer Shaimiyev in Tatarstan, Murtaza Rakhimov in Bashkortostan, or Mikhail Nikolaev in Sakha-Yakutia, not to mention the then ongoing first war in Chechnya.

This student would not have begun her analysis on December 12, 1993, when the Constitution was ratified under dubious conditions, but rather on August 10, 1990, when Boris Yeltsin, then Chairman of the RSFSR Supreme Soviet, addressed political elites in Kazan' and urged them to "take as much independence as you can hold on to," words repeated a few days later in Ufa with the more

popular variant, "take all the sovereignty you can swallow." In that ambiguity between independence and sovereignty was planted seeds of confusion that continue to haunt Russian federalism. Independence and sovereignty, of course, are not the same thing, especially in the context of a federal system. But operating within the defective federal shell of the Soviet Union, the difference went unnoticed for awhile.

This student would have observed how that speech unleashed a torrent of declarations of sovereignty from the regions. These declarations—although of no legal significance—had real repercussions. Some regions paid taxes, delivered conscripts, and enforced federal law while other regions did not, seemingly with impunity. As different regions took different views of what their sovereign status meant, this affected the negotiation of the first Federal Treaty and the 1993 Constitution that ultimately repudiated the more decentralized bargain that that treaty had struck. Some regions felt betrayed by the rejection of a treaty that they felt had established the foundations of a new relationship with Moscow. One region actually sought to secede. And more than half negotiated special bilateral relations with Moscow that established varying degrees of fidelity to the constitutional division of powers and subject-matter jurisdiction. The legal status of these early bilateral treaties was as shaky as that of the declarations of sovereignty that preceded them. Some of them were signed in secret, none of them were ratified by legislatures at any level.

None of this, of course, was immediately obvious or predictable from a facial assessment of constitutional *text*. Federal *structure* could create power, and create limits on power, as important as more easily identified textual commands. History, too, could inform how both textual and structural constitutional claims should be assessed. Such constitutional glosses are common, especially in systems of government as complicated as federal systems.

But that was years ago. What if the same bright Oxford student were to write on the same examination question today? The essay would look very different. She would probably not linger very long with the text of the Constitution before describing a succession of federal statutes, especially those passed at the start of Vladimir Putin's first term as president. As you know, these federal laws and presidential decrees ended the bilateral treaty process. One statute ousted regional governors and parliamentary chairmen as *ex officio* members of the upper chamber of the Federal Assembly, the Council of the Federation. By decree, federal districts were created that broadly overlapped existing military districts. Federal overseers, men who were mostly of high military rank, were appointed by President Putin. Another statute gave the federal president powers to dismiss regional executives, regional legislatures and municipal governments. In addition, President Putin acquired the statutory power to appoint regional executives himself (thus ending all direct elections for heads of regional governments throughout the Federation). Other than the federal president, the only remaining executive officials subject to direct, popular election are mayors.

Even more recent legislation has ended direct representation of single-mandate constituencies in the lower chamber, the State Duma. The cumulative result, therefore, is that *every* region of Russia now has a chief executive nominated by the federal president and removable by him, and *no* region of Russia has any direct representative to the Federal Assembly with anything remotely similar to an electoral constituency in that region. That shift from political accountability to the people—whom the Constitution repeatedly describes as the bearers of sovereignty and the single source of power in Russia—has deprived the Russian Federation of one of the core protections in a federal system against over-centralization: the political process. There exists what Associate Justice David Souter of the United States Supreme Court referred to as "the political component of federalism." In words that referenced the "founding fathers" of the American federal republic, but which sound eerily prescient for a Russia then flush with petro-dollars, he underlined how important this was for a federal system. Politics, he wrote, "should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy."

The student may well have described these measures as part of the swing of a pendulum, a reaction to the extreme weakness of the federal center under Yeltsin and increasing legal confusion caused by his parade of bilateral treaties and agreements. The student would also now have plenty of federal Constitutional Court opinions to evaluate. He or she would have noted the Court's early ambivalence about issuing rulings about federal-regional relations, the inconsistency of its early opinions and their low rate of compliance under Yeltsin, followed by the Court's more aggressive enforcement of President Putin's so-called federal reforms. The student would note that what had been *achieved* was not solely a function of constitutional text, but owed much to political forces and to the unhappy memory of the 1990s. The text of the Constitution was sufficiently vague to permit an extraordinary shift of power between the regions and the federal government without any significant amendment at all. But this shift was accomplished by devaluing structural constraints on that text placed on it by core principles of federalism.

In my book, which was published in 2002, I observed the start of this swing of the pendulum during Putin's first few years in office. I forecast that this malleable constitution, on its own, would no more stop extreme centralization under President Putin than it had stopped the extreme decentralization of federal-regional relations under President Yeltsin. At least part of what was required was the strengthening of federal *and* regional institutions to ensure that federal and regional powers respected the spheres of authority of each, and a strong, independent Constitutional Court that could interpret the Constitution with integrity and fidelity to both the text and the structural principles embedded in that document. The likelihood that even this wish list would suffice, however, was undermined by the failure of federal and regional political elites to come to a consensus about exactly what those structural principles actually were and in what foundational document they were to be found. Vladimir Putin's so-called dictatorship of law had certainly ended the parade of declarations and bilateral treaties launched by Yeltsin's famous call to "take all the sovereignty you can swallow." But it had not, indeed could not have had the intention of resolving the underlying philosophical differences between federal and regional elites: Was this a federation based on a constitution or a treaty? Was this a federation in which the regions were granted their governing authority by a supremely sovereign Moscow? Or was it Moscow that derived *its* limited powers from regions that had ceded some, but not all, of their sovereignty to the center? In other words, Russia did not adopt a federal system based on an agreed foundation of the most basic principles of federalism.

The inherent attraction of federalism is that, to borrow a phrase from Associate Justice Anthony Kennedy of the United States Supreme Court, federalism "split the atom of sovereignty." That idea unleashes opportunities for spectacular innovation, generates dynamos for economic progress, and establishes overlapping forums for democratic self-government. It creates economies of scale and a whole much greater than the sum of its parts. Federalism creates multiple sources of sovereignty within a single state, endowing or preserving each sovereign entity with spheres of authority that are simultaneously co-ordinate and independent. The regional and federal governments are dependent on one another, and yet each possesses jurisdictions constitutionally protected against intrusion by the other.

This division of sovereignty has another advantage, particularly important for Russia. As Associate Justice Sandra Day O'Connor noted: "Federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Put another way, also in O'Connor's words, "A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." In the structure of federalism is thus a protection of individual rights that can be more potent than their mere identification in a list. In other words, text alone does not protect liberty, constitutional structures do, too.

Those structures are almost gone in Russia. At the request of the International Academy of Comparative Law, I wrote a report last fall (co-authored with Alexei Trochev and Nikolay Balayan) on the unification of law in the Russian

Federation. I presented our findings in Mexico City four months ago, as part of a larger project that compared the unification of law in 23 federal systems worldwide. The conclusions of both our national report and the general report are startling when considered in Russia's historical perspective. Compared to other federal systems, Russia's legal system is among the most unified in the world. It is almost certainly the most centralized system in the world that still claims to be federal.

The text of the Constitution identifies eighteen subjects over which jurisdiction is allocated to the central government. Fourteen subjects are allocated to the joint authority of the central government and regions. Subjects not specifically allocated are left to the regions. Notwithstanding this division, all of these subject areas are, for all practical purposes, under the control of the central government to the degree that it desires to exercise such control. The default rule in Russia is that that question—what is inherently local in nature—is a question for the central government alone to decide. Therefore, all laws and normative legal acts of the regions in areas of joint jurisdiction must be issued in accordance with the federal law on the issue. The Constitutional Court has upheld the central government's view that in areas of joint authority, the central government takes the leading role in establishing the space left for local law-making, even when that space is a null set. No historical or structural gloss appears to temper this engorgement of power.

Federal law often operates throughout Russia directly, unmediated by regional law. Thus, the law of contracts, torts, property, business organizations, and other aspects of private and commercial law (subjects that other federal systems may leave to the jurisdiction of the component states) are all governed exclusively by federal law. Through a system of codification, the central government regulates all civil law, civil procedure, criminal law, criminal procedure, administrative law and procedure, and the procedure for use in the commercial courts. There are federal codes governing the use of land, air, water, and forests. Federal codes also govern all labor law and family law. There are codes for the citing and construction of towns, housing, collection of taxes and customs duties, and the regulation of government budgets. Even the form of government *within* the region is not the exclusive prerogative of that region. My colleagues and I were hard pressed to identify meaningful spheres of jurisdiction within the exclusive sovereign power of the subjects of the federation. With the exception of certain limited controls over linguistic and cultural practices, these do not appear to exist. From the point of view of federalism, this is a terrible state of affairs. As then-United States Chief Justice William Rehnquist observed, a federal constitution "requires a distinction between what is truly national and what is truly local."

The current relationship between Moscow and the regions is a relationship that I am no longer certain may be described as federal in any meaningful sense of that word. It lacks now many of the structural features of federalism that I have identified: a division of sovereignty in which each entity is simultaneously co-ordinate and independent; a political component that protects this division between what is truly national and what is truly local; and an understanding that in dividing power both horizontally and vertically there is a structural protection for individual rights that manifests itself as much in regional legal distinctions as in autonomy. Russia today presents an example of what can happen when constitutional text is interpreted in a vacuum, with too little attention to identifying these foundational principles, and little attempt to make structural and historical arguments to interpret constitutional text with fidelity to those principles. Arguments and conclusions drawn from constitutional structure and history are as valid and as important tools of constitutional interpretation as argument from the plain meaning of the text. Indeed, structure and history stabilize a text and prevent the sort of pendulum swings that we have seen in Russia. But these tools—as important to a legislature as to a judiciary—have not been used in Russia. And the longer they go unused, the more difficult their use will become. Let me give you one example.

In December 2005, the Constitutional Court upheld the constitutionality of President Putin's new power to nominate governors for regional

confirmation, thus ending their direct election. Will Pomeranz has written an excellent analysis of this case that you will soon be able to read in *Demokratizatsiya*, but let me briefly note some of the opinion's features and omissions. The Court noted the variety of direct and indirect ways that the Constitution provided for filling federal executive and representative offices: some elected, some *ex officio,* some textually proscribed, others left to be established by statute. "Thus," the Court concluded, "the possibility of different variants of endowing with authority organs and offices of public power, which are not directly named in the Constitution of the Russian Federation as elected," leaves open the possibility of change as to how to fill these positions. The Court concluded that if the text is silent, this alteration is constitutional.

But the Court never mentions provisions of the Constitution that support the broader structural protections of federalism against the drumbeat of a unified executive. For example, the Court concludes that regional executives are "links" in the chain of a "unified system of state power". Thus, regional executives, it says "stand in relations of subordination directly to the President of the Russian Federation" based on the latter's direct, nationwide popular election. But this interpretation would render Article 85 of the Constitution meaningless, since this article limits the President's powers to resolve differences between federal and regional organs of state power to that of "conciliatory procedures." Such a limitation would be strange indeed if regional executives were mere subordinates of the federal president.

This manner of reasoning—deriving permitted avenues of organizing state power from the absence of textual restrictions—is to recast a constitution as a mere code. But the plain meaning of the text, or the absence of any text, is not the only source of constitutional authority. The structure of the Constitution establishes prohibitions as forcefully as the text can. The federal structure and recent history of Russia provide strong arguments against such a reading of the text.

I have already mentioned the political component of federalism and the need for genuine distinctions between what is truly national and what is truly local. Federalism, although found in many variations in many countries, does have a certain base meaning. There is more to a written constitution than the plain meaning of its text. And yet the Constitutional Court of the Russian Federation has found it relatively easy to subordinate those principles to the principle of the "unity of the system of state power" in Articles 5 and 77 of the Constitution. That phrase would seem to be best understood as limited *by* federal principles rather than as placing a limit *on* federal principles. Read in the context of a *federal* constitution, that language does not necessarily lead one to support the idea of an "executive vertical."

In conclusion, let me say this. You will have noticed that I have flecked my remarks with quotations from justices on the United States Supreme Court. I did this deliberately, perhaps unduly provocatively, but not to suggest that American federalism is a model for anyone to follow. American federalism is probably the worst possible approach for Russia or any other multi-national, multi-ethnic, or multi-lingual country. These justices are not talking about American federalism, they are talking about principles of federalism in the abstract. These principles include: that there be a meaningful distinction between what is truly national and what is truly local; a political component of federalism that creates multiple levels of direct political accountability; that power is sufficiently diffused to protect individual liberty from attack by either local or national powers.

What is more, these justices made these arguments not by looking to the text of an American document, but by looking at the structures that a federal constitution creates. The word "federal", after all, is not to be found anywhere in the text of the U.S. Constitution. Each quotation is from a case decided in the last fifteen years (i.e. during the new era of federalism that it was hoped the Russian Constitution had introduced). The Russian Constitution has been interpreted with insufficient attention to these principles of federalism, principles derived as much from its structure as from its unique recent history as from its text. Instead, the Constitution's text has too often been overprivileged and read in a vacuum to render in-

terpretations that are ahistorical and contrary to the structures of the federal state that it purports to create.

The Oxford exam I mentioned at the start of my remarks included more than one opportunity for the student to discuss Russian federalism. The very next question on that exam provided a quotation from the great Dutch scholar of Soviet and Russian law, Ferdinand Feldbrugge, who rightly concluded: "The Soviet Union was a unitary state which masqueraded as a federation." The student was asked whether he agreed with this assessment and whether things in Russia were now different. The able student in 1995 might have pointed to the disparity between formal Soviet structures and actual practice to draw conclusions about that entity, but accept the invitation of the question to advance a more optimistic view based on the text of the new Constitution.

There is little reason for optimism about federalism in Russia in the near term unless, like Mikhail Gorbachev in his time, Dmitry Medvedev should surprise us in his. The Constitution has thus far escaped substantial amendment by way of Chapter 9 of the Constitution. And yet, in the short span of fifteen years its federal structure has been almost completely undone. That is a bad sign. Worse than a constitution that is buried under the weight of constant amendment is a constitution that, in the face of systemic institutional change, need not be amended much at all. Thank you.