

Rethinking Federalism

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Abstract

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This thesis is motivated by uncertainty in the academic literature surrounding the meaning of federalism and the appropriate usage of the concept to describe political systems. In particular, its use in characterising systems of regional integration which have moved beyond a strictly inter-governmental character, but not yet reached Statehood, is today highly contested, as in the case of the European Union. The established consensus that this entity constitutes a wholly novel '*sui generis*' form, neither federal nor confederal in character, has been tempered in recent years by a growing willingness among scholars to deploy the lens of comparative federalism to analyse the polity. However, the precise relevance of the concept in this new context remains unsettled.

Can political science achieve any more definite understanding that removes such doubt? I consider this question through the perspective of the history of ideas, by examining the evolution of federalism from inception to the present day.

I argue that the history of the federal idea in the United States reveals that the heart of the problem lies in confusion over the nature of sovereignty. Ever since Philadelphia federalism has been thought to mean 'a division of sovereignty'. However, the subsequent Civil War did appear to demonstrate that the notion of sovereignty shared between two levels of government was a false construction: either the whole or the parts could be sovereign, but not both simultaneously. This point, it seems - the indivisibility of sovereignty - was not fully taken on board afterwards in the United States and elsewhere. The thesis seeks to put this right and to systematically relate the evolving concept of federalism with the evolving and contested nature of sovereignty.

On this ground, I suggest that we clarify the definition of federalism as 'a division of the powers flowing from sovereignty'. This in turn yields two specific varieties of 'compound polity' where before only one was known: the single State and multi-State federal forms. The latter has to date been an unobserved species, which, it would seem, the fact of the EU's existence now forces us to recognize.

‘When the facts change, I change my mind. What do you do, Sir?’

J. M. Keynes

‘If a man will study how things arise from their beginning and come to be, in this way he will best perceive the truth of a thing’.

Aristotle

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Glossary of Terms

ASEAN	Association of Southeast Asian Nations
AU	Africa Union
CARICOM	Caribbean Community
CIS	Commonwealth of Independent States
EC	European Community
ECSC	European Coal and Steel Community
EDC	European Defence Community
EEC	European Economic Community
EMU	Economic and Monetary Union
EPC	European Political Community
EU	European Union
NATO	North Atlantic Treaty Organisation
QMV	Qualified Majority-Voting
SEA	Single European Act
TEC	Treaty Establishing the European Community
TECE	Treaty Establishing a Constitution for Europe
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNASUR	South American Union of Nations
US	United States
WWII	World War II

Chapter 1

Introduction

I. Uncertainty Over the Meaning and Usage of Federalism

Any work entitled *Rethinking ... (X, Y or Z)* inevitably invites the suspicion that the author intends to embark on a long and laborious quest to ‘reinvent the wheel’ - perhaps only ultimately to take the literature little further forwards from where it started out. It may also be inferred that he plans to overturn the inherited framework of ideas and concepts carefully crafted over generations, in favour of some untested new schema that may or may not withstand subsequent scrutiny. Worse still, the impression may be received that he holds the existing scholarship in low esteem, arrogantly dismissing it as simply erroneous and failed. This is, in some ways, the perennial problem of academe: how does ‘new thinking’ introduce itself within an existing canon of literature? And how, especially, is that insertion to be made - diplomatically - when the prevailing body of scholarship has some critical weakness in it? If real discovery, as Szent-Gyorgyi put it, consists of ‘... seeing what everyone has seen and thinking what nobody has thought’¹, how does the scholar present and have accepted a genuinely transformational idea where it may be needed?

I would like to begin this thesis by making clear that I do not consider that the existing literature has wholly failed in its attempt to ‘think’ federalism. Quite the

¹ Cited in Good, Irving *The Scientist Speculates* (Heinemann, 1962), p.15.

reverse, in fact: the *acquis* of federal scholarship developed over recent centuries leaves the field in a good state of health. In particular, the decades after the Second World War have seen a period of fruitful theorising that has continued through into the present day. Works by authors such as Wheare², Riker³, Friedrich⁴, Duchacek⁵, Davis⁶, Forsyth⁷, King⁸, Elazar⁹, Pinder¹⁰, Nicolaidis and Howse¹¹, Kelemen¹², Menon and Schain¹³, Burgess¹⁴, Hueglin and Fenna¹⁵ and Watts¹⁶ have cumulatively contributed a body of literature that is at once insightful and comprehensive for the student of the subject to draw upon. Nevertheless, there do remain key issues of conceptual and terminological confusion still to be addressed. It is in a spirit of constructive intellectual development, then, that I put forward in these pages my suggestions for tackling them.

Despite the fairly restricted parameters of this task - implying more a work of completion than of wholesale creation - the approach required to confront it is, I argue, of necessity, radical. For the outstanding problems appear resistant to treatment by the traditional means we have so far employed. The old path of incremental

² Wheare, Kenneth *Federal Government* (Oxford University Press, 1946).

³ Riker, William *Federalism: Origin, Operation, Significance* (Little Brown, 1964).

⁴ Friedrich, Carl *Trends of Federalism in Theory and Practice* (Pall Mall, 1968).

⁵ Duchacek, Ivo *Comparative Federalism: the Territorial Dimension of Politics* (Holt, Rinehart & Winston, 1970).

⁶ Davis, S. Rufus *The Federal Principle: a Journey Through Time in Quest of a Meaning* (University of California Press, 1978).

⁷ Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981).

⁸ King, Preston *Federalism and Federation* (John Hopkins University Press, 1982).

⁹ Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987).

¹⁰ Pinder, John *European Community: the Building of a Union* (Oxford University Press, 1995).

¹¹ Nicolaidis, Kalypso and Howse, Robert (Eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001).

¹² Kelemen, Daniel *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004).

¹³ Menon, Anand and Schain, Martin (Eds.) *Comparative Federalism: the European Union and the United States in Comparative Perspective* (Oxford University Press, 2006).

¹⁴ Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006).

¹⁵ Hueglin, Thomas and Fenna, Alan *Comparative Federalism: a Systematic Inquiry* (Broadview, 2006).

¹⁶ Watts, Ronald *Comparing Federal Systems* (McGill - Queen's University Press, 2008).

adaptation, with each author making his own minor adjustments to the existing set of terms and definitions, in successive attempts at bringing full clarity, seems to have reached its limits. We need, at this juncture, I contend, to attempt to think afresh on the subject by going back to first principles and working forward from this firm base by steady logical deduction; and in respect of reconsidering the essential foundations of the concept, to rethink federalism.

Within this broad working context, however, I far from advocate starting again from a complete *tabula rasa*. Rather, I argue that, in reflecting anew on the matter, we gain the opportunity to reassemble the federal concept in full working order, combining the few required new insights with the many valuable ones of the prior scholarship. As I have endeavoured to think ‘outside the box’ so-to-speak, challenging all inherited assumptions as the research has progressed, I have been struck by how often the individual fragments of thought necessary to construct a coherent and properly-integrated intellectual framework have been already present in the earlier forays of authors within the field, as each has wrestled with the various thorny problems encountered and posited potential pathways to better-functioning concepts. This project seems, therefore, in some respects simply one of bringing these elements together and combining them in their proper relation.

The thesis follows the valuable guidance offered by Ryle that one valid type of social science research may be that which seeks simply to ‘... make clear what was unclear before’¹⁷. The specific grey area still lingering in the literature today that motivates the thesis concerns uncertainty over the precise meaning of federalism. This appears, in turn, to be responsible for ambiguity surrounding the appropriate usage of the concept in analysing and describing political systems. In particular, the relevance of

the federal concept in characterising the outcome of processes of regional integration where the form of co-operation has moved beyond that of a strictly inter-governmental character, but has not yet reached Statehood, remains the subject of heated debate. As Howse and Nicolaidis, for example, comment of the product of the most advanced such process occurring today, European integration: ‘... although most scholars would agree that it has been a federation in the making since the 1960s, the language of federalism, the very term, continues to be highly contested’¹⁸.

This intellectual problem also has wider implications, apparently spilling over into the domain of practical politics at the present time and, arguably, hampering the search for consensus. For the Convention on the Future of Europe of 2002 - 3 was unable to agree upon a succinct formula incorporating the concept in a ‘definition of the Union’, intended to serve as the leading article of its draft Constitutional Treaty. This was despite a large majority among the Convention delegates apparently supportive of its inclusion in one form or another¹⁹. Instead, this body had to settle simply for a lowest common denominator descriptive characterisation of the nature of the Union, five lines in length. Observing its debates, Nicolaidis finds the ‘dreaded F-word’ as controversial an issue as it had been a decade earlier at Maastricht, with in the end only agreement as to what the European Union (EU) *was not* - not what it *was*: ‘... Witness the stands taken on the Convention floor. Everyone agrees on one point:

¹⁷ Ryle, Gilbert *Collected Papers*, Vol. II (Hutchinson, 1971), p.166.

¹⁸ Howse, Robert and Nicolaidis, Kalypso ‘Introduction: The Federal Vision, Levels of Governance, and Legitimacy’ in Nicolaidis and Howse, *op. cit.*, p.8.

¹⁹ Nicolaidis records that up to eighty-five per cent of delegates were either openly in favour, or presumed to be so by their tacit backing of the chair’s draft text, which had stated that the EU manages its common policies ‘... on a federal basis’.

Nicolaidis, Kalypso ‘What is in a Name? Europe’s Federal Future and the Convention on the Future of Europe’ in *Journal of European Law*, January 2004, p.1.

because the EU is *sui generis* there is no definition of the nature of the beast in manuals of public law²⁰.

Beyond the purely ideological and populist battles, I believe that such difficulties have less to do with uncertainty over the EU's characteristics and nature - the body, after all, seems well analysed and understood today by the academic community - than with uncertainty surrounding the meaning of federalism. For on close inspection quite some dissatisfaction with the construction and definition of the concept still appears to persist in the literature, which could well, I suggest, be responsible for the apparent identification and categorisation problems. I argue that it is desirable for political science - indeed for any science - to deliver a clear answer to a clear question where this is at all possible; and that the question *Is a system of regional integration which has progressed beyond a strictly inter-governmental character, but not yet become a State, federal?* can be answered simply and straightforwardly in a 'yes' or 'no' manner. This is not overly-simplistic, it seems, but just a matter of building a methodologically-sound definition of federalism and deploying it in a rigorous way. Current lengthy and complex responses to the question, usually beginning with the qualification 'It depends what you mean by federalism ...', I posit, are unnecessary. These appear means of accommodating, and living within the constraints of, ambiguity in the concept - their current employment being due to need rather than any inherent virtue. Where such requirement can be eliminated by tighter and clearer definition, then it should be.

So what is it exactly that must be changed and improved? In the chapters that follow, I aim to show that there is one fundamental conceptual flaw running through the scholarly literature at present, causing miscommunication and misunderstanding,

²⁰ *Ibid.*, p.1.

whose correction, like pulling on the key piece of string in a tangled ball, can unravel the problem and bring clarity where before was only disorder. This concerns the idea that sovereignty is divisible. Close analysis of the American integration process shows how sovereignty as an ultimate concept - the single *final* source of authority in a political community, whose location when known is capable of resolving any internal conflict, in case of dispute - was unhelpfully jettisoned at the Philadelphia Convention in 1787. The framers of the United States (US) Constitution instead introduced the compromise notion of sovereignty divided between two levels of government (and hence apparently *two* highest authorities) as the only way at that time of securing widespread agreement on a text, both in the Convention itself and in subsequent popular ratification in the thirteen States. Yet, the resort to force in the Civil War some seventy years later did eventually appear to make clear the fallacy of this novel - and seemingly paradoxical - idea. Rather surprisingly, though, we have still not managed to pin-point the obstacle and overcome it by restoring the true meaning of sovereignty as an ultimate - and thus indivisible - concept. Today, with federalism defined as ‘a division of sovereignty’, the scholarly literature is instead attempting to operate without such a notion.

The tendency to revere the American founding myth - and hence implicitly the genesis of modern federalism as well - may be one factor in making us reluctant currently to reappraise inherited doctrines. A further one may be that the Southern States had deployed an indivisible notion of sovereignty in support of their case for secession in the Civil War, and had lost, with the result that the former mainstream dogma of divisibility became entrenched in America afterwards. As Hueglin and Fenna observe wryly, ‘... Winners get to write the rules’²¹. However, the fact that the

²¹ Hueglin and Fenna, *op. cit.*, p.46.

original system had, indeed, descended into bloody conflict in the first place, would seem to have demonstrated conclusively that the prior presumption of two tiers of government, each with a *share* of sovereignty, had been misplaced. For the idea upon which it had been based - the division of governing powers between the levels, each acting within a well-defined sphere and supreme within its limits - had been shown false by the existence of grey areas in the Constitution which required a third party judge to arbitrate and allocate the competence. The individual component units had then been seen unable to protect their interests against encroachment by the general government in certain key unenumerated domains perceived by them to be vital, and *in extremis* to reassert control over such interests through re-establishing independence. They had thus been seen to fail to give meaning to any claim to maintain sovereignty; and, correspondingly, the US had been shown to have been forged into a single - and henceforward indissoluble - sovereign State. Whatever the reason for our reticence until now, it appears that we urgently need to reinstate a valuable but presently overlooked idea.

An indivisible conception of sovereignty can be integrated within the existing academic *acquis* effectively, I argue, by making a simple adjustment to the definition of federalism, framing it not as ‘a division of sovereignty’ but ‘a division of the powers flowing from sovereignty’. If we implement this subtle but nonetheless crucial change, we find the field of political structures in our view radically transformed. The old central ‘compound’ space of federalism previously thought of under one heading, representing one model only - the zone of ‘divided sovereignty’ of the ‘federation’ or ‘federal State’ - now reveals itself to be better understood as composed of two forms based on indivisible sovereignty: the single State and multi-State federal forms. These are now properly conceived as equal halves of the concept, with a ‘rubicon’ of

sovereignty transfer demarcating the boundary between them (this being the point of transition from one form to the other, when sovereignty passes either up or down, from the parts to the whole, or vice-versa). Only in this way, it seems, can our basic framework of political structures be made both coherent and complete, and grey areas clarified.

The research embarks on the journey to illuminate the nature of the current confusion and locate appropriate means for its clarification, by attempting to trace the history of the idea of federalism from its inception through to the present day, and to systematically relate this with the parallel evolution of the contested idea of sovereignty. A firm understanding of the origins of the federal concept, it is felt, an appreciation of where it has come from and how it gradually developed over centuries past, could contribute to providing the requisite perspective on the prevailing situation to permit the identification of a clear and well-founded response.

On this basis, the research question of the thesis is: *What can be learnt from the evolution of federalism over time for the construction of a valid federal concept today?* In order to address this question, the thesis will explore how the concept and terminology of federalism have evolved over time.

The remainder of this introductory chapter is divided into two sections. The first section reflects on the nature of concepts in social science. For this thesis is at heart a conceptual thesis, and so it is central to our concern to grasp what scholars who have inquired into this precise subject have had to say on the matter. The second section establishes the exact stage that the existing literature on federalism has reached: both the points of consensus or disagreement among authors and the questions that are identified as still awaiting an answer.

II. The Nature of Concepts in Social Science

Goertz considers concepts to be of ‘primordial importance’ within social science. However, paradoxically, he observes, they have been rather neglected compared to the ‘massive’ literatures on quantitative measures (indicators, scales and suchlike). He comments that they are ‘... a central part of our theories, yet researchers, apart from Sartori and Collier, have focussed very little attention on social science concepts per se’²². These two scholars he sees as the dominating figures in the recent work on the topic, in a league of their own, with the latter’s thought in many respects a natural extension of the former’s. Here, we will follow the writings of Sartori in some depth, for his 1970 essay and later elaborations on the subject have provided both the original catalyst and a continuing frame of reference for scholars’ subsequent reflection in this area. As Goertz tells us:

‘... There are few articles in political science that deserve the predicate “classic,” but certainly Sartori’s “Concept Misformation in Comparative Politics” merits the label. Thirty-plus years since its appearance in the *American Political Science Review* (1970) it shows up regularly on qualitative and research methods syllabi’²³.

Collier and Gerring begin their recent volume, *Concepts and Method in Social Science: the Tradition of Giovanni Sartori* (2009), by bringing out the importance of Sartori’s early work on research methodology to the searching fundamental questions getting at the heart of the validity of social science research:

‘... Sartori stands at the forefront among scholars who have tackled problems of conceptual confusion. His work poses many questions: What is the basic structure of the concepts in comparative social science? What analytic and practical tools are most useful for working with these concepts? Can uniform standards for concept

²² Goertz, Gary ‘Introduction’ in Goertz, Gary (Ed.) *Social Science Concepts: A User’s Guide* (Princeton University Press, 2006), pp.1-2.

²³ Goertz, Gary ‘Concept Intension and Extension’ in Goertz, *op. cit.*, p.69.

usage be formulated? How does one persuade scholars to follow these standards?’²⁴.

In this context, an illuminating snap-shot of the motivation that runs through his thinking is gained from the foreword to the 1984 volume he edited, entitled *Social Science Concepts: A Systematic Analysis*:

‘... We all know that words are multi-meaning, that our concepts are conceived very differently, and that our arguments are plagued by ambiguities and inconsistencies. The point is what to do about all of this. Can the present-day chaos be turned into a cosmos that allows, at a minimum, for intelligible communication and constructive discussion?’²⁵

This is clearly a rather bleak assessment. The approach that Sartori recommends the social scientist adopt to begin countering the unhappy state of affairs appears sensible and balanced. In his 1970 essay, he urges scholars to avoid falling into the trap of being either an ‘unconscious thinker’, oblivious to concerns of method (he believes the majority of researchers), or an ‘over-conscious thinker’, burdened by an excessive preoccupation with methods and applying standards drawn from the physical sciences (a sophisticated minority). Instead, he elevates the ‘conscious thinker’ who can steer a

‘... middle course between crude logical mishandling on the one hand, and logical perfectionism (and paralysis) on the other hand’²⁶.

Sartori sees a wide gap then existing between these ‘two unsound extremes’, offering plenty of room for productive improvement in the method employed by social scientists. Whilst most reference to ‘research methods’, he says, amounts to little

²⁴ Collier, David and Gerring, John ‘Introduction’ in Collier, David and Gerring, John (Eds.) *Concepts and Method in Social Science: the Tradition of Giovanni Sartori* (Routledge, 2009), p.3.

²⁵ Sartori, Giovanni ‘Foreword’ in Sartori, Giovanni (Ed.) *Social Science Concepts: A Systematic Analysis* (Sage, 1984), p.10.

²⁶ Sartori, Giovanni ‘Concept Misformation in Comparative Politics’ in Collier and Gerring, *op. cit.*, p.13.

more than a discussion of the survey techniques or social statistics used, the more central concern lies with *methodology*, which is about

‘... the logical structure and procedure of scientific enquiry. In a very crucial sense there is no methodology without *logos*, without thinking about thinking. ... my underlying complaint is that political scientists eminently lack (with exceptions) a training in logic - indeed, in elementary logic’²⁷.

Sartori’s grounding in, and diligent application of, the traditional classical approach to logic stemming from Aristotle, which defines concepts via ‘necessary and sufficient conditions’, is indeed a central feature of his thought²⁸. In natural consequence, a key focus for him lies in establishing rules and procedures for co-ordinating concepts. For, as Collier and Gerring observe, he is convinced that ‘... key terms and concepts, once defined, are too often used inconsistently’²⁹. A central theme in his approach, therefore, is a drive to bring order and rigour, through advocating a uniformity of definition and usage across the discipline³⁰.

The issue of conceptual confusion became an acute problem, in Sartori’s view, with the ‘new comparative expansion’ of political science in the 1960s and early 1970s, part of the so-called ‘behavioural revolution’ in the social sciences, which entailed both an enlargement of the scope of study towards the periphery of the political and a proliferation of the types of political system observed. This heralded the emergence of what he terms a ‘travelling problem’ in the attempt by political scientists to apply

²⁷ *Ibid.*, p.13.

²⁸ Goertz, Gary ‘Concept Intension and Extension’ in Goertz, *op. cit.*, p.71.

²⁹ Collier, David and Gerring, John ‘Introduction’ in Collier and Gerring, *op. cit.*, p.4.

³⁰ His 1984 work represents an initial joint attempt by a number of scholars to bring some consistency of definition and of substantive content to a limited selection of key concepts within the discipline. The three steps of ‘concept analysis’ set out here are : (i) anatomy (sorting out the constituent elements of a concept, i.e. its properties or attributes), (ii) reconstruction (organising these in some meaningful and logically sound fashion), and (iii) concept-formation (selecting a definition on some warranted and explicated grounds).

Sartori, Giovanni ‘Foreword’ in Sartori, *op. cit.*, p.11.

existing concepts, which had been ‘previously defined and refined’ by former generations (and for which the thinking had been ‘already done’), to a broader range of cases. Whilst the prevailing fashion was for ‘reconceptualization’, for Sartori this raised the question: ‘... how far, and how, can we travel with the help of the available vocabulary of politics?’³¹. He is led, by reflecting on this development, to introduce the idea of ‘conceptual stretching’:

‘... By and large, so far we have followed (more or less unwittingly) the line of least resistance: broaden the meaning - and thereby the range of application - of the conceptualizations at hand. That is to say, the larger the world, the more we have resorted to *conceptual stretching*, or conceptual straining, i.e., to vague, amorphous, conceptualizations. ... the net result of conceptual straining is that our gains in extensional coverage tend to be matched by losses in connotative precision. It appears that we can cover more - in traveling terms - only by saying less, and by saying less in a far less precise manner. ...

A major drawback of the comparative expansion of the discipline is, then, that it has been conducive to indefiniteness, to undelimited and largely undefined conceptualizations. We do need, ultimately, “universal” categories - concepts which are applicable to any time and place. But nothing is gained if our universals turn out to be “no difference” categories leading to pseudo-equivalences’³².

Conceptual stretching, then, is seen to impede genuine comparison, and is thus a ‘poor remedy’ to the travelling problem. Why compare? Sartori explains that to compare is to control, to check generalisations, laws of the ‘If X, then Y’ type, against all cases. This is in principle a global enterprise. By and large, he says, ‘... we obtain comparability when two or more items appear “similar enough”, that is, neither identical nor utterly different’. In this regard, he suggests that ‘... a taxonomic unfolding represents a requisite condition for comparability’ - and thus he recommends a reversion to the discipline imposed by the logical framework of

³¹ Sartori, Giovanni ‘Concept Misformation in Comparative Politics’ in Collier and Gerring, *op. cit.*, p.14.

³² *Ibid.*, pp.14-5.

definition under necessary and sufficient conditions. He says firmly: ‘... When we dismiss the so-called “old fashioned logic” we are plain wrong, and indeed the victims of poor logic’³³.

For our predecessors, he observes,

‘... the background of comparability was established by the *per genus et differentiam* mode of analysis, i.e., by a taxonomical treatment. In this context, comparable means something which belongs to the same genus, species or sub-species - in short to the same class. Hence the class provides the “similarity element” of comparability, while the “differences” enter as the species of a genus, or the sub-species of a species - and so forth, depending on how fine the analysis needs to be. However, and here is the rub, the taxonomical requisites of comparability are currently neglected if not disowned’³⁴.

Aside from such processes of classification, he argues,

‘... we dispose of no other unfolding technique. Indeed, the taxonomical exercise “unpacks” concepts, and plays a non-replaceable role in the process of thinking in that it decomposes mental compounds into orderly and manageable sets of component units.

... especially, we need taxonomical networks for solving our fact-finding and fact-storing problems. No comparative science of politics is plausible - on a global scale - unless we can draw on extensive *information* which is sufficiently *precise* to be meaningfully compared. The requisite condition for this is an adequate, relatively stable and, thereby, *additive filing system*’³⁵.

Thus, for Sartori, the classical approach to concept-formation is essential to valid social scientific inquiry. By contrast, researchers at the time being sent all over the world on ‘... indiscriminate fishing expeditions for data’ (indiscriminate in the sense that they lacked taxonomical backing) was like going fishing without adequate nets. The unhelpful consequence of this, as he saw it, was that the joint enterprise of

³³ *Ibid.*, pp.15, 17.

³⁴ *Ibid.*, p.16.

³⁵ *Ibid.*, pp.19, 21.

comparative politics was then ‘... menaced by a growing potpourri of disparate, non-cumulative and - in the aggregate - misleading morass of information’³⁶.

How then is the classical approach structured? Let us bring into the discussion here the illuminating elaboration given by a leading member of the ‘rationalist’ school, Mill, in his *A System of Logic* (1843). This author begins his study by identifying logic as ‘... the art and science of reasoning’. The meaning of ‘reasoning’ he takes simply as being ‘... to infer any assertion, from assertions already admitted’ as being true³⁷. Thus, it is the process of *inference* that for Mill comes to occupy the centre of the stage.

The subject of logic, he brings out, concerns strictly the *procedure* or *rules* for correctly making inferences, on the basis of judging *evidence* alone: ‘... Logic is not the science of Belief, but the science of Proof, or Evidence’³⁸. It is in this connection that he highlights the central role played by processes of naming, definition and classification in the workings of any science, as essential facilitators of the proper functioning of reasoning:

‘... Logic ... is the science of the operations of the understanding which are subservient to the estimation of evidence: both the process itself of advancing from known truths to unknown, and all other intellectual operations in so far as auxiliary to this. It includes, therefore, the operation of Naming; for language is an instrument of thought, as well as a means of communicating our thoughts. It includes, also, Definition, and Classification. For, the use of these operations (putting all other minds than one’s own out of consideration) is to serve not only for keeping our evidences and the conclusions from them permanent and readily accessible in the memory, but for so marshalling the facts which we may at any time be engaged in investigating, as to enable us to perceive more clearly what evidence there is, and to judge with fewer chances of

³⁶ *Ibid.*, p.20.

³⁷ Robson, John (Ed.) *Collected Works of John Stuart Mill*, Vol. VII (University of Toronto Press, 1973), p.4.

³⁸ *Ibid.*, p.9.

error whether it be sufficient. These, therefore, are operations specially instrumental to the estimation of evidence, and, as such, are within the province of Logic'³⁹.

The basic building block of logical processes, Mill explains, is the proposition. This is composed of three parts: the subject, the copula and the predicate. For example, in the proposition 'lead is heavy', 'lead' is the subject, 'is' is the copula and 'heavy' is the predicate. The linking copula always either affirms or denies the predicate of the subject. So in this case, the quality 'heavy' is affirmed of the substance 'lead'. In the light of this understanding, the meaning of truth and falsehood takes on sharper focus:

'... The answer to every question which it is possible to frame, must be contained in a Proposition, or Assertion. Whatever can be an object of belief, or even of disbelief, must, when put into words, assume the form of a proposition. All truth and all error lie in propositions. What, by a convenient misapplication of an abstract term, we call a Truth, means simply a True Proposition; and errors are false propositions'⁴⁰.

Through the affirmation or denial of successive propositions, a tally of the 'attributes' or 'properties' of a thing or phenomenon, let us call it X, can be established. To then say that X is an instance of a class of objects going under the general name of Y, is to observe that it shares certain key attributes with all the other members of that class, which are also those of the general name Y (its defining characteristics). Such a name may embrace a large group of practical examples, or it may not, as Mill makes clear:

'... Every name the signification of which is constituted by attributes, is potentially a name of an indefinite number of objects; but it needs not actually be the name of any; and if of any, it may be the name of only one. As soon as we employ a name to connote attributes, the things, be they more or fewer, which happen to possess those attributes, are constituted *ipso facto* a class'⁴¹.

³⁹ *Ibid.*, p.12.

⁴⁰ *Ibid.*, p.20.

⁴¹ *Ibid.*, p.118.

It is possible, by clearly identifying the attributes of phenomena, to represent the classical approach to concept-formation through constructing either tree or block diagrams (in this thesis, I adopt the latter method throughout). These show how within a universe of objects a broad class of thing or ‘genus’ can be sub-divided into ‘species’, then into further ‘sub-species’, and so on. To illustrate this with an example, in Figure 1 below the universe of political systems is divided into two genera and four species; and the entire unorganised realm of practical examples (in this case comprising a limited selection of four instances: the EU, France, Germany and the UN) is thus ‘shaken out’ into an organised classification.

<i>Proposition 1: ‘It is a State’</i>		political system <i>EU, France, Germany, UN</i>			
		State (TRUE) <i>France, Germany</i>		non-State (FALSE) <i>EU, UN</i>	
		unitary State (TRUE) <i>France</i>	non-unitary State (FALSE) <i>Germany</i>	unitary non-State (TRUE) 	non-unitary non-State (FALSE) <i>EU, UN</i>

Figure 1 - The Classical Approach to Concept-Formation⁴²

⁴² The term ‘State’ is taken to mean the political association that establishes sovereign jurisdiction within defined territorial borders and exercises authority through a set of permanent institutions. The term ‘unitary’ is taken to mean the concentration of governing powers at a single centre.

Each specific instance of a political system above is placed in its appropriate conceptual category or class by testing for evidence of the attributes of being: (i) a State, and (ii) unitary. Germany, for example, as a federal State, meets the first criterion but not the second; and thus it falls into the ‘non-unitary State’ category. In this way, the unordered dataset is given structure, and the similarities and differences between the individual observations of data are brought to light.

Sartori points out that, in view of such an analytical framework, concepts are themselves really no more than sets of propositions, and that concept-forming is actually ‘proposition-forming’ or ‘problem-solving’ activity. He might have added here that concept-forming is also ‘definition-forming’ activity, since the two necessarily occur at the same time; indeed, they are one and the same thing, two sides of the same coin. For developing a concept of a thing depends on identifying the thing’s attributes, which collectively then go to comprise the definition.

As was seen in Figure 1, to say a practical example is an instance of a concept, such as a unitary State, simply posits affirmative responses of the thing to the concept’s constitutive propositions - and nothing either more or less than this. From this understanding, Sartori now introduces the key idea that concepts are essentially, in terms of their practical purpose, ‘data containers’. The question here is what gives such containers validity:

‘... the concepts of any social science are not only the elements of a theoretical system; they are equally, and just as much, data containers. Indeed data is information which is distributed in, and processed by, “conceptual containers”. And since the non-experimental sciences basically depend on fact-finding, i.e., on reports about external (not laboratory) observables, the empirical question becomes what turns a concept into a valuable, indeed a valid, fact-finding container.

... what establishes, or helps establish, the discriminating power of a category is the taxonomical unfolding. Since the logical requirement of a classification is that its classes should be mutually exclusive and jointly exhaustive, it follows from this that the taxonomical exercise supplies an orderly series of well-sharpened categories, and thereby the basis for collecting adequately precise information. And this is indeed how we know whether, and to what extent, a concept has a fact-gathering validity⁴³.

If the taxonomical approach is rigorously followed, therefore, it will yield a contiguous and complete set of conceptual containers, and thus furnish the basis for conducting valid social science.

Perhaps running contrary to the initial expectation that concepts are (or should be) richly-detailed descriptions, we can see from the structure of the taxonomical framework that the truth is, in fact, that they can be as heavy or as light as we choose to make them. The procedure is simply to add or subtract propositions, thus moving to lower or higher level categories respectively⁴⁴. In this way, we pass either down or up what Sartori terms the 'ladder of abstraction' (or, as others have preferred to call it, the 'ladder of generality'⁴⁵). He illuminates the nature of the trade-off involved here between the intension (connotation) and extension (denotation) of a concept, first of all clarifying the meaning of these terms:

‘... A standard definition is as follows: “The extension of word is the class of *things* to which the word applies; the intension of a word is the collection of *properties* which determine the things to which the word applies” ... Likewise, the denotation of a word is the totality of objects indicated by that word; and the connotation is

⁴³ Sartori, Giovanni ‘Concept Misformation in Comparative Politics’ in Collier and Gerring, *op. cit.*, pp.19-20.

⁴⁴ Mill comments: ‘... It is a fundamental principle in logic, that the power of framing classes is unlimited, as long as there is any (even the smallest) difference to found a distinction upon’. Robson, *op. cit.*, p.122.

⁴⁵ Collier, David and Gerring, John ‘Introduction’ in Collier and Gerring, *op. cit.*, p.9.

the totality of characteristics anything must possess to be in the denotation of that word'⁴⁶.

He then makes the key point that one may, in climbing the ladder of abstraction, broaden the extension of a concept (its coverage) by reducing its intension (its properties) without sacrificing any accuracy:

‘... In this case a more “general,” or more inclusive, concept can be obtained without any loss of precision. The larger the class, the lesser its differentiae; but those differentiae that remain are precise’⁴⁷.

So there is no uncertainty introduced at all in manoeuvring in this way, either up or down the ladder of abstraction, from more specific to more general concepts or vice-versa. By contrast, he says, ambiguity is the effect of *conceptual stretching*, which amounts to a careless and unscientific attempt to

‘... augment the extension without diminishing the intension: *the denotation is extended by obfuscating the connotation*. As a result we do not obtain a more general concept, but its counterfeit, a mere generality ... conducive only to vagueness and conceptual obscurity’⁴⁸.

This bad habit he illuminates with an effective metaphor, warning of the dangers inherent for the discipline of political science, and for the sub-discipline of comparative politics in particular, of a casual approach to the use of concepts. It is, he says, ‘... dangerously conducive to the Hegelian night in which all cows look black (and eventually the milkman is taken for a cow)’⁴⁹.

⁴⁶ Sartori, Giovanni ‘Concept Misformation in Comparative Politics’ in Collier and Gerring, *op. cit.*, p.22.

⁴⁷ *Ibid.*, p.22.

⁴⁸ *Ibid.*, pp.22-3.

⁴⁹ *Ibid.*, p.21.

Sartori argues, instead, that a properly-applied taxonomical unfolding, generating a series of ‘well-sharpened’ categories, is conducive to conceptual clarity. In this, he challenges the commonly-held belief that concepts are somehow inherently ‘fuzzy’ (or, perhaps more specifically, have ‘fuzzy’ boundaries). He points to the obstacle to comparison, and the progress of social science, that such a notion would pose: ‘... If our data containers are blurred, we never know to what extent and on what grounds the “unlike” is made “alike”’⁵⁰.

It ought to be possible, in principle, to determine whether any one practical example is an instance of a concept, that is to say whether it falls inside or outside the boundaries of a conceptual container, from reference to its identifying properties. It must be simply a matter of assessing whether the observed case has, or has not, each of the required attributes stated in the definition of the concept. The necessary conditions for the effective handling of concepts, therefore, would seem to be: (i) to be clear about the properties specified by a concept (the intension); and (ii) to distinguish carefully between low-, mid- and high-level concepts, setting out formally the definitions of every one employed and, perhaps preferably, creating discrete terms to refer to each.

Mill provides some valuable further insight into the method of constructing definitions, which we briefly consider here. This will be helpful to us when we come to consider how a valid concept of federalism can be established from first principles later in the thesis. He begins by noting that ‘... The simplest and most correct notion of a Definition is, a proposition declaratory of the meaning of a word’. He then explains that this may take either a direct or an indirect form. The former, enumerating all the attributes predicated by a general name in a long list, ‘... is the most precise and least equivocal of any; but it is not brief enough, and is besides too

⁵⁰ *Ibid.*, p.20.

technical for common discourse'⁵¹. The latter method is therefore more commonly observed. This predicates of the general name

‘... another name or names of known signification, which connote the same aggregation of attributes. This may be done ... by predicating two or more connotative names, which make up among them the whole connotation of the name to be defined’⁵².

This process, he says, of forming a definition of a general name (a concept) by breaking it down into two or more component names (sub-concepts) is helpful from a scientific stand-point, aiding our understanding, being the very meaning of analysis:

‘... The definition of a name ... is the sum total of all the *essential* propositions which can be framed with that name for their subject. ... To resolve any complex whole into the elements of which it is compounded, is the meaning of analysis: and this we do when we replace one word which connotes a set of attributes collectively, by two or more which connote the same attributes singly, or in smaller groups’⁵³.

As Mill points out, in order to establish a clear concept, we do not in fact need to know *all* the common attributes of the objects that constitute the class - just the critical ones that go to make up the definition. Then we need simply employ the taxonomical approach rigorously and consistently:

‘... It is not ... necessary, in order to have clear ideas, that we should know all the common properties of the things which we class together. That would be to have our conception of the class complete as well as clear. It is sufficient if we never class things together without knowing exactly why we do so, - without having ascertained exactly what agreements we are about to include in our conception; and if, after having thus fixed our conception, we never vary from it, never include in the class anything which has not those common properties, nor exclude from it anything which has. A clear conception means a determinate conception; one which does not fluctuate, which is not one thing to-day and another to-morrow, but remains fixed and invariable, except when, from the

⁵¹ Robson, *op. cit.*, pp.133-4.

⁵² *Ibid.*, p.134.

⁵³ *Ibid.*, p.134.

progress of our knowledge, or the correction of some error, we consciously add to it or alter it. A person of clear ideas, is a person who always knows in virtue of what properties his classes are constituted; what attributes are connotated by his general names'⁵⁴.

Sartori also offers helpful practical guidance to the researcher on the construction of definitions. In particular, he cautions against over-specification in selecting the concepts we work with, suggesting that the conscious thinker should attempt to develop better intermediate categories along a medium level of abstraction. As Collier and Gerring note, he advocates the elaboration of '... minimal definitions - i.e., those that capture what are understood as core (necessary and sufficient) attributes of a phenomenon'⁵⁵. In other words, our concepts should be at as high (as general) a level as possible, whilst still achieving the required discriminatory power. The challenge for the political scientist, therefore, would appear to lie principally in identifying the *salient* properties of any concept. It is this, it seems, that should form the focus of our attention when attempting to frame definitions.

If we follow this advice, we should have at our disposal in the taxonomical structure a powerful tool for analysing real world observations of phenomena. It should supply us with a way of constructing well-ordered and well-sharpened series of conceptual containers whose individual components are mutually-exclusive and jointly-exhaustive; that is, series which have neither gaps within them nor zones of overlap. Such a framework should be conducive to conceptual clarity. It should provide a reasonably stable and additive filing system, thus allowing both the steady accumulation of knowledge and clear communication among scholars.

⁵⁴ Robson, John (Ed.) *Collected Works of John Stuart Mill*, Vol. VIII (University of Toronto Press, 1973), p.659.

⁵⁵ Collier, David and Gerring, John 'Introduction' in Collier and Gerring, *op. cit.*, p.5.

Let us leave the last word here to Mill, who echoes this conclusion when he says:

‘... In order that we may possess a language perfectly suitable for the investigation and expression of general truths, there are two principal ... requisites. The first is, that every general name should have a meaning, steadily fixed, and precisely determined. When by the fulfilment of this condition, such names as we possess are fitted for the due performance of their functions, the next requisite, and the second in order of importance, is that we should possess a name wherever one is needed; wherever there is anything to be designated by it, which it is of importance to express’⁵⁶.

In common with Sartori, then, Mill advocates the establishment of both constant and complete mental filing systems of concepts.

III. The Point the Literature on Federalism Has Reached Today

Such a line of reasoning appears to speak directly to our concern in this thesis with the fact that systems of regional integration which have advanced beyond a strictly inter-governmental stage of development, but which have not yet become States, presently go unidentified. We saw earlier in the chapter the European Convention delegates’ unanimous agreement that the EU constitutes a *sui generis* form today; and we find many academic commentators confirming this impression in their writings. Menon, for example, says it ‘... fails neatly to fit into any of the conceptual boxes we have created to discuss political phenomena’⁵⁷; and Goldsworthy, citing Bellamy and Castiglione, says it is widely believed that ‘... there is something new, or, as is often said, *sui generis*, in the constitutional structure of the European Union’⁵⁸. Yet is there not, after over fifty years of existence, and the recent entry into force of a new constitutional settlement in the Treaty of Lisbon, something in the nature of this novel

⁵⁶ Robson, *op. cit.*, p.668.

⁵⁷ Menon, Anand *Europe: the State of the Union* (Atlantic, 2008), p.3.

⁵⁸ Goldsworthy, Jeffrey ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Walker, Neil (Ed.) *Sovereignty in Transition* (Hart, 2003), p.423.

- and apparently quite stable - political order which is, as Mill phrased it, ‘... of importance to express’?

The *sui generis* perspective has a counterpart in the established scholarly consensus that the EU is neither federal nor confederal in character. Marquand, for example, says it has ‘... always been less than a federation but more than a confederation’⁵⁹. Likewise, Laffan notes that it lies ‘... between a confederation and a federation’⁶⁰. In its apparently unique *hybrid* character, the EU appears to inhabit a grey area of no-man’s land: what Burgess has called a ‘twilight zone’⁶¹ and Magnette a space of ‘in-betweenness’⁶². Like the coin falling down the crack between the cushions of a sofa, it seems, the polity is lost to reasoned analysis within the discipline by the basic instrument of classification. Krasner reflects the general sense of puzzlement that results from this state of affairs: ‘... There is no commonly accepted term for the European Union. Is it ... a commonwealth, a dominion, a confederation of states, a federation of states? Nevertheless, it exists’⁶³.

So when Delors and Nye observe, slightly in advance of the start of the European Convention’s proceedings in 2001, that the European model ‘... defies all attempts at categorization along traditional lines’⁶⁴, they are simply replicating the mainstream understanding. Yet, there has, by this time, begun to be some movement discernible on the academic plane, as scholars have started to apply insights from comparative federalism to analysis of the EU’s operation from the mid-1990s onwards. This development leads them to propose that both the term and notion of federalism are

⁵⁹ Marquand, David ‘Federalism and the British: Anatomy of a Neurosis’ in *Political Quarterly*, Vol. 77, No. 2, April 2006, p.175.

⁶⁰ Laffan, Brigid *The Future of Europe Debate* (Institute of European Affairs, 2002), p.10.

⁶¹ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.41.

⁶² Magnette, Paul *What Is the European Union? Nature and Prospects* (Palgrave, 2005), p.190.

⁶³ Krasner, Stephen *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999), p.235.

now ‘... no longer taboo in Europe’⁶⁵. In spite of the strong appearance of a departure here, however, as was noted earlier, an appropriate means for incorporating the concept in a definition of the Union in the EU’s founding treaties could not subsequently be identified in the Convention. So what, we may wonder, is the precise relevance of federalism to the European construction in this newly-emerging context?

The comparative federalism turn in the literature has been commented upon by a number of authors. Kelemen and Nicolaidis, for example, tell us that over the past decade ‘... comparative federalism has moved from the periphery of scholarship on the European Union to the mainstream’⁶⁶. Not only has this phenomenon led, they argue, to the application of many useful perspectives gleaned from other federal systems in the world to analysis of the EU; but the EU, in its turn, appears to have enhanced the wider study of comparative federalism - and, indeed, been responsible for something of a burst of academic theorising:

‘... Recently, more and more EU scholars have applied the lens of comparative federalism to the EU polity (see for instance Bednar et al. 1996; Koslowski 1999; Schmitter 2000; McKay 2001; Nicolaidis and Howse 2001; Zweifel 2002; Bogdanor 2003; Börzel and Hosli 2003; Kelemen 2003, 2004; Ansell and Di Palma 2004; Fabbrini 2005; Trechsel 2005a; Schain and Menon 2006; Halberstam and Maduro 2007). And conversely scholars of comparative federalism have discovered the European Union and increasingly integrate the EU into their comparative studies of other federal systems (Friedman Goldstein 2001; Filippov et al. 2004; Rodden 2005; Bednar 2006). Indeed, interest in the EU has helped spark the renaissance in comparative federalism research in recent years’⁶⁷.

One seminal work that stimulated the process of trans-disciplinary - and more particularly trans-continental - learning and engagement that has perhaps been

⁶⁴ Delors and Nye ‘Preface’ in Nicolaidis and Howse, *op. cit.*, p.xvi.

⁶⁵ *Ibid.*, p.xiv.

characteristic of the 2000s decade was Nicolaidis and Howse's *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001). This was followed five years later by a second trans-Atlantic collaboration, Menon and Schain's *Comparative Federalism: the European Union and the United States in Comparative Perspective* (2006). The approach of the two sets of authors was similar, in the respect that each sought to bring out '... a comparative dimension of federalism in the United States and the European Union'⁶⁸.

The editors of *The Federal Vision* frame their project as a dialogue about patterns and modes of governance on either side of the Atlantic. Acknowledging that the two systems are 'fundamentally different kinds of polity', they hold no naïve motives of 'transplanting' between them; instead, they simply hope to draw helpful insights from one another's experience. Their operating premise is that

'... common to both the EU and the US is a set of challenges to governance, which in both polities are connected to the special nature of the problem of legitimacy in the context of multi-level governance, of federalism in the broadest sense of the term'⁶⁹.

Nicolaidis and Howse do not, therefore, try to force their contributors into a straightjacket, by making them read federalism in any one way. Their intention is simply to establish, through use of the 'federal lens'⁷⁰, a '... broad paradigmatic umbrella', a 'pluralistic' framework that can '... encompass all forms of shared

⁶⁶ Kelemen, Daniel and Nicolaidis, Kalypso 'Bringing Federalism Back In' in Jorgensen, Knud Erik, Pollack, Mark and Rosamond, Ben (Eds.) *Handbook of European Union Politics* (Sage, 2007), p.301.

⁶⁷ *Ibid.*, p.302.

⁶⁸ Menon, Anand and Schain, Martin 'Preface' in Menon and Schain, *op. cit.*, p.v.

⁶⁹ Howse, Robert and Nicolaidis, Kalypso 'Introduction: The Federal Vision, Levels of Governance, and Legitimacy' in Nicolaidis and Howse, *op. cit.*, p.5.

⁷⁰ Nicolaidis, Kalypso 'Conclusion: The Federal Vision Beyond the Federal State' in Nicolaidis and Howse, *op. cit.*, p.439.

governance’⁷¹. The ‘federal vision’, then, as Delors and Nye observe, is ‘... more a metaphor than a description of a unique legal structure’⁷². Most of the contributing authors to the volume, they note, in fact *do not* envision a federal State for Europe; rather, they perceive in the EU ‘... a decentralized, transnational form of federalism ... and do not advocate a change in its nature’⁷³.

Whilst such an all-embracing interpretation of the federal concept has the clear advantage of encouraging a healthy exchange of views and cross-fertilisation of ideas among specialised fields and sub-fields within the social sciences too long segregated, there remains the concern that adopting a ‘broad church’ approach to definition may bring problems. It may have the effect of masking underlying differences of view concerning the nature of federalism, obscuring sources of disagreement and creating an impression of greater consensus than in fact exists. The very thing that allows profitable interaction and discussion may, in the end, simply serve to put off the critical arguments necessary for gaining the full and vitally-important clarity on the subject for another time and place. Whilst the editors of *The Federal Vision* make no claim to a uniformity of perspective on the term among their contributors, the possibility remains that the entire benefit of such scholarly collaboration may not be reaped without attempting a consistency of approach.

In a similar vein to Nicolaidis and Howse, Menon and Schain make clear in their volume that they do not try to ‘... fit the various contributions within a narrow conceptual framework of federalism’, nor attempt to ‘... develop some precise definition of the frontiers of the term’. Instead, they ‘... broadly define federalism ...

⁷¹ Howse, Robert and Nicolaidis, Kalypso ‘Introduction: The Federal Vision, Levels of Governance, and Legitimacy’ in Nicolaidis and Howse, *op. cit.*, p.27.

⁷² Delors and Nye ‘Preface’ in Nicolaidis and Howse, *op. cit.*, p.xiv.

⁷³ *Ibid.*, p.xiv.

in the spirit of Daniel Elazar⁷⁴. This author has been the leading exponent of an expansive interpretation of the concept over recent decades, as others have commented⁷⁵. Let us take a moment here to consider his approach, together with those of other contemporary scholars of federalism such as Watts (to whom Menon and Schain also refer), King and Burgess, before returning to Menon and Schain's work.

Elazar's guiding principle, first elaborated in *Exploring Federalism* (1987), is that federalism involves the combining of elements of 'self-rule and shared rule'⁷⁶. This is a low-threshold definition, meaning that '... a wide variety of political structures can be developed that are consistent with federal principles'; and that, as a corollary, '... Using the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal State'⁷⁷. From these starting premises, he develops a broad set of eight types of 'federal arrangement', of which the federation / federal State is thus only one model.

Burgess notes how slightly earlier, in *Federalism and Federation* (1982), King had developed a different distinction between 'federalism' as a 'multidimensional driving force' and 'federation' as its 'institutional, structural and systemic counterpart'⁷⁸, which he himself had later taken further. He sees this dichotomy as originally having grown out of Livingston's 1952 *Political Science Quarterly* article 'A Note on the Nature of Federalism'. Then, building on this, in *Trends of Federalism in Theory and Practice* (1968), Friedrich had introduced the idea of distinguishing between federalism as a 'process' and federation as the terminal end-point of such processes.

⁷⁴ Menon, Anand and Schain, Martin 'Introduction' in Menon and Schain, *op. cit.*, p.4.

⁷⁵ Burgess notes that '... Daniel Elazar has been the most vociferous advocate of widening both the scope and meaning of federalism'.

Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), p.286.

⁷⁶ Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987), p.5.

⁷⁷ *Ibid.*, pp.11-2.

⁷⁸ Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), p.47.

In putting the evolving distinction on a formal footing, Burgess sees King therefore simply making ‘... explicit what had always been implicit in the mainstream literature’. According to this perspective, federalism and federation were understood to be ‘... in a nutshell, two sides of the same coin, as King noted in his memorable observation that “there may be federalism without federation”, but there can be “no federation without some matching variety of federalism”’⁷⁹.

He goes on to note how Watts took up and slightly altered this framework, in *Comparing Federal Systems in the 1990s* (1996), by enlarging the structural component to distinguish between ‘federation’ and a broader realm of ‘federal political systems’, following Elazar⁸⁰. Watts’ approach, therefore, represents something of a synthesis of King / Burgess and Elazar:

‘... a modest revision to ... (the federalism and federation) ... distinction was made by Watts ... so that the term “federalism” is identified as a normative concept and “federation” is categorised as a species of the larger genus “federal political systems”. This rearrangement of the conceptual furniture appears to have been influenced by Elazar’s interpretation of federalism in his *Exploring Federalism*, first published in 1987. Elazar’s focus upon “varieties of federal arrangements” prompted Watts to use the term “federal political systems” as a “genus of political organization which provides for the combination of shared rule and self-rule”. This allowed him to construe federal political systems as a broad umbrella concept encompassing “a variety of species” such as those that Elazar had previously identified: federation, confederation, federacy, associated statehood, unions, leagues, constitutional regionalisation, and constitutional home rule’⁸¹.

⁷⁹ See King, Preston *Federalism and Federation* (John Hopkins University Press, 1982); Burgess, Michael *Federalism and Federation in Western Europe* (Croom Helm, 1986); and Burgess, Michael and Gagnon, Alain-G *Comparative Federalism and Federation: Competing Traditions and Future Directions* (University of Toronto Press, 1993).
Ibid., p.47.

⁸⁰ Watts states explicitly that he draws his set of categories from this author.
Watts, Ronald *Comparing Federal Systems in the 1990s* (Queen’s University Press, 1996), pp.6-9.

⁸¹ Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), pp.47-8

It was through this process of transition, it seems, that it has become acceptable currency today, in academic discussions, to use federalism to describe political structures broader than the federation / federal State alone. Yet, if such a perspective on the concept, in its very looseness and apparent all-pervasiveness, has the merit of reducing inhibitions among prospective interlocutors and eliminating the risk of becoming bogged down in ‘semantic distraction’⁸² over definition, we must wonder whether we encounter here a case of conceptual stretching - whether, as Sartori intimated may be the case, our ‘... gains in extensional coverage ... (are) ... matched by losses in connotative precision’ and our ‘universals’ reduced to ‘no difference categories’ (see the quotation on page 17). For the result of such an approach would seem to be that the question *Is a system of regional integration which has progressed beyond a strictly inter-governmental character, but not yet become a State, federal?* presently elicits no clear response. Being clearly within the realm of ‘federal political systems’, one might expect the answer ‘yes’. However, the one most commonly given in the case of the EU is ‘no’ - for the reason that it is not a federation or federal State, i.e. because it is not seen as ‘genuinely’ or ‘fully’ federal.

In a passage that echoes the potential for confusion that Watts’ ‘federation and federal political systems’ distinction raises, Burgess openly airs his doubts about the worth of apparently using the same (or very similar) words to apply in more than one context. He brings out the ambiguity that his and King’s ‘federalism and federation’ dichotomy may engender, for example, when attempting to conceptualise the EU as ‘... a classic case of federalism without federation’⁸³. The two terms, he says,

⁸² Kelemen, Daniel and Nicolaidis, Kalypso ‘Bringing Federalism Back In’ in Jorgensen, Pollack, and Rosamond, *op. cit.*, p.301.

⁸³ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.29.

‘... might be used to describe the process of “federalizing” Or ... they might equally be used to refer to the logical outcome of this process ... At first glance, this may seem a harmless indulgence. However, the problem with this kind of terminological imprecision is that it produces both confusion and genuine misunderstanding, especially when we relate it directly to European integration. For example, it is not clear precisely how the term “federal” should be applied to the EU without either misleading people or making the study of the EU itself intellectually unintelligible. Yet we know that there are some aspects of the EU which are decidedly “federal” or are referred to as “federal-type”. How, then, do we use the terms “federalism” and “federation” in order to bring clarity to our subject?’⁸⁴.

It is at precisely such a destination, it would seem, that the comparative federalism turn in the literature has arrived today. For the federal (or not) character of systems of regional integration in an advanced stage of development does not appear to receive clear illumination from this body of research. There is certainly the danger that, for the uninitiated, the titles of works such as those of Nicolaidis and Howse and Menon and Schain would appear to suggest a definite ‘yes’ for an answer. However, this misimpression can be averted by careful reading of the works’ content. Nevertheless, what emerges is an uncertain picture: neither unequivocal confirmation nor unequivocal denial.

The implicit assumption running through Menon and Schain’s volume - though this is not directly spelled out - seems to be of a core and a periphery of meaning to the concept of federalism: the ‘genuine’ federalism of federation, and a wider and looser ‘second best’ zone of federal political systems. The EU is characterised as a ‘... developing federal system’⁸⁵, the implication here being that the polity is already within the wider zone and progressing in the direction of real federalism - but is not there yet (and is, in fact, considered unlikely to be so in the foreseeable future). So it

⁸⁴ *Ibid.*, p.25.

⁸⁵ Menon, Anand and Schain, Martin ‘Preface’ in Menon and Schain *op. cit.*, p.v.

is not thought to be truly or fully federal. The authors' observation that '... elements of federalism and confederalism are mingled'⁸⁶ in the EU, indicates that they deem it to be only *partly* federal in character at the present moment in time - though the federal elements are seen as substantial and growing in number. The conclusion they draw is seemingly the same as that drawn by Piris, who interprets the EU as a species of 'partial federalism' and designates it a 'Partially Federal Entity', plainly for the reason that it is not a federal State⁸⁷; and by Nicolaidis and Howse, who see it as an '... apparently not-quite-yet federal'⁸⁸ order, in comparison with the US⁸⁹.

Through their definitional approaches, both sets of comparative federalism authors are able to conceive of the EU as a 'federal system' for purposes of comparison, but they have to insist upon retaining the rider of employing a broad definition. Menon and Schain, for example, say: '... We assume that Europe can be understood as a system, which in turn can be compared with other federal systems, broadly conceived'⁹⁰. Without such a qualification, it seems, they would not be able to employ the federal label. The fact that there is more than one definition of federalism in current circulation would appear to lie at the root of the problem: on a broad definition the EU is thought to be federal, but on a narrow definition it is not. Thus, we are brought back

⁸⁶ Menon, Anand and Schain, Martin 'Introduction' in Menon and Schain, *op. cit.*, p.5.

⁸⁷ He says: '... the EU is not a federal state because it lacks a single demos, it lacks *Kompetenz-Kompetenz* and, more simply, because the Member States lack the requisite will to make it one. For the same reasons, there is no realistic prospect in the foreseeable future of the EU being transformed into a European federal nation state.

However, due to the fact that it has developed its own legal order which, together with the legal orders of the Member States, creates a multilayered structure and legal environment, the EU does employ a number of tools which are also used in federal systems equally facing the challenge of coexisting legal orders. These are federal tools which distinguish the EU from classic international organisations. But the fact that the EU utilises such tools does not, per se, make it a federal state'.

Piris, Jean-Claude 'The European Union: Towards a New Form of Federalism?' in Fedtke, Jörg and Markesinis, Basil (Eds.) *Patterns of Regionalism and Federalism: Lessons for the UK* (Hart, 2006), pp.70, 78, 86.

⁸⁸ Howse, Robert and Nicolaidis, Kalypso 'Introduction: The Federal Vision, Levels of Governance, and Legitimacy' in Nicolaidis and Howse, *op. cit.*, p.5.

to consideration of whether the conceptual stretching involved in an Elazar-type definition is actually help or hindrance.

Yet this is not the end of the story - at least, not quite. For if genuine federalism appears trapped in the prison of the federal State, the very thrust of much of the literature in the comparative federalism turn is in fact concerned with breaking the link between federalism and Statehood. Authors writing in this vein, such as Kelemen and Nicolaidis, whilst apparently wishing to move in this direction, have not yet found a completely satisfactory means of achieving their aim.

Hence Kelemen and Nicolaidis' argument for 'Bringing Federalism Back In'⁹¹; Nicolaidis' quest for a '... federal vision beyond the state'⁹²; and Kelemen's forceful claims that '... It is a mistake to conflate the principle of federalism with the federal state'⁹³, and that those who have done so in the past have '... thrown out the federalism baby with the statehood bath water'⁹⁴. For these scholars, the federalism they discern for the EU appears not of a 'loose' or 'second best' type - but genuine federalism - even if it is emphatically *not* a federal State.

For Nicolaidis, a key spur to the search for such a full-bodied characterisation has been the recent constitutional discussion, leading through the ill-fated Constitutional

⁸⁹ Menon and Schain note that, in their work, the '... developing federal system in Europe' is to be compared with '... the federal system in the United States'.

Menon, Anand and Schain, Martin 'Preface' in Menon and Schain, *op. cit.*, p.v.

⁹⁰ Menon, Anand and Schain, Martin 'Introduction' in Menon and Schain, *op. cit.*, p.10.

⁹¹ Kelemen, Daniel and Nicolaidis, Kalypso 'Bringing Federalism Back In' in Jorgensen, Pollack, and Rosamond, *op. cit.*

⁹² Nicolaidis, Kalypso 'Conclusion: The Federal Vision Beyond the Federal State' in Nicolaidis and Howse, *op. cit.*, p.478.

⁹³ Kelemen, *op. cit.*, p.7.

⁹⁴ Kelemen, Daniel 'The Structure and Dynamics of EU Federalism' in *Comparative Political Studies*, Vol. 36, No. 1/2, February/March 2003, p.185.

Treaty⁹⁵ to the Treaty of Lisbon⁹⁶. At the turn of the millennium, she and Howse observe, the political debate in Europe moved from a discussion about subsidiarity and the appropriate level of government for collective action, the day-to-day management of the Union, to

‘... one about the need for a new covenant, a European constitution. ... Here is the paradox. Most constitution supporters agree on two points: that this should not be the blueprint for a “federal state” of Europe - in other words, to some extent the discourse of constitutionalism must be liberated from its statist origins; and that a constitution is needed, above all, to make clear and explicit to the citizens who does what in the European Union - the hallmark of democratically accountable federalism. We would seem to want European federalism without the word, with its statist resonances and connotations. Perhaps this is right’⁹⁷.

In Kelemen’s writing, there is likewise a clear sense that the EU *is* federal, in that it meets the requirements of a minimal definition of federalism. This takes Elazar’s broad definition as a starting point, and then tightens it considerably to bring a focus on the middle zone along an integratory pathway. This, then, appears to be the realm of genuine federalism:

‘... A polity can rely on federal arrangements even if it is not, and may never be, a full-fledged federal state (Cappelletti et al., 1986; Elazar, 1987). What then is federalism? For the purposes of this article, a minimalist definition suffices. Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions,

⁹⁵ The Treaty Establishing a Constitution for Europe (TECE), also known as the ‘Constitutional Treaty’ or ‘European Constitution’, was signed in Rome on 29 October 2004. After failed referenda in France and the Netherlands in 2005, the ratification process was abandoned in favour of an amending treaty, eventually the Treaty of Lisbon.

⁹⁶ Signed on 13 December 2007 and entered force on 1 December 2009. Also known as the ‘Reform Treaty’, this document amended both the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC), renaming the latter the Treaty on the Functioning of the European Union (TFEU).

⁹⁷ Howse, Robert and Nicolaidis, Kalypso ‘Introduction: The Federal Vision, Levels of Governance, and Legitimacy’ in Nicolaidis and Howse, *op. cit.*, p.9.

and (c) a high federal court adjudicates disputes concerning federalism. In this sense, the EU is already a federal system.’⁹⁸.

In a recent further development in the field, reinforcing the impression of momentum building behind some kind of paradigmatic shift, Hueglin and Fenna, writing in *Comparative Federalism: A Systematic Inquiry (2006)*, adopt a narrow conception of federalism as referring to federation only, but nevertheless include the EU *within* their field of vision. This they do in respect of what they see as ‘... its unique institutional setup, and because of its genuine supranationality in a number of core policy areas’, which mean that it ‘... can be described and appreciated as an emerging federal system’⁹⁹. Noting the novel discovery of a new type of ‘treaty federalism’ in this form, they view it as one of four ‘basic models’ of federalism, the other three being the American, Canadian and German:

‘... The EU may be considered a model in its own right. While it is not yet a fully developed federation in the conventional sense, its inclusion is warranted insofar as it may indeed be a model character for a new type of federalism in a globalizing world’¹⁰⁰.

Yet this seemingly advancing approach - now considering the EU hand-in-glove with other fully-fledged federal States - appears to be a principal cause of the peculiar effect that a table listing ‘The World’s Current 26 Federations’ has to be qualified by the following caveat in a footnote: ‘... This is not to say that all of these qualify as true or genuine federations’¹⁰¹. When is a federation not a federation? In the case of the EU, it seems...

There is, therefore, despite steady incremental progress, still lingering uncertainty in the literature on federalism today. The group of scholars in the vanguard of change

⁹⁸ Kelemen, *op. cit.*, p.185.

⁹⁹ Hueglin and Fenna, *op. cit.*, p.73.

¹⁰⁰ *Ibid.*, p.63.

appear to know where they want to go - but not how to get there. Magnette, who plainly discerns the *sui generis* dilemma when he asks *What Is the European Union?*¹⁰² in the title of his recent book, surveys the intellectual landscape and concludes: ‘... It will probably take time for scholars, leaders and citizens to agree on a “concept” encapsulating the EU’s nature’¹⁰³. Kelemen and Nicolaidis, however, seem to be heading in a clear and definite direction, when they say:

‘... Perhaps the starting assumption ... is that the real debate should no longer be about whether the EU is federal, but *what kind of federalism* it represents, or indeed how the prevailing understanding of federalism should be reconfigured to accommodate the case of the EU and potential cases like it. The main challenge here is to do away with the mental association between federalism and statehood, which has come to spill over from the normative to the analytical domain. In effect, the door for using the federal lens can be opened most widely by the assumption that the EU is not, and will not likely become, a classic federation (Elazar 1987) or the reproduction of any national model at the supranational level (Nicolaidis and Weatherill 2003). In other words, it will instead inhabit the area of multi-state federalism, qualifying as a federal union, not a federal state (Nicolaidis 2004; Magnette 2005)’¹⁰⁴.

This ‘multi-State federalism’ seems exactly the territory that we need to illuminate - and not federalism meant here in its broad or loose sense, but federalism in its narrow (and hence genuine) sense. How to operationalise this notion, to give substance to the intent, would seem to be the nub of the problem today.

¹⁰¹ *Ibid.*, p.56.

¹⁰² Magnette, *op. cit.*

¹⁰³ *Ibid.*, p.192.

¹⁰⁴ Kelemen, Daniel and Nicolaidis, Kalypso ‘Bringing Federalism Back In’ in Jorgensen, Pollack, and Rosamond, *op. cit.*, p.306.

Conclusions

In this introductory chapter, we have prepared the ground for the core research element of the thesis in three important respects. First, we have identified the motivation for the research in uncertainty over the precise meaning and definition of federalism, and hence over the appropriate manner of deploying the concept. Secondly, we have understood what scholars have thought as to the true nature of concepts in social science and the procedure for their effective handling. Thirdly, we have established the point that the existing literature on federalism has reached today.

I perceive the present confusion to be due, in part, to the fact that we witness in the field of federalism a case of unhelpful conceptual stretching - that the concept has a core essence that is obfuscated by the simultaneous use of a broader acceptance in parallel. I see the identification of clear definitions as a vital ingredient in the workings of a valid social science, and will attempt to show in the course of the thesis how we may indeed locate one in this specific instance by appropriately incorporating an indivisible notion of sovereignty at the heart of the concept, in the following:

federalism:	a form of government in which the powers flowing from sovereignty are divided between two levels of government that are of equal status
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On this basis, I suggest that the EU should be conceived as genuinely federal, since it is seen to fall inside the scope of the concept once the latter is properly established. Federalism - the zone of the compound polity - is now seen to encompass two structures where before only one was observed: the single State and multi-State federal forms. These may be termed, respectively, the federation (the federal State)

and the federal union (the federal union of States). Definitions of each form are as follows:

federation:	a political system composed of one State, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status
federal union:	a political system composed of many States, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status

In this manner, the problematic '*sui generis*' gap in our framework of basic political forms is closed off. It becomes apparent that we have been all along missing one species of political system. It is the sheer perplexing novelty of the EU, it seems, that forces us to wake up to this fact, to reappraise our concepts and to adapt them accordingly.

The thesis now proceeds from here in the following manner. Part I, 'Analysis of the Concept' (Chapters 2 and 3), considers what are understood to be the main constitutive elements of federalism as a concept in political science presently and outlines the reconstruction of the concept from first principles envisaged. This sets the scene for the subsequent historical survey and brings to the fore the key analytical components whose incremental progression over time we will be concerned to monitor. Part II, 'The Historical Development of the Federal Idea' (Chapters 4 to 9), sets off on this journey by searching for the earliest roots of federalism. It then charts the concept's evolution over later centuries, through the three experiences of regional integration when major theoretical debates about the nature of intermediate political forms have taken place: the American, German and European instances. These are the principal occasions when sustained and cumulative intellectual exchanges on the

nature of federalism, and its inter-relationship with the concept of sovereignty, have occurred. Since the first of these forms so central a place in the analysis, representing the genesis of the modern variant of federalism with which we are familiar today, we will investigate this case in particular detail over three chapters - broadly before, during and after the radical changes brought about by the Philadelphia Convention and the adoption of the US Constitution. Chapter 10 concludes.

Part I

Analysis of the Concept

Chapter 2

What Is Federalism?

The key conceptual idea underlying this thesis can be simply stated in the following terms. Federalism is widely thought today to mean ‘a division of sovereignty’; but sovereignty is indivisible. For if it is defined to be the *final* and *absolute* source of political authority in a political community, there can be only *one* sovereign body. So our received concept of federalism inherited from previous generations, it seems, is founded on a contradiction.

I argue that one small but crucial definitional adjustment is capable of shining light on the former darkness of conceptual confusion. Examination, in Part II, of the historical journey that the federal idea has made, in particular of the American debates between the Philadelphia Convention and the Civil War on the nature of the novel polity they had established, will reveal the failure to distinguish between ‘sovereignty’ and ‘the powers flowing from sovereignty’ to lie at the heart of the matter. Indeed, a long-running conflation of these two ideas, across the centuries, appears to be responsible for much of the uncertainty and contention surrounding both the concepts of federalism and sovereignty; and thus past theoretical difficulties with each seem to be closely inter-related - that is, to stem from a common source. Whilst the powers flowing from sovereignty are divisible, it will emerge clearly from the analysis, sovereignty itself is not. So to achieve a coherent notion of federalism today, we need

to make the relatively minor refinement that it be defined not as ‘a division of sovereignty’ but as ‘a division of the powers flowing from sovereignty’.

This may, in any case, be what many scholars actually have in mind when they conceive of federalism presently. However, the now more clearly-formulated definition brings out that the concept necessarily gives rise to not one but two federal forms, where the powers flowing from sovereignty are divided between two levels of government: one where sovereignty resides in a single ‘people’ coextensive with the whole polity, and one where it resides in several ‘peoples’ coextensive with the individual component parts. Only in this way, it seems, can our current schema of basic political forms be made internally-consistent and complete.

The idea of a ‘people’, in the sense of a ‘political community’, now comes to the fore as central to the analysis. Whilst one people can, it seems, be thought of simultaneously in many ways (i.e. as constituting one whole people, several regional groups, multiple local communities, and so forth), and correspondingly an individual may at the same time hold several over-lapping identities, only one of these ‘levels’ can be considered sovereign. For one association alone can have the distinguishing characteristic that it forms a body of humanity whose destiny is henceforward shared in perpetuity, for better or worse, with *in extremis* full and final authority over its members, sanctioned by the will of the majority: that is to say, a *political* community. Such an association cannot be composed of smaller political communities, or itself form part of a larger political community, or else its decisions would be contingent, not final and absolute. Hence the importance of ‘national’ citizenship (in the present epoch, at least), as distinct from membership of other groups, in terms of the special bond that it signifies between members who hold the same.

It may, certainly, be possible to operate without such a notion in practice. However, the violent and bloody history of the Middle Ages demonstrates that a clear ordering concept of ultimate authority over a given territory - manifested in the idea of sovereignty - is necessary if peaceful and civilised coexistence is to be secured on a permanent basis. This is required, from an external stand-point, in order to prevent the competing claims to represent legitimate authority that would otherwise lead to conflict; and from an internal perspective, a settled political space must have its own means of dispute resolution to maintain tranquillity, in the absence of any higher authority in the international sphere. There must, therefore, be a single and clearly identifiable final arbiter. This is found today in democratic States in the personality of the political community¹⁰⁵. Arguably, any 'State' in which the precise location of sovereignty is unclear, though it may through chance exist peacefully for some time, contains the seeds of its own destruction, and is in fact not a proper State. Such was the experience of the early American federal system, which descended into civil war in the mid-nineteenth century for precisely this reason. Other federal systems around the world today, through the prevailing misformation of the federal concept, also appear to contain similar such seeds. Their growth and blossom would, however, be forestalled by clarification of the definition of the concept.

¹⁰⁵ Here we are, indeed, led back to the point of acknowledging that the ordered and peaceful way of life that much of mankind enjoys today rests upon the prior establishment of the 'political fact' of an existing political community: a sovereign people or State. When there is no agreement about who constitutes the political community - i.e. whether a body of humanity is one or more such communities, or itself an integral part of a larger community - then there can be no harmony, and recourse to the use of force is the only option in the competing claims to exercise the right to govern until such a time as a clear group bond is forged. Once this is achieved, however, whether naturally or through blood and iron, implying a general recognition of group membership (that is, who is 'in' the group and who is 'out'), the problem is resolved and a means of taking decisions peacefully is established. This point, the necessity of first establishing a basis before civilised society can begin, is often neglected or forgotten today, in parallel with the prevailing fashions for thinking in a 'post-Statist' or 'post-sovereign' way, and in terms of divisible sovereignty, in an era of globalisation in which governing powers are increasingly distributed and shared among multiple levels, both above and below the State. Whilst the powers flowing from sovereignty are certainly divided and dispersed in this manner, sovereignty itself remains undivided as the source of such powers. The continued importance of the latter concept appears frequently overlooked in the literature at the present time.

This second chapter inquires into the precise nature of federalism, with the objective of preparing the ground for an attempt to show, in the next chapter, how a valid federal concept may be constructed. It is divided into two sections. The first section reviews the troubled recent history of scholarly debates over the definition of the concept. The second section identifies the current consensus understanding of it in political science today.

I. The Vain Search for a Definition in Past Debates

The classic statement of federalism was offered by Wheare in *Federal Government* (1946). This text has been the most common point of departure for scholars working in the field over the past half-century and appears to remain still today the foundation stone of the current federal literature¹⁰⁶. We begin our examination of past debates here by reviewing his definition of the term, and considering how scholars at first attempted to refine it and later ended up rejecting it - wrongly, I suggest.

Wheare sets out by observing a unique principle operating in America after entry into force of the US Constitution in 1789, which he sees as distinguishing this political entity from others falling under the broad heading of ‘associations of States’. He demonstrates that in all the other examples of such groupings he considers (America under the Articles of Confederation from 1781 - 88, the Austro-Hungarian Empire of 1867 - 1918, the German Empire of 1871 - 1918, the League of Nations and South

Africa from 1909 onwards) one level of government, either the regional or common level (i.e. either the lower or upper tier), is clearly 'dependent' on the other level. In the US after Philadelphia, by contrast, the two levels of government are observed to be at root 'independent' of one another. This distinctive feature leads him to establish a 'federal principle', reflecting the observed actuality of the American case:

'... It seems justifiable to maintain ... that the difference in principle between the form of association embodied in the modern Constitution of the United States and the other forms of association which have been discussed, is an important and a practical difference; so important, indeed, that it justifies us in placing the United States in a separate category among associations of states. And, further, since the United States is universally regarded as an example of federal government, it justifies us in describing the principle, which distinguishes it so markedly and so significantly, as the federal principle'¹⁰⁷.

Wheare now defines his important notion:

'... By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent'¹⁰⁸.

In this thesis, a key assumption I make is that it is possible to conceive of processes of regional integration and disintegration as being located along a linear pathway between many small States (either unitary or federal) and one large unitary State, these being thought to represent the extreme terminal points of such processes. In

¹⁰⁶ In 1961, Vile noted that '... The most influential definition is that of Dr. K. C. Wheare'. Writing more recently, in 2006, Burgess considers Wheare's analysis still 'enormously influential'. He tells his readers that although it is '... tempting for some critics to discredit and discard it as having outlived its usefulness', being a somewhat 'static' and 'legalistic' interpretation, nevertheless this temptation must be resisted. For time and again, '... we will return to his comparative analysis in the continuing search for conceptual clarity and terminological precision'.

Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.24.

Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), pp.27-8.

Vile, Maurice *The Structure of American Federalism* (Oxford University Press, 1961), p.193.

¹⁰⁷ Wheare, Kenneth *Federal Government* (Oxford University Press, 1963), p.10. Originally published in 1946.

¹⁰⁸ *Ibid.*, p.10.

between, a range of intermediate political structures are envisaged that I characterise as occupying zones of conceptual space along such a continuum, as I will demonstrate visually in a moment. There seems good reason for supposing that this assumption is valid. For past experiences of regional integration, notably the Swiss, American and German cases, suggest that the political systems resulting from such processes tend to remain on the pathway, if at different places along it at different phases in history. The assumption, however, does not go unchallenged. I will give further consideration to the question, and alternative perspectives, later in the thesis.

The framework of basic categories that Wheare is led to develop from his initial premise is a three-fold schema. In this arrangement, two forms of association involving the ‘dependence’ or ‘subordination’ of either one or other level are conceived as symmetrically surrounding his ‘federal principle’, where the two levels are by virtue of their ‘independence’ from one another thought to be ‘co-equally supreme’¹⁰⁹. These he identifies as ‘confederation’ and ‘devolution’ respectively:

‘... That form of association between states in which the general government is dependent upon the regional governments has often been described as a “confederation” and the principle of its organization “the confederate principle”. ... The other form of association - that in which the regional governments are subordinate to the general government - is often described as “devolution” and the principle of its organization as “the devolutionary principle”’¹¹⁰.

On this understanding, then, federalism is conceived to be the genuinely *middle zone* along an integratory pathway, as illustrated in Figure 2. Here, as Wheare notes, the

¹⁰⁹ *Ibid.*, p.10.

¹¹⁰ *Ibid.*, pp.32-3.

federal principle is understood to imply ‘... equality of status between the regions ... and the general government’¹¹¹.

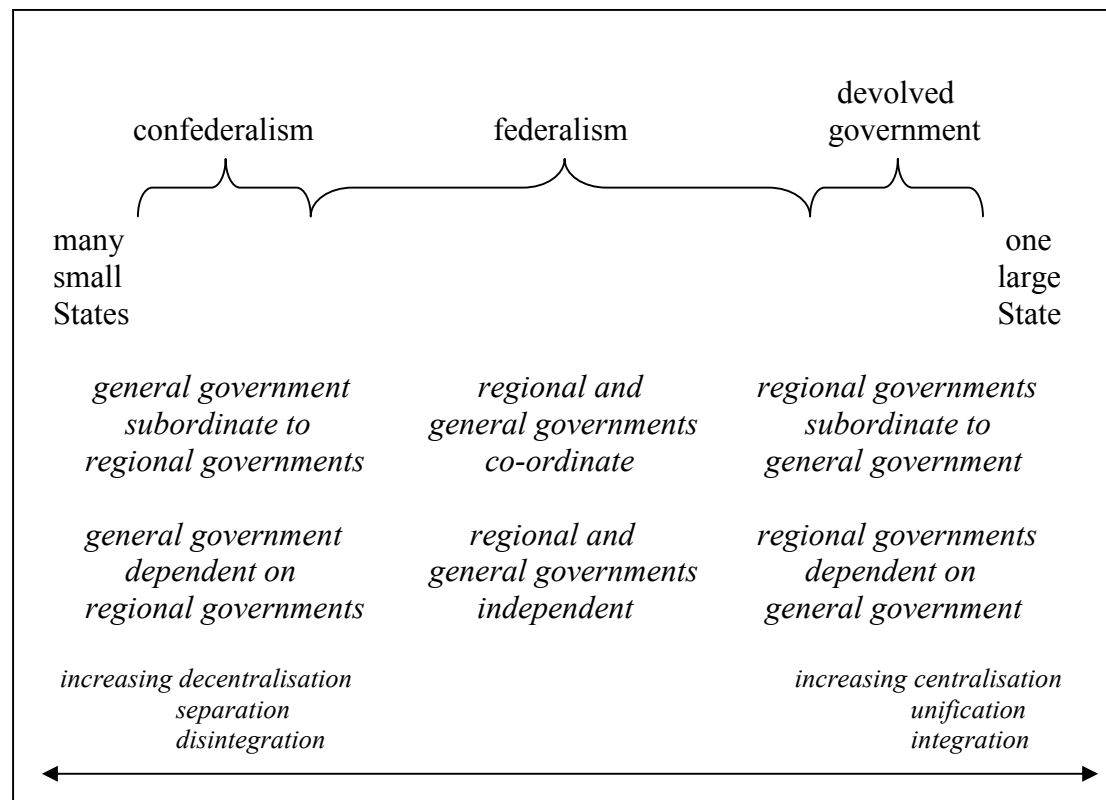


Figure 2 - Wheare's Framework of Basic Political Forms

Burgess notes how authors such as Livingston, Davis and Birch in the 1950s offered critiques of Wheare's definition, which they viewed as too restrictive in its emphasis on '... a particular kind of jural relationship'¹¹². Birch's analysis, in *Federalism, Finance and Social Legislation in Canada, Australia and the United States (1955)*, in particular, led to two major departures, in arguing that the two levels of government in federal systems were in practice neither (i) limited to their own sphere, nor (ii) entirely independent of one another - as Wheare had suggested. This led him to coin

¹¹¹ *Ibid.*, p.244.

¹¹² Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), p.31.

the phrase ‘co-operative federalism’¹¹³, and to prune Wheare’s definition ‘... so that it accorded much more with contemporary post-war developments’¹¹⁴, by removing the ‘independence’ and ‘own sphere’ criteria from the federal principle.

Vile’s words, in *The Structure of American Federalism* (1961), afford us clarity as to the currents of the debate flowing at around this time. He says:

‘... as A.H. Birch has pointed out, the tremendous growth of concurrent powers in the last part of the nineteenth century and during this century has brought about an overlapping of governmental functions so that it is difficult to see the various levels of government as restricted to their own spheres. While it is still true that many functions remain almost the exclusive concern of Federal or State governments, there are very many important functions where competition or co-operation are the rule. Birch suggests, therefore, that the definition of federalism can remain essentially the same, but can be shortened by the omission of the requirement that each level of government be restricted to its own sphere. He suggests that the co-ordinate status of Federal and State governments remains an essential part of the definition of federalism, although he no longer stresses the independence of the two levels of government. This approach to the definition of federalism, becomes, therefore, an adaptation of a definition which well suited the era of “dual federalism”, to the new age of “co-operative federalism”’¹¹⁵.

Vile goes on to note, however, that ‘... the problem goes deeper than this’. He sees co-ordinacy as ‘... even more difficult to sustain, in political terms’ than independence, in view of the continual ebb and flow of ‘power and influence’

¹¹³ The ‘dual federalism’ of the nineteenth century gave way in the first half of the twentieth century to ‘co-operative federalism’, in which actions of the two levels of government were seen to be increasingly intertwined. Burgess notes, in this regard, Grodzins’ ‘... famous metaphor of the “marble cake” of functional interpenetration, policy entanglement and essentially intergovernmental relations to characterise American federalism’.

Ibid., pp.33, 39.

¹¹⁴ *Ibid.*, p.33.

¹¹⁵ Vile, *op. cit.*, pp.193-4.

undermining the idea of an absolute equality between the levels¹¹⁶. He is thus led to suggest their *joint* replacement by a single common feature:

‘... Let us take these ideas of mutual independence and co-ordinate status, which we see have considerable importance for the definition of federalism, and reconsider them in the light of a characteristic of federalism which embraces both of them ... - the mutual *interdependence* of Federal and State governments’¹¹⁷.

Reflecting similar dissatisfaction with the construction of federalism, Burgess sees subsequent contributions by Riker, Sawer, Duchacek and Davis in the 1960s and early 1970s questioning the definition, meaning, and even ultimately the value, of the concept. The sombre mood was compounded by the failure of a number of federations in this period (for example, the West Indies in 1962, Rhodesia and Nyasaland in 1963, the expulsion of Singapore from Malaysia in 1965, the civil war in Nigeria from 1967 - 70 and the splitting of Pakistan in 1971¹¹⁸). Writing in *Modern Federalism* (1969), Sawer now chose to move forward with only ‘rough descriptions’ of ‘stages of federalism’, because he considered that attempts to define either the word or the thing were ‘... likely to be futile’¹¹⁹. In this unhappy state, Burgess sees the intellectual debate by 1970 as simply having ‘petered out’¹²⁰.

Writing in *Comparative Federalism: The Territorial Dimension of Politics* (1970), Duchacek surveys the apparently barren landscape at this time:

‘... There is no accepted theory of federalism. Nor is there an agreement as to what federalism is exactly. The term itself is

¹¹⁶ He says in this regard: ‘... The relative influence of Federal and State authorities will vary with each particular issue, and will depend ... upon the political disposition of the various forces which go to make up the abstractions of “Federal Government” and “State governments”’. The ultimate solution of many of these issues must be in terms of the “defeat” of one level by the other, for it is in this way that so many decisions are taken’.

Ibid., p.196.

¹¹⁷ *Ibid.*, p.196.

¹¹⁸ Watts, Ronald *Comparing Federal Systems in the 1990s* (Queen’s University Press, 1996), p.102.

¹¹⁹ Cited in Burgess, *op. cit.*, p. 43.

¹²⁰ Burgess, *op. cit.*, p. 44.

unclear and controversial. ... Federalism has now become one of those good echo words that evoke a positive response but that may mean all things to all men, like democracy, socialism, progress, constitution, justice, or peace. We see the term applied to almost any successful combination of unity with diversity'¹²¹.

Likewise, Davis, in a 1972 article entitled 'The Federal Principle Revisited', was led to a 'depressing and uncertain' destination:

'... The more we have come to know about it, the less satisfying and the less reputable has become almost the whole of our legacy of federal theory. Virtually all of the perspectives of politics have contributed to the decline of the federal Humpty-Dumpty'¹²².

When Vile returned to the scene in 1977, with an essay 'Federal Theory and the "New Federalism"', he attempted to move discussion away from the sterile debate about definition towards a 'developmental model', which saw federalism as '... "a cluster of different techniques" used to "try to establish and maintain a particular kind of balance or equilibrium between two levels of government, albeit a moving, changing equilibrium"'¹²³. This was, in Burgess' opinion, '... probably the most sophisticated approach to the study of federal political systems in the Anglo-American literature at that time'; but it, too, was rapidly subjected to the same sort of deconstruction and dismissal as its predecessors, as specific propositions collapsed under close scrutiny¹²⁴.

Burgess is thus led to draw the following conclusion from the whole debate over the post-war period:

'... It is clear that by the end of the 1970s a scholarly consensus of sorts about federalism had emerged. Agreement had been reached about the futility of pursuing an elusive, all-embracing definition

¹²¹ Cited in Burgess, *op. cit.*, p. 44.

¹²² Cited in Burgess, *op. cit.*, p. 44.

¹²³ Cited in Burgess, *op. cit.*, p. 45.

¹²⁴ Burgess, *op. cit.*, p. 45.

intended to encapsulate all of the complexities and subtleties that inhered in federalism. The debate, in short, was going nowhere'¹²⁵.

Thirty years on from this apparent conceptual dead-end, there is still no greater definitional clarity¹²⁶. However, we now live in more optimistic times. There has been a revival of interest in federal arrangements around the world in recent years, with Belgium becoming a federation in 1993, and Spain and South Africa moving in this direction with the adoption of federal-type constitutional structures in 1978 and 1996 respectively (though not formally declaring themselves federal States)¹²⁷. In parallel with this development, and further stimulated by the respect in which the European Union has gradually appeared to develop a federal character, there has been a renewed growth in the literature on the subject. Probably as a consequence of what seems like past semantic distraction, however, the authors of such works tend to steer clear of, or skate rather quickly over, the definitional issue.

Hueglin and Fenna, for example, say that '... Federalism has a reasonably well-defined meaning', and frame the concept simply by distinguishing it '... from more centralized unitary government on the one hand and more decentralized confederal arrangements on the other'¹²⁸. It could be that this approach - apparently returning to and reinstating the heart of Wheare's analysis - is exactly the right one to adopt. For the real essence of federalism, as he brought out, lies in its very intermediacy,

¹²⁵ *Ibid.*, p.47.

¹²⁶ In the opening paragraph of his most recent work, Burgess observes that today '... The study of federalism construed in its broadest sense is fraught with difficulties that are reflected in both theory and practice. ... while such a thing as federal theory does exist, there is, as yet, no fully fledged theory of federalism. At best there is partial theory based upon rigorous conceptual analysis and the pursuit of terminological precision. At worst there is crass empiricism rooted in the failure to develop concepts and define the key terms'. Sounding a heavily cautionary note, which resonates strongly with the concern of this study, he adds: '... Without this fundamental preparation it is not possible to engage in genuine comparative analysis that has theoretical implications'.

Ibid., p.1.

reflecting the *middle zone* along the integratory pathway. Encapsulating this idea would appear the essential key to laying the foundations of a coherent intellectual framework. It seems beyond doubt that this is the core of meaning to modern federalism - the territory of the 'mixed' or 'compound' polity - which leads in turn to the two levels of government established being considered co-equal actors.

It seems that from careful scrutiny we can pick out multiple senses to certain key words that were responsible for the uncertainty that entered Wheare's analysis, leading to its premature undermining and rejection. Gaining an appreciation of such earlier 'pitfalls' may help our thinking progress down a more worthwhile path today. We consider the terms 'independent' and 'co-ordinate' successively.

We may note two different meanings to the word 'independent' that were simultaneously present in Wheare's 1946 discussion, concerning the relations between the general and regional governments. We observe, first, the sense of 'having nothing to do with', or 'having no connection at all with'; and, secondly, the sense of 'not being dependent upon for continuing existence'. Whilst the former concerns more day-to-day interaction in policy-making, the latter is more a constitutional issue. The two are clearly very different matters and need to be kept separate. For whilst independence in the former sense of any one level being restricted to its 'own sphere' is indeed inoperable today in the context of co-operative federalism (and thus was rightly jettisoned), in the latter constitutional sense it clearly remains of central importance. Thus, it seems, the idea needs to be retrieved from the conceptual dustbin, so-to-speak.

¹²⁷ Hueglin, Thomas and Fenna, Alan *Comparative Federalism: a Systematic Inquiry* (Broadview, 2006), pp.138-42.

Watts, *op. cit.*, p.3.

¹²⁸ Hueglin and Fenna, *op. cit.*, p.31.

Likewise, the word ‘co-ordinacy’ can have two different meanings. In the sense of absolute equality of power among two levels of government, an exact fifty-fifty split, it is evidently an absurd notion, in view of the ever-shifting power relations inherent in federal structures, all occurring within the envelope of more long-term cyclical fluctuations in the federal balance over time towards and away from greater centralisation. Nevertheless, a principle of formal constitutionalised equality in the *standing* of the two levels - indicating that *structurally* the relationship between them is deemed to be one of *peers*, rather than of *principal and agent* - seems essential. Wheare’s co-ordinacy notion thus also appears to require rescue and rehabilitation.

It is equality *of status* that seems the essential point (a view, indeed, found reflected in Wheare’s own writing - see the quotation above on page 52). These, therefore, appear the two crucial qualifying words needed to clarify and give firm substance to the notion of equality. What seems to be the essence of federalism is two genuine levels of government, of co-equal *constitutional* rank or precedence; that is, levels that are *constitutionally independent* and *constitutionally co-ordinate*. In this regard, ideas of independence and co-ordinacy are clearly seen to be inter-connected - for it is the former that gives rise to the latter.

II. The Current Consensus Understanding

Despite the earlier critiques of his definition of federalism, Wheare’s broad perspective of a tripartite schema of forms, as shown in Figure 2 on page 52, in fact remains current in the discipline today. We find this perspective confirmed by several other authors in addition to Hueglin and Fenna, for example McKay (whose initial reference below to regional or local government within a unitary State clearly reflects the devolutionary principle):

‘... Under unitary government sovereignty is vested in the central authorities, which can in turn decide on the shape of regional and local governments. This is the case in such countries as Britain, France and Japan. Under confederal arrangements sovereignty is vested in the state or regional governments, whose agreement is required in order to sanction action by the central government. The US Articles of Confederation and the Confederacy during the Civil War operated roughly in this way, and such organizations as the United Nations and NATO approximate to confederal systems. The defining feature of federalism is that of *dual sovereignty* or a *sharing* of powers between state and central governments. Under federalism each level of government is assumed to be supreme in at least one policy area. Typically the federal government would have responsibility for defence and foreign affairs, while the states would control such things as education and law and order’¹²⁹.

Echoing McKay’s line of thinking, McCormick likewise interprets the difference between confederalism and federalism as being seen to lie principally in their contrasting implied perspectives on the location of sovereignty:

‘... Confederation is a loose system of administration in which two or more organizational units keep their separate identities but give specified powers to a central authority for reasons of convenience, mutual security or efficiency. The members are sovereign and the central authority is relatively weak, existing solely at the discretion of the members and doing only what they allow it to do. If states were to form a confederation, then the citizens of those states would continue to relate directly to their own governments, and only indirectly to the higher authority. ... The latter would draw up laws and regulations for the states, but would exist solely at their discretion and pleasure. ...

By contrast to a confederation, a federal system is one in which at least two levels of government - national and local - coexist with separate or shared powers, each having clearly defined and independent functions but neither having supreme authority over the other. Unlike a confederal system, where the higher authority does not exercise power directly over individuals, a federal government exercises power over both its constituent units and its citizens, and there is a direct relationship between citizens and each level of government’¹³⁰.

¹²⁹ McKay, David *American Politics and Society* (Blackwell, 2001), p.60.

¹³⁰ McCormick, John *Understanding the European Union: a Concise Introduction* (Palgrave, 2002), pp.6-12.

McKay and McCormick thus characterise confederalism as a form of co-operation between wholly sovereign States - and hence of inter-governmentalism - whilst federalism is thought to involve the *sharing* of sovereignty.

Heywood affirms that this perspective is generally-held in the discipline when he identifies 'confederations' or 'leagues' as '... a main form of inter-governmentalism' (alongside 'treaties' or 'alliances'), and defines inter-governmentalism as '... any form of interaction between states which takes place on the basis of sovereign independence'¹³¹. By contrast, he says, '... federalism requires the existence of two distinct levels of government, neither of which is legally or politically subordinate to the other. Its central feature is therefore the notion of shared sovereignty'¹³².

Thus, the mainstream consensus view within political science presently seems to be that under confederalism sovereignty remains in the possession of the component

parts of a political association, undisturbed as an integral whole (irrespective of whether it is thought conceptually to be divisible or indivisible)¹³³. As concerns federalism, however, the assumption made here is, of necessity, that the concept is divisible. Though Wheare refers only to a ‘division of powers’ (and notably does not himself use the precise term a ‘division of sovereignty’ throughout his entire work),

¹³¹ Throughout the thesis, I follow this broad understanding of inter-governmentalism, which encompasses both the treaty-based international organisation and stronger forms, such as that which Wheare identifies as ‘league or confederation’.

It is in this sense that O’Neill is led to observe: ‘... A confederation is the antithesis of a federation’. He says: ‘... Federations are states in their own right. ... A confederation on the other hand is a concert of sovereign states principally arranged for their members’ mutual advantage. ... the members of confederations do acknowledge one another’s rights as sovereign states. ... They are interstate rather than intrastate arrangements’.

Confederalism is, then, for O’Neill ‘... a special type of intergovernmental arrangement’. This type of limited political order, he explains, ‘... aims to formulate practical procedures for cooperation and to facilitate by institutional devices beyond ordinary diplomatic intercourse, the smooth conduct of interstate relations. The attempt here to move beyond nominal intergovernmentalism and to fashion it into formal codes and procedures that minimise the risks of conflict, encourages crisis management. And indeed it reinforces a mood of harmony and a propensity to collaboration between the participating states’.

Seen in these terms, he argues, the adoption of a confederalist framework in the debate on European integration in the 1970s and early 1980s can be understood as ‘... an attempt to refine an intergovernmental paradigm’. Drawing on Taylor’s confederal analysis, however, he notes that still ‘... The bottom line here remained the inviolability of national sovereignty’.

Fabbrini is another author who understands confederalism as a species of inter-governmentalism. He observes, for example, that the EU has come to adopt a ‘double method of decision-making’, combining two very contrasting approaches in a single system: ‘... the Community (or federal) method and the intergovernmental (or confederal) method’.

Fabbrini, Sergio ‘Is the EU Exceptional? The EU and the US in Comparative Perspective’ in Fabbrini, Sergio (Ed.) *Democracy and Federalism in the European Union and the United States: Exploring Post-national Governance* (Routledge, 2005), p.6.

Heywood, Andrew *Key Concepts in Politics* (Palgrave, 2000), pp.246-7.

O’Neill, Michael *The Politics of European Integration: a Reader* (Routledge, 1996), pp.70-6.

Wheare, *op. cit.*, p.5.

¹³² Heywood, *op. cit.*, p.240.

¹³³ Leben, for instance, characterises the form as one created ‘... through a treaty and maintenance of Member States’ sovereignties’.

Leben, Charles ‘A Federation of Nation States or a Federal State?’ in Joerges, Christian, Mény, Yves and Weiler, Joseph (Eds.) *What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer* (European University Institute, 2000), p.110.

others, both before and after him, have taken this construction to be implicit in the formation of the federal concept¹³⁴.

The terms ‘dividing sovereignty’, ‘sharing sovereignty’ and ‘pooling sovereignty’ are today seen as interchangeable expressions¹³⁵. The idea here is thought to be that if the whole parcel of sovereign powers of a State is ‘divided’ into many competences, a certain number of these can be delegated either upwards or downwards, either to supra-national or sub-national authorities respectively, to be exercised either jointly or

¹³⁴ For example, Bogdanor notes: ‘... In his classic work, *Federal Government*, K.C. Wheare ... (says) ... the federal principle implies a constitutionally guaranteed division of legal sovereignty between two layers of government divided territorially. Sovereignty is thus not confined to one government, but divided or shared between two’.

That Wheare is nevertheless aware of, and sympathetic to, this interpretation is evident from his acknowledgement of Garran’s definition of federalism as ‘... perhaps the best there is’. This had styled it: ‘... A form of government in which sovereignty or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other’. Likewise, he notes Freeman’s definition of the term, which had incorporated the phrase a ‘... complete division of sovereignty’.

As a point of further interest, we appear to see here the roots of Wheare’s own definition. An even earlier source that probably in turn had inspired them can be traced back to the founding American experience itself, in *The Federalist Papers*. James Madison in *Federalist No. 39* argued that under the then proposed US Constitution the general and regional governments would form ‘... distinct and independent portions of the supremacy ... within their respective spheres’. No doubt it was this thinking that led his colleague and friend Thomas Jefferson to observe subsequently, in correspondence, the existence of a line marking the division between national and state governments which made them two ‘coordinate’ governments, ‘... each sovereign and independent in its own sphere’. Thus, what gradually becomes clear here is the intimate nature of the relationship between the formation of the federal concept and the founding of the modern America.

Bogdanor, Vernon ‘Federalism and the Nature of the European Union’ in Nicolaidis, Kalypso and Weatherill, Stephen (Eds.) *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003), p.49.

Jefferson cited in Friedrich, Carl *Trends of Federalism in Theory and Practice* (Pall Mall, 1968), p.21. Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), No. 39, p.258. Originally published in 1788.

Wheare, *op. cit.*, pp.14-15.

separately. In the case of a supra-national order, that portion of competences which is exercised in common is thus conceived to be ‘shared’ or ‘pooled’ by the several parties to the order acting together as one.

The current consensus understanding of the nature of basic political forms within the discipline, therefore, seems to be as shown in Figure 3:

¹³⁵ Some examples of such usage are as follows:

Howse and Nicolaidis ask: ‘... What shall we make of the notion of divided sovereignty at the heart of federalism?’

Bomberg, Peterson and Stubb offer the following as a definition of federalism: ‘... Principle of sharing power and sovereignty between levels of governance, usually between central or federal level, and substate (state, provincial, Länder) level’.

Finally, Dinan poses the question: ‘... why did European states, traditionally jealous of their independence, pool sovereignty in an international organization that increasingly acquired federal attributes?’

Bomberg, Elizabeth, Peterson, John and Stubb, Alexander (Eds.) *The European Union: How Does It Work?* (Oxford University Press, 2008), p.241.

Dinan, Desmond ‘How Did We Get Here?’ in Bomberg, Peterson, and Stubb, *op. cit.*, p.23.

Howse, Robert and Nicolaidis, Kalypso ‘Introduction: The Federal Vision, Levels of Governance, and Legitimacy’ in Nicolaidis, Kalypso and Howse, Robert (Eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001), p.2.

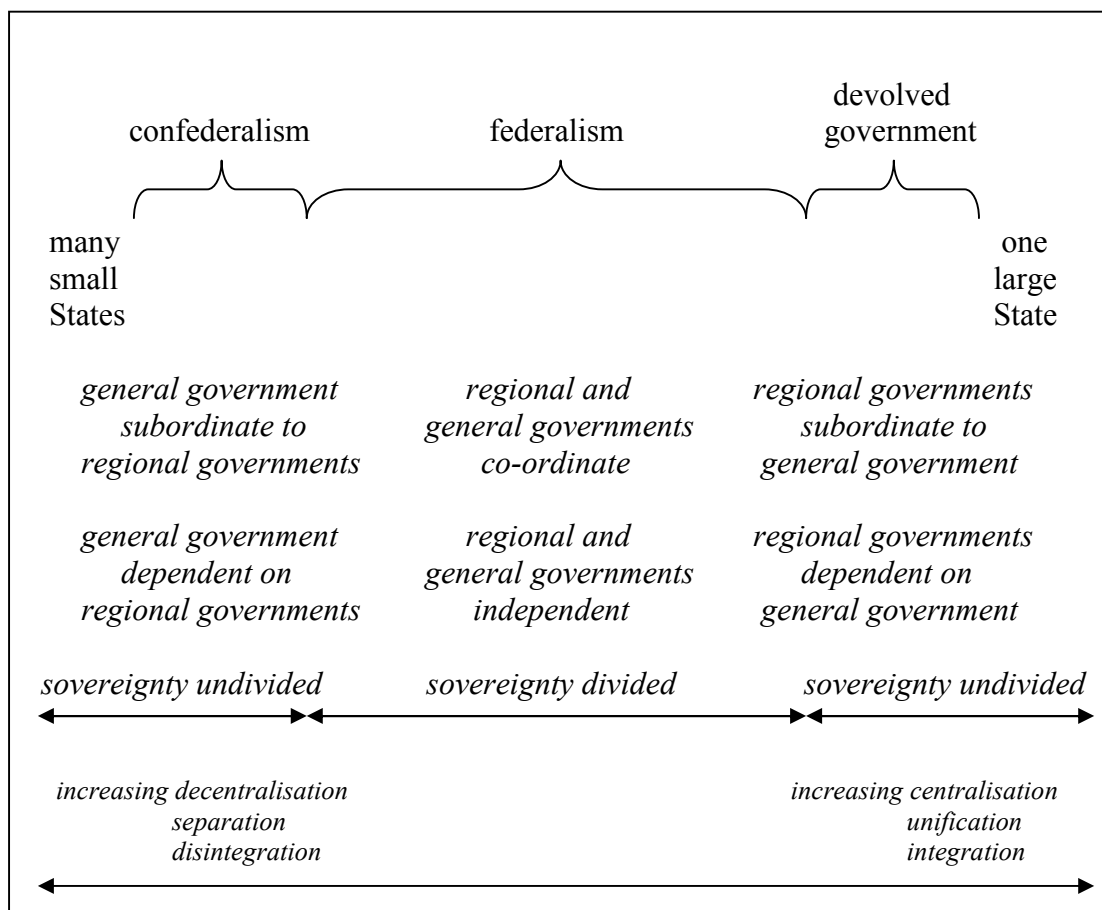


Figure 3 - The Current Consensus Framework of Basic Political Forms

The challenge to this orthodoxy today comes from the need to conceptualise systems of regional integration in an advanced stage of development, such as the EU. The latter has now moved beyond a strictly inter-governmental character, thus being understood to have passed *out* of the zone of confederalism - without appearing to have entered the realm of federalism¹³⁶. Since it is not yet a State (there is wide consensus on this point), it cannot under the standard definition be conceived as a federation - the only presently-acknowledged formal political structure for what is

¹³⁶ As Marquand and Laffan were seen to note in the previous chapter, the EU is considered less than a federation but more than a confederation, thus being thought to lie *between* the two forms (see page 29).

thought to be ‘sovereignty-sharing’¹³⁷. So it appears, somewhat paradoxically, to inhabit a grey zone of conceptual space that is termed ‘*sui generis*’ (meaning ‘of its own form’ or ‘genus’), as illustrated in Figure 4 below:

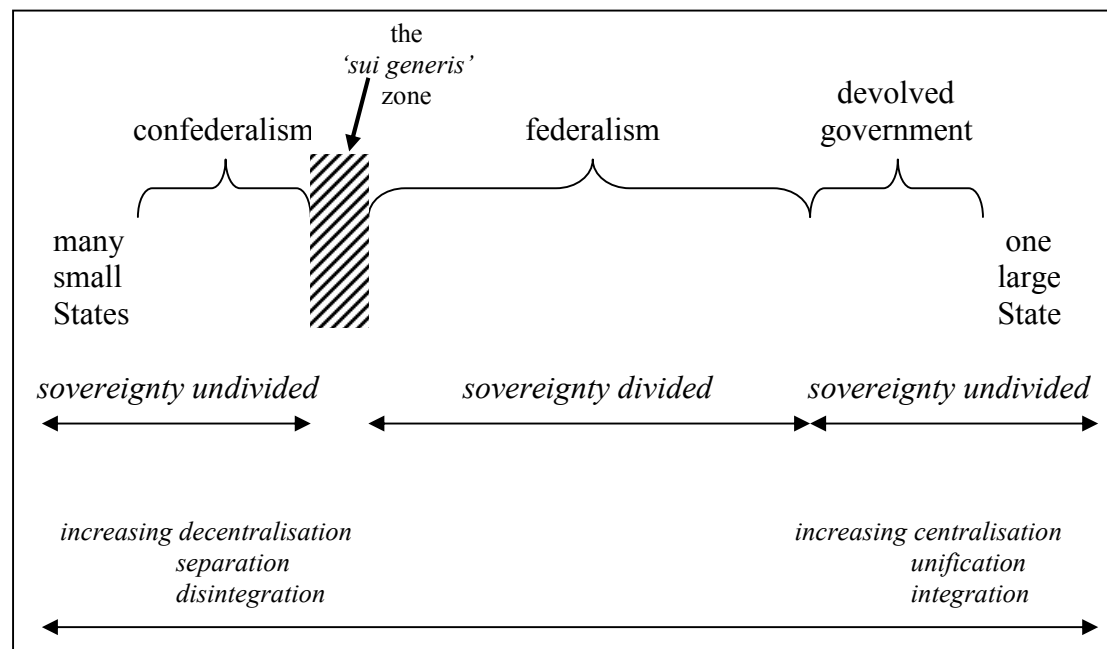


Figure 4 - The Present ‘*Sui Generis*’ Dilemma

Heywood indicates the direction of travel occurring here when he says that inter-governmental co-operation in the EU has ‘... gradually given way to supranational cooperation’¹³⁸. Bomberg, Stubb and Peterson offer the following definitions of these two terms:

¹³⁷ Burgess, borrowing from King, defines federation as ‘... an institutional arrangement, taking the form of a sovereign state, and distinguished from other such states solely by the fact that its central government incorporates regional units in its decision procedure on some constitutionally entrenched basis’.

Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.25.

¹³⁸ Heywood, *op. cit.*, p.247.

‘... Intergovernmentalism is a process or condition whereby decisions are reached by specifically defined cooperation between or among governments. Formally, at least, sovereignty is not relinquished. The term intergovernmentalism is usually contrasted with supranationalism.

... Supranationalism means above states or nations; that is, decisions are made by a process or institution that is largely (but never entirely) independent of national governments. The subject governments ... are then obliged to accept these decisions. ... The term supranationalism is usually contrasted with intergovernmentalism’¹³⁹.

Conceptually, one key difference between the two is thought to lie in the move from unanimous decision-making under the former, to majority decision-making under the latter, since decisions take on an ‘independent’ supra-national character at the moment when the prior controlling or blocking power of the individual national governments (the so-called ‘veto’) is given up. In the case of the EU, this shift began principally after the entry into force of the Single European Act (SEA)¹⁴⁰ in 1987, which ushered in the widespread use of qualified majority-voting (QMV) to speed up agreement of the legislation required for completion of the single market. This juncture, then, is seen to mark the moment that the EU moved clearly from the realm of confederation into the ‘*sui generis*’ space. As the then President of the European Commission, Jacques Delors, remarked at the time, the entity at that stage in its development became an ‘Unidentified Political Object’¹⁴¹.

¹³⁹ Bomberg, Elizabeth, Stubb, Alexander and Peterson, John ‘Introduction’ in Bomberg, Peterson and Stubb, *op. cit.*, p.10.

¹⁴⁰ Signed in Luxembourg on 17 February and The Hague on 28 February 1986, and entered force on 1 July 1987.

¹⁴¹ Delors, Jacques *Europe, 30 Years After the Signature of the Treaty of Rome*, Speech at the People’s University, Lille, 8 March 1987, translated from the original French.

Conclusions

In this second chapter, we have enquired into the nature of federalism as a concept in political science. First, we observed how the scholarship searched in vain for a precise definition of the concept in the post-war period and in the process deserted Wheare's seminal formulation. Secondly, we saw how, despite this, the current consensus understanding of the nature and meaning of the concept in the discipline in fact still reflects the core of Wheare's thinking, being thought to represent the central zone in a tripartite schema of basic political forms along the integratory pathway.

The novel EU, seemingly defying classification by this mainstream framework, still has the effect of puzzling the discipline over twenty years after its first observance. Unsure how to alter the inherited wisdom of past generations, it seems, scholars are unable to account for the apparent anomaly. For what is it exactly that is wrong with the existing thinking and system of concepts? To date, the scholarship has seemed uncertain.

However, the model that the EU embodies, rather than being a 'temporary' or 'transitional' phase in the passage between established categories, as some had initially asserted, shows every sign now of entrenching itself and becoming

permanent¹⁴². This makes answering the conundrum posed increasingly urgent. I suggest that it is possible to respond adequately if we are prepared to think radically on the structure of our concepts by going back to first principles. In particular, it seems critical to think again on the nature of sovereignty; and it is this to which we turn our attention first in the next chapter, Chapter 3.

¹⁴² Bogdanor suggests that, in view of the deep historic, linguistic, religious and cultural divisions between the member States, the existing political order ‘... could prove to be, not a transitional stage, but rather a long-lived form of government’. He draws the conclusion that ‘... it is worth bearing in mind the well-known French aphorism, “C’est seulement le provisoire qui dure”’.

Magnette envisages three scenarios for the future of the EU: ‘... Either the parliamentary component will be asserted, leading the Union to a German-style federal-type regime; or the intergovernmental element will gain ascendancy; or finally and most likely, the Union will remain halfway between these two ideal types’. In this, he says, the EU will retain the ‘... mixture of “supranationalism” and “intergovernmentalism” which has been its hallmark from the beginning’.

Moravcsik reinforces this view, saying: ‘... Europe appears to have reached a stable constitutional equilibrium, within which only incremental changes ... are likely to take place. ... The broad contours of the EU’s relationship to the member states seem set for the foreseeable future. It is now time for Europeans to get off, or at least slow, the bicycle. To be sure, there will be new functional challenges, some we cannot yet imagine, but until these unforeseeable exogenous shocks hit us and new advances in the European project are required, it seems the constitutional structure will look remarkably as it does today’.

Writing in 2010, Piris comments of the constitutional settlement recently instituted: ‘... The Lisbon Treaty did not change the nature of the Union, which remains a “partially federal entity”. This means that the EU is neither a classic international intergovernmental organisation, nor a State: it acts with federal powers in some fields (external trade and competition policy, for instance) and as a classic international organisation in other fields (notably foreign policy)’. Far from being a ‘leap’ towards a federal State, he concludes, the Treaty in fact ‘... marks a halt’ to the ambitions of the integrationists. He adds: ‘... It might even be seen as a “containment” of the powers of the European Union’.

Bogdanor, Vernon ‘Federalism and the Nature of the European Union’ in Nicolaidis and Weatherill, *op. cit.*, p.49.

Magnette, Paul *What Is the European Union? Nature and Prospects* (Palgrave, 2005), pp.201-3.

Moravcsik, Andrew ‘The World’s Quiet Superpower’ in *European Voice*, 29 March 2007.

Piris, Jean-Claude *The Lisbon Treaty: a Legal and Political Analysis* (Cambridge University Press, 2010), p.331.

Chapter 3

Constructing a Valid Federal Concept

This chapter attempts to show how, despite the earlier resignation of scholars to the apparent futility of trying to define federalism, a valid definition of the concept can in fact be constructed once the various component parts of the definition are themselves clearly defined and understood. To this end, it is divided into three sections. The first section identifies the core meaning of sovereignty. The second section shows how the component elements of the federal concept may be integrated together. The third section elaborates a definition of federalism on the basis of the foregoing analysis.

I. Identifying the Core Meaning of Sovereignty

A full understanding of any concept, as we learnt in Chapter 1, must necessarily include the identification of a precise definition. Discouragingly for the researcher, however, in the case of sovereignty a consistent theme arising in the literature is the doubtfulness of attaining this goal. Keating, for example, finds ‘... endless problems with the terminology of sovereignty’¹⁴³; and for Patten it is a ‘... notoriously slippery idea’¹⁴⁴. Indeed, a brief review of the literature on the subject does reveal a range of perspectives or ‘faces’ to the concept - for example, internal *versus* external¹⁴⁵, legal

¹⁴³ Keating, Michael *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001), pp.x, 12.

¹⁴⁴ Patten, Chris *Not Quite the Diplomat: Home Truths About World Affairs* (Penguin, 2005), p.60.

¹⁴⁵ Heywood, Andrew *Key Concepts in Politics* (Palgrave, 2000), p.37.

Philpott, Dan ‘Sovereignty’ in Zalta, Edward (Ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2003 Edition),
URL=<http://plato.stanford.edu/archives/sum2003/entries/sovereignty/>.

versus political¹⁴⁶ and *de jure versus de facto*¹⁴⁷ - which make it appear more confusing and difficult to gain a hold on than might at first have been anticipated. Is this complexity and seeming ambiguity as to its nature really the best that political science can achieve, for what must be counted as among the most important - if not itself *the* most important - of political concepts to mankind?¹⁴⁸

In part, this elusiveness has to do with historical legacy. For the concept of sovereignty was born in, and developed through, a lengthy and complicated process of claim and counter-claim regarding its nature and location, as the world moved from the pre-modern medieval era into the modern era of the nation State, in the sixteenth and seventeenth centuries. Bodin was the first to develop a systematic treatment of the idea, defining it in his *Six Books of the Republic* (*Les Six Livres de la République*) (1576) as ‘... the absolute and perpetual power of a republic’¹⁴⁹. As Hinsley notes, though, in the end he had fudged his indivisible conception, hedging it in a ‘rulership contract’ between the ruler and the ruled. It was Hobbes who took the next logical step, in *Leviathan* (1651), by abandoning any notion of a ‘people’ (the ruled) and

¹⁴⁶ Crick, Bernard ‘Sovereignty’ in Sills, David (Ed.) *The International Encyclopedia of the Social Sciences* (Macmillan and Free Press, 1968), p.81.

Heywood, *op. cit.*, p.37.

¹⁴⁷ Austin, John *The Province of Jurisprudence Determined* (Cambridge University Press, 1995), p.281. Originally published in 1832.

Patten, *op. cit.*, p.61.

¹⁴⁸ Woodrow Wilson confirms the impression of its salience, saying: ‘... The conception of political sovereignty is ... a question central to the life of states and to the validity of law’.

Likewise, Jackson sees sovereignty as ‘... a foundation institution and a basic frame of reference of modern political life’. He says: the ‘... classical view of sovereignty as political independence is sometimes dismissed as mere legality. Of course it is legality. But legality, i.e., legal authority and right, is not something that is trivial or of little interest or concern to practical politicians. On the contrary, ... it is of profound interest and concern’.

He then points to the external aspect that seems to flow from the internal: ‘... sovereignty as classically understood is a qualification that makes certain political systems, about 190 at the present time, eligible to play a role on the stage of world politics. ... The role of a sovereign state is usually regarded as the most important of all roles that anyone could perform on the world stage. Sovereign states are the leading actors in world politics’.

Jackson, Robert ‘Introduction: Sovereignty at the Millennium’ in *Political Studies*, Vol. 47, No. 3, 1999, pp.425, 428.

Wilson, Woodrow ‘Political Sovereignty’ in *An Old Master and Other Political Essays* (Scribner’s, 1893), p.61.

depositing sovereignty exclusively in the State (the ruler) - in the face of the then perceived impracticality of confiding it to the mob. This, in turn, was exactly what Rousseau subsequently tried to do with his popular sovereignty concept, established in *The Social Contract (Du Contrat Social)* (1762)¹⁵⁰.

However, it would seem that this hangover can now be left firmly in the past. For from the French and American experiments in republican government in the late eighteenth century onwards, a growing belief in sovereignty's ultimate location with the people, the emerging democratic electorate, has taken root. Today, this is a fact almost so taken for granted that it seems close to facile to posit any other conception. Yet constitutional theory appears yet to catch up, with contrasting dominant views of sovereignty's nature and location being maintained in different countries: variously in constitutions, constitutional courts, legislatures or States (for example, in the United Kingdom (UK), the doctrine of 'parliamentary sovereignty'). Witness the growth in popularity in recent years of the referendum as a means of consulting the people - generally believed to be a source of authority higher than legislatures and to which the latter must defer when a binding one is held. Need we, therefore, today persist with any more complex concept than sovereignty located indivisibly in the body of the people, the political community?

Jackson's perspective on the trajectory that the concept has followed over time would appear supportive of this line of reasoning. He says:

¹⁴⁹ Cited in Hinsley, Francis *Sovereignty* (Watts, 1966), pp.71, 122.

‘... Sovereignty begins its career as dynastic sovereignty. Political authority is autocratic or absolutist ... Sovereignty logically would seem to end its career as popular sovereignty. Political authority is democratic or at least representative’¹⁵¹.

Writing in his landmark work *Sovereignty (1966)*, Hinsley offers the following explanation of the meaning of the term:

‘... the idea of sovereignty ... (is) ... the idea that there is a final and absolute political authority in the political community ... and no final and absolute authority exists elsewhere’¹⁵².

The term ‘political community’ here Hinsley conceives loosely; and, indeed, the focus of his attention is directed towards tracing the historic journey of attempts to pin-point the precise repository of sovereignty within the political community. If, however, we take the expression more narrowly as a synonym for ‘people’, a body of men who consent to be united politically into one association, then we would already appear to be close to a suitable definition of sovereignty.

Malcolm, writing in *Sense on Sovereignty (1991)*, identifies a definition of a similar form. He lays particular stress on freedom from external influence, characterising sovereignty as

‘... a matter of plenary and exclusive competence, a matter of enjoying full authority internally and not being subordinated to the authority of another state’¹⁵³.

¹⁵⁰ Hinsley tells us: ‘... There was only one essential difference between the argument of Rousseau’s *Contrat Social* ... and that of *Leviathan*. Rousseau took over every ingredient in Hobbes’s statement but made it yield, not the exclusive and omnipotent sovereignty of the rulership whatever its form, but the exclusive and omnipotent sovereignty of the community or the People. Like Hobbes, he insisted on the concept of the state as a unitary personality, eliminating ... all vestige of the ancient idea that the constituted body politic accepted government via a contract with the Ruler. ... But unlike Hobbes, he equated the state with the body politic of the people that was formed by the social contract between associated individuals, reducing government, the rulership, to a mere commission’.

Ibid., p.153.

¹⁵¹ Jackson, Robert ‘Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape’ in *Political Studies*, Vol. 47, No. 3, 1999, p.444.

¹⁵² Hinsley, *op. cit.*, p.26.

We should note that common to both definitions are ideas of the *finality* and *totality* of political authority within a given political community.

Malcolm's analysis is of particular relevance to our concern in this thesis, as he illuminates the principal causes of the current confusion over the concept. In so doing, he leads us towards identifying its essential core of meaning. We will, therefore, now follow his argument in some depth.

The internal and external aspects of sovereignty are judged by Malcolm inherently connected, being '... two sides of the same coin'¹⁵⁴. Furthermore, he has no time for what he sees as the conflation of sovereignty with power - thus also refusing the *de jure versus de facto* distinction. In this connection, he cites a number of European statesmen (Heath, Ashdown, Brittan, Spinelli and Howe) considering the concept of sovereignty to be outdated or meaningless - he believes wrongly - in the context of European integration. This group sees 'true sovereignty' as a matter of effectiveness, i.e. the ability to '... advance and protect our national interests'¹⁵⁵ or '... our power to influence our own destiny'¹⁵⁶. Of all such definitions of sovereignty, he says,

¹⁵³ Malcolm, Noel *Sense on Sovereignty* (Centre for Policy Studies, 1991), p.17.

¹⁵⁴ *Ibid.*, p.15.

¹⁵⁵ Quotation from the 1975 White Paper on UK Membership of the EEC, cited in Malcolm, *op. cit.*, p.8.

¹⁵⁶ Quotation from the speech by Geoffrey Howe in the debate in Parliament on the 1975 White Paper on UK Membership of the EEC, cited in Malcolm, *op. cit.*, p.8.

‘... The central fault ... is that they fail to make any distinction between power and authority’¹⁵⁷.

Malcolm interprets sovereignty as exclusively a matter of authority. I take the term ‘authority’, in this thesis, to mean the right to command obedience in a political community. The equation of sovereignty with power, Malcolm says, is

‘... not inherently absurd or self-contradictory, but it does contradict the normal usage of most informed users of the term ... in the past’¹⁵⁸.

To set the distinction in an appropriate context, he distinguishes between a ‘core’ and a ‘periphery’ of meaning ascribed to sovereignty. He finds the concept of authority to lie at its core, as, for example, deployed in the fields of political philosophy, constitutional theory and international law; whereas he finds the power meaning to lie at its periphery. This is because, he reasons, the authority meaning has a significance that requires a specialised term to convey it. There is nothing question-begging, he argues

‘... by asserting that the concept of sovereignty involves the concept of authority: that is simply a recognition of how the notion

¹⁵⁷ Thinking along similar lines, Jackson comments: ‘... Sovereignty is a contested concept. ... Is sovereignty independence? Is it autonomy? The first is a notion of authority and right, but the second is a notion of power and capability. Historians, international lawyers and political theorists tend to operate with the first concept. Political economists and political sociologists tend to employ the second concept. The former ... is, shall we say, a more traditional approach to the subject. The latter ... is ... a more contemporary social science approach to the subject. ... There is evidence of these two categorically different approaches in political science definitions of sovereignty at the present time. And there are pitfalls waiting for anyone who is not fully aware of that’. Jackson, Robert ‘Introduction: Sovereignty at the Millennium’ in *Political Studies*, Vol. 47, No. 3, 1999, pp.424-5.

Malcolm, *op. cit.*, p.10.

¹⁵⁸ Malcolm, *op. cit.*, p.7.

of sovereignty is used by people who mean something distinctive when they use it'¹⁵⁹.

He now goes on to define a constitution as a set of rules for the exercise of political authority in a legal order¹⁶⁰. If a State is 'constitutionally independent', he says, i.e. it has *plenary* authority within its territory and is subject to no external influence, then

'... it is sovereign; if it is not, it is not. There can be no scale of percentages in between'¹⁶¹.

So for Malcolm, then, sovereignty is a binary - and hence an indivisible - concept. In like manner, James sees sovereignty as '... either present or absent, with no

¹⁵⁹ Philpott is another author who distinguishes between a core and a periphery of meaning, and finds authority at the core.

Krasner, by contrast, considers the power meaning to lie at the core, as for example when he says: '... sovereignty as it has been conventionally understood is eroding or even withering away'. He identifies a number of '... aspects, or different ways of conceptualizing or talking about sovereignty'. Among these are: 'interdependence sovereignty' (the ability or capacity of a State to regulate international flows), 'domestic sovereignty' (the effectiveness and legitimacy of domestic State structures) and 'Westphalian sovereignty' (freedom from external influence). These are all clearly power or effectiveness meanings of the term, whose possession by the nation State is increasingly challenged by the growing pressures of globalisation and interdependence.

One might consider that the authority meaning should perhaps be seen as the 'true' meaning of sovereignty, and the power meaning not a meaning at all. This is, however, not the position I adopt in this thesis. For the power meaning is widely-used and proposing its discontinuation would be somewhat unrealistic in the circumstances. Therefore, I confine my recommendations to clearly differentiating the core and peripheral meanings of the concept. If this approach is rigorously applied, it would seem, most confusion can be avoided.

Ibid., p.11.

Krasner, Stephen 'Preface' and 'Problematic Sovereignty' in Krasner, Stephen (Ed.) *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, 2001), pp.vii, 2.

Philpott, *op. cit.*

¹⁶⁰ Malcolm, *op. cit.*, p.17.

¹⁶¹ *Ibid.*, pp.20-1.

intermediate possibilities', and therefore as being 'unitary'¹⁶². He cautions that certain usages of the term presently invite muddled thinking. For example, when some

'... speak of internal and external sovereignty ... that is a dangerous terminology, for it can all too easily be taken to mean that sovereignty can, as it were, be split down the middle, enabling one of its halves to exist without the other. In fact, a sovereign state is all of a piece'¹⁶³.

According to this perspective, the effectiveness of the State structures flowing from political authority in controlling events, in shaping and executing policy, and ultimately in delivering results for citizens (the power meaning), is neither here nor there. What matters is constitutional independence. It is the freedom of a people to choose, to decide for themselves and chart their own destiny for good or ill, that constitutes the essence of sovereignty; not the ability to turn those choices into successful outcomes.

¹⁶² James brings out, from an international relations perspective, how the idea of 'constitutional independence' lies at the heart of established practice concerning the mutual recognition of States as legitimate participants in the international arena. Such practice, he says, effectively amounts to an 'unwritten constitution' governing international conduct, thus framing the definition of what constitutes sovereign Statehood: '... A sovereign state may have all sorts of links with other such states and with international bodies. But the one sort of link which it cannot have (for thereby it would lose its international status) is a constitutional one. For sovereignty ... consists of being constitutionally apart, of not being contained, however loosely, within a wider constitutional scheme'.

The concept of sovereignty, he notes, is therefore '... not one which can exist in degree, in terms of more or less. In political terms, a sovereign state may be weak; it may barely be able to support itself by its own efforts. This is the sort of entity which has been graphically described as quasi-state. But such a condition does not detract from the state's constitutional status - nor, consequentially, from its ability to play at least a diplomatic role in international relations. For constitutional independence is either possessed, or not. The relevant entity is sovereign (and therefore 100% sovereign) or lacks sovereignty - lacks it totally'.

James, Alan 'The Practice of Sovereign Statehood in Contemporary International Society' in *Political Studies*, Vol. 47, No. 3, 1999, pp.461-3.

¹⁶³ *Ibid.*, pp.462-4.

What is the worth of such sovereignty today, we might ask, if forces beyond the control of the State severely restrict its ability to deliver results? Not much, might be the response. However, disputing the *value* of sovereignty - in its core authority sense - is a conceptually distinct matter from disputing its continuing *existence*, and must be understood as such¹⁶⁴.

Going beyond this clear statement of the core meaning of sovereignty as an indivisible authority notion, Malcolm's analysis is of help to us in this chapter in one further concern: its bearing on the related issues of the 'alienation' and 'delegation' of sovereignty.

In the circumstance of strong external pressures, he notes, a State may decide to merge with another State. In this case, there would be a '... shift in political

¹⁶⁴ In this connection, James is perhaps too accommodating when considering the many '... different uses of the term sovereignty', which are '... not each of them facets of the same concept or phenomenon', that presently operate in the field. Whilst noting that a '... profusion of concepts is being paraded', he simply allows his own clear perspective to stand alongside other erroneous views which are left to go unchallenged. For instance, Wallace's claim for the 'sharing of sovereignty' in the EU appears to stand on the premise that '... constitutional independence has ... been ceded'. His concept of sovereignty, in common with James, concerns authority, but is understood as a composite construction which James reads as '... a bundle of separable rights'. Some of these Wallace sees as lost to the European sphere; hence constitutional independence 'ceded' and sovereignty 'shared' or 'pooled'. James, having gone to great lengths to demonstrate that sovereignty is '... something which a state either has immutably or not at all', could surely argue that this position is not tenable; that constitutional independence cannot be partially ceded and that sovereignty cannot be partially transferred.

The fault in such thinking seems to lie in failing to understand sovereignty as *ultimate* in nature (by definition). For as many, such as Menon, note, the EU's member States continue to be recognised today as 'sovereign political actors' (not 'partially sovereign political actors'); and, as Wallace himself remarks, '... In the last resort, the principle of constitutional independence could still be reasserted through withdrawal from any or all of these European institutions'. So they are still fully sovereign States.

Wallace's concept would seem to imply that any elements of sovereignty ceded could be unilaterally unceded. If so, it seems self-evident that it was not genuine sovereignty that was ceded in the first place; merely some of the powers flowing from sovereignty. The danger with this approach to sovereignty is that it risks obscuring the core meaning of the concept as a final authority notion (indeed, it already appears to have done so effectively). This means, in turn, that the location of (core) sovereignty becomes unclear and uncertainty as to whether the 'States' of the EU remain sovereign political actors (that is, remain States) or not is introduced.

Ibid., pp.457-9.

Menon, Anand *Europe: the State of the Union* (Atlantic, 2008), p.153.

Wallace, William 'The Sharing of Sovereignty: the European Paradox' in *Political Studies*, Vol. 47, No. 3, 1999, pp.505, 518.

authority'¹⁶⁵; that is, the alienation of sovereignty - the dissolving of an existing people or political community and the establishment of a new enlarged one. Alternatively, as in the case of the EU, States may decide to take the more limited step of pooling jointly some of the powers flowing from sovereignty - but not sovereignty itself - in an international organisation or a stronger union of States. Malcolm is quite clear that this could be conceived, when he says:

‘... Sovereignty itself cannot be delegated. But the exercise of a state’s sovereign authority in certain areas can be delegated’¹⁶⁶.

At this point, we can bring out clearly the nature of sovereignty and the probable reason for much of the past confusion in this area. Sovereignty itself, it seems, cannot be shared or divided among levels of government; but the powers flowing from sovereignty can. All the time sovereignty remains the indivisible *source* of political authority, whole and intact. This is illustrated in Figure 5 below.

¹⁶⁵ Malcolm, *op. cit.*, p.20.

¹⁶⁶ *Ibid.*, p.25.

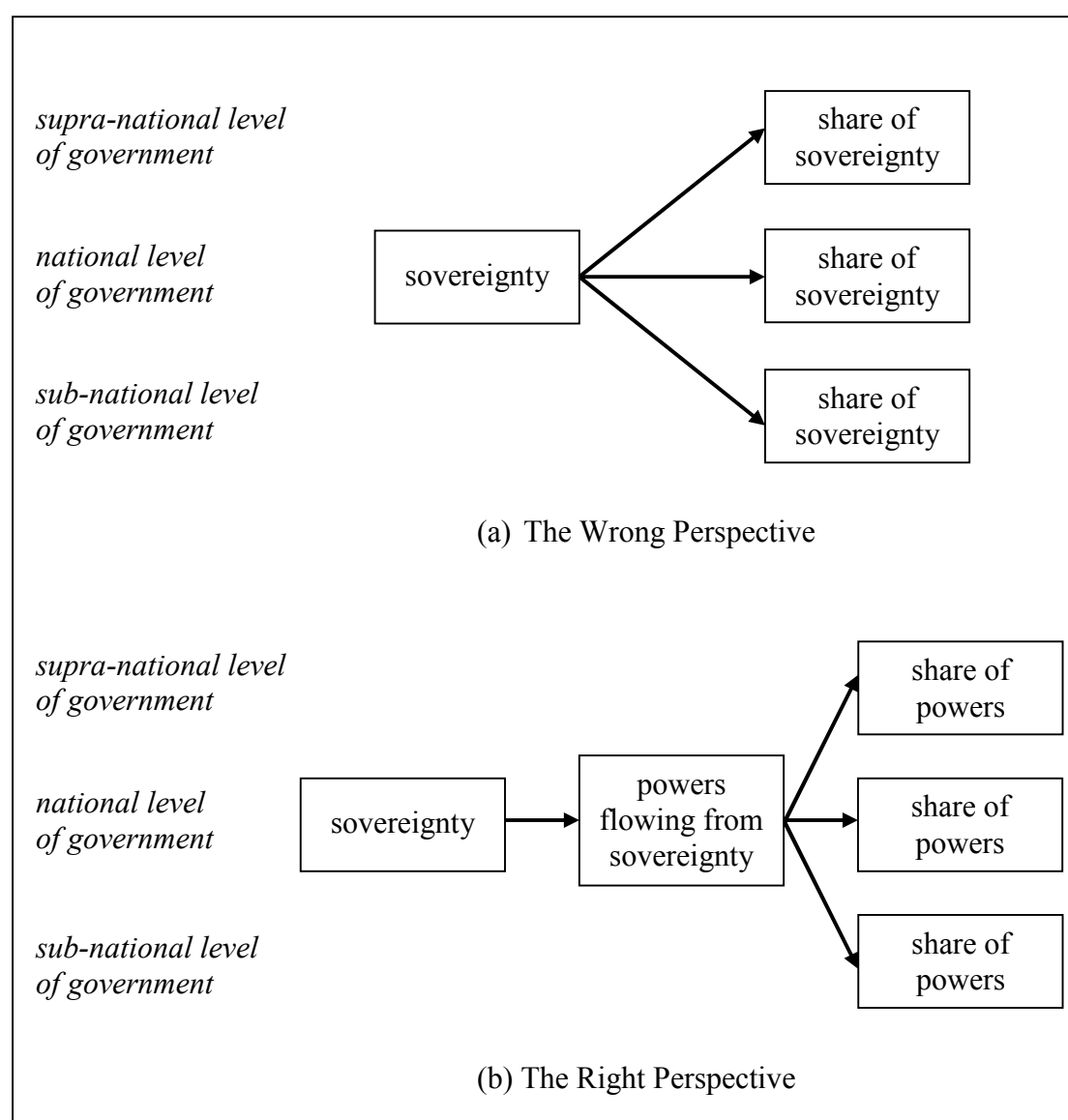


Figure 5 - The True Nature of Sovereignty¹⁶⁷

Now the uncertain matter of the alienability of sovereignty comes into clearer focus¹⁶⁸. In normal times, it seems, sovereignty remains in the possession of the

¹⁶⁷ It seems important to make clear here that the illustration, in Figure 5, of sovereignty residing at national level is not meant to indicate that it resides in the national government. Rather, it is intended to show that it resides in the political community at this level of aggregation: the 'people' or 'nation'. All governments in democratic States, whether sub-national, national or supra-national, are merely trustees of shares of delegated powers from the source of sovereignty, the people.

people, who only delegate the exercise of some of the powers flowing from sovereignty to various levels of government through a constitution. However, in exceptional circumstances, States can engage in a once-and-for-all act of alienation, in which sovereignty itself is either pooled with that of other States to form a single larger State or fragmented into several smaller States. In either case here, in contrast with the former (mere conditional delegation), the act is final and irreversible. It can be argued that in the modern democratic age, such an act of alienation of the highest powers of a State, were it to be considered, would be best achieved through the giving of express consent by the people in a referendum, held in a clear, explicit and open manner¹⁶⁹.

If sovereignty is the final and highest source of authority in the political community, it does, indeed, seem a corollary that that authority must be unlimited and illimitable, as Malcolm states, including the right of alienation. In this context, similarly, a constitution cannot be said to 'limit' sovereignty, as an external force (as some assert). Rather, it represents a voluntary self-limitation by the political authority, for the ordered exercise of the powers flowing from sovereignty - which could, by constitutional means, potentially be undone. As Malcolm says:

¹⁶⁸ Forsyth points to the prevailing state of ambiguity here, when he poses the following unanswered questions in the theory of regional integration and disintegration: '... What is the nature of the pact or agreement by which states transcend the classic or normal modalities of interstate relations? How far can states go in voluntarily alienating statehood? When and how do ... (unions of states) ... change into full and complete states?'

Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), pp.7-8.

¹⁶⁹ We are now able to clarify our definition of terms in this area. 'Delegation' is taken to mean the granting to a third party by the sovereign body of the right to exercise certain of the powers flowing from sovereignty on a conditional basis, i.e. subject to later recall. The 'ownership' of such powers is not permanently transferred. Thus, the phrase 'delegation of sovereignty' should more properly be expressed 'delegation of some of the powers flowing from sovereignty'. The term 'alienation', by contrast, is understood to mean the permanent transfer of sovereignty itself.

‘... A constitution does not limit sovereign authority in the sense of opposing it and reducing it. What it does is to determine - that is, state the rules for - the ways in which that authority is exercised’¹⁷⁰.

A point of weakness in Malcolm’s argument occurs at the very end of his train of thought. He concludes that it is probably best to stop trying to locate sovereignty in any particular body, for that creates ‘... all sorts of problems’¹⁷¹. Yet this is surely where his analysis leads. Why do we still today, in modern democratic States, seem to show such reluctance confiding sovereignty to the organised body of the people, the body politic, clearly defined? Is this due to worries over revolution (a hang-over from the French or Russian experiences)? Or is it due to fear of a slide into anarchy? Surely this is simply a matter of self-assurance. For as Malcolm himself asserts:

‘... The basis of political authority is that it is recognised, or granted, or willed, or believed in, by the people who are subject to it, the members of the political community’¹⁷².

Just one more step in the logic would seem to be required in locating sovereignty indivisibly with the *ultimate* and original source of political authority, the people.

On this understanding, we will take as our definition of sovereignty in this thesis the following:

sovereignty:	the final and absolute source of political authority located in the body of the political community
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We can also now, in parallel, establish a definition of Statehood, since the two concepts are intimately related, as Crick points out:

¹⁷⁰ Malcolm, *op. cit.*, p.21.

¹⁷¹ *Ibid.*, p.22.

¹⁷² *Ibid.*, p.19.

‘... The concept of “sovereignty” implies a theory of politics which claims that in every system of government there must be some absolute power of final decision ... The simplest form of the theory is the common assertion that “the state is sovereign,” which is usually a tautology, just as the expression “sovereign state” can be a pleonasm. For the concept of “the state” came into use at about the same time as the concept of sovereignty, and it served the same purpose and had substantially the same meaning’¹⁷³.

Heywood provides an apt formulation, in pointing to the political community as the source of political authority (i.e. of sovereignty) within a defined territory, and the governmental organs of the State as this body’s agents for the exercise of the powers flowing from sovereignty. It is upon his definition that we draw here:

the State:	the political association that establishes sovereign jurisdiction within defined territorial borders and exercises authority through a set of permanent institutions ¹⁷⁴
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II. Integrating the Component Parts

Having at this juncture formed a clear view as to the nature of sovereignty, we are now in a position to begin assembling a better-functioning concept of federalism from first principles. We first need to recall the key elements of the mainstream understanding of federalism today in political science, identified in the last chapter. These are thought to be, flowing from Wheare’s original formulation of the federal principle: (i) a division of powers among two levels of government, and (ii) equality between the levels. These two features would seem to be the concept’s salient attributes, as it is presently conceived in the discipline. We may illustrate this construction using a block diagram, as in Figure 6 below:

¹⁷³ Crick, *op. cit.*, p.77.

¹⁷⁴ Heywood, *op. cit.*, p.39.

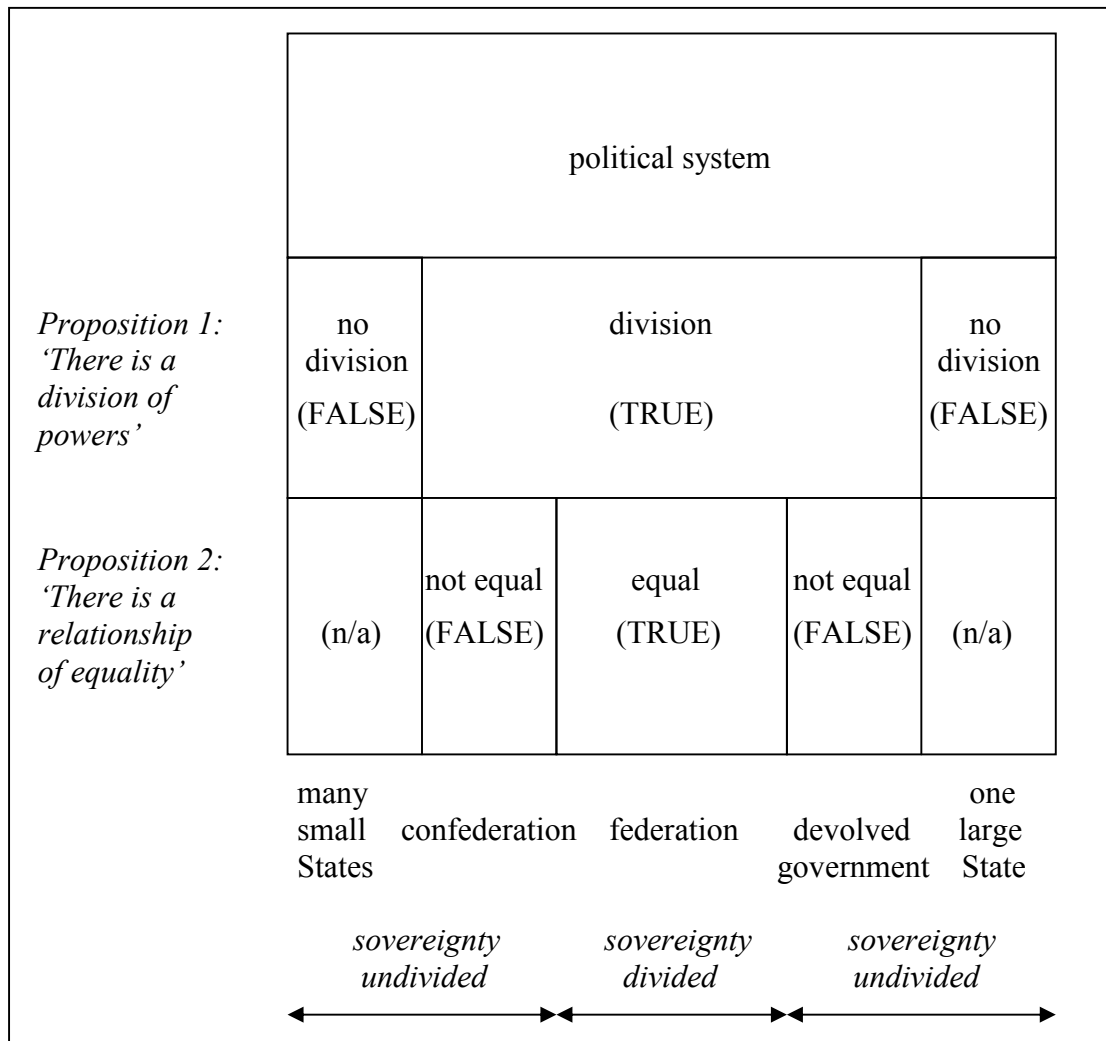


Figure 6 - The Current Construction of Federalism

It will be noted that this elaboration maps exactly onto the consensus framework of basic political forms established in Figure 3 on page 64. As was observed earlier, the general tendency has been to assume that the relationship of equality between the two levels of government predicated under federalism means that the division of powers is actually a division of *sovereignty*; whereas under confederalism and devolved government within a unitary State, sovereignty is thought to remain intact with either the lower or the upper level.

This mainstream conception of federalism, then, reflects the core central zone along an integratory pathway. By contrast, Elazar's definition covers the entire region of

divided powers. As Burgess was seen to note above, his schema of ‘federal arrangements’ encompasses both the categories of the confederation / league and devolved government (see the quotation on page 34). Concerning the latter, which he terms ‘union’, he clearly sees a relationship of dependence between the lower and upper tiers of government - in view of the central government’s observed unilateral power to abolish the sub-units - yet nevertheless is comfortable interpreting this form as lying within the ambit of federalism:

‘... Decentralized unitary states constitutionally guarantee their local governments considerable autonomy in some areas, but local powers are invariably restricted to matters determined by the central authorities to be local and are subject to national supervision, restriction, and even withdrawal, though tradition may militate against precipitous action by the central government in areas where local privileges are well established. Still, as the English experience has shown, even powerful traditions supporting local autonomy have not stood in the way of great reconcentration of power by democratically elected parliaments when such reconcentration has been deemed necessary by parliamentary majority’¹⁷⁵.

It now emerges clearly that Elazar’s definition of federalism, in omitting the equality criterion, represents a wholly different understanding of the concept. Here, we observe both broad and narrow perspectives as to what constitutes federalism in current use, as illustrated below in Figure 7. It seems plausible to suggest that such conceptual stretching has been a major reason for the apparent loss of intellectual coherence within the field over recent decades; and, as a corollary, that we must now seek to reverse it. We must, it seems, get back to Wheare.

¹⁷⁵ Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987), p.49.

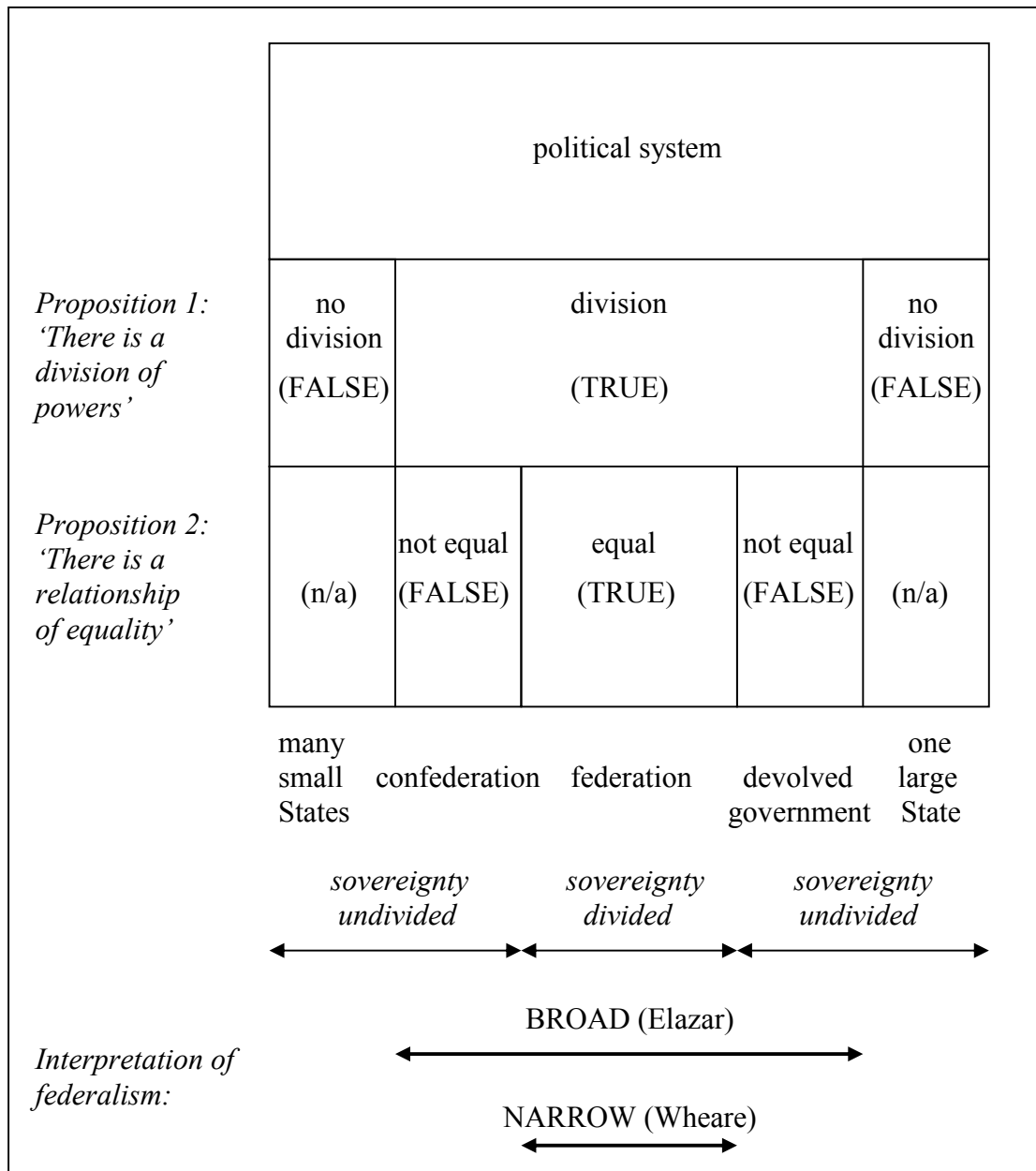


Figure 7 - The Stretching of the Federal Concept

Forsyth is an author who evidently shares a concern about the negative obscuring effects of a stretched definition of federalism. The term, he says, can be used in a 'very wide over-arching sense', in which it

'... would seem to mean basically "association", "co-sociation", "reciprocity", "mutuality", and to be contrasted with "rule", "empire", "dominance", "monarchy". It may be said to stand for one of the two great organizing principles of political and social life, which in the well-ordered state should fit together harmoniously. Precisely because of its all-pervasive character

however, federalism in this sense makes a dangerous object of study. With sufficient effort it can be detected almost everywhere, and endless pursuit can take the place of hard analysis. To become significant it would seem to be almost essential to differentiate it by relating it to the other basic concepts of political life, and above all, it may be suggested, to the concept of the state. “Federal union” - as the spectrum between interstate and intrastate relations - and “federal state” - as the spectrum between federal union and the unitary state - would seem to be the two critical categories of federalism when it is differentiated in this way,¹⁷⁶.

Thus, Forsyth advocates maintaining a narrow ‘differentiated’ definition of federalism. Interestingly, we also see in his writing a novel approach to the analysis of the concept itself, apparently dividing Wheare’s core realm for the first time into two distinct structures: the federal union of States and the federal State. Implicit in this elaboration is Forsyth’s seeming innovation of restoring a central place to the concept of Statehood in the analysis of intermediate political forms. In relation to the then European Community (EC), for example, he argues:

‘... There has been an unfortunate tendency ... to apply paradigms and models to the Community in which reference to the state is either completely avoided, or kept to an absolute minimum. ... (This) ... is scarcely conducive to clear thinking because it deflects the eye from the main constituent elements of the Community’¹⁷⁷.

Integral to this system of thought is the idea of a ‘threshold’ lying between the two federal forms, the multi-State and single State models, which is seen to determine the ‘locus of sovereignty’¹⁷⁸. We find in this perspective of federalism, then, and in contrast to the currently dominant divided sovereignty view, an indivisible conception of sovereignty. Though Forsyth does not expand on this point forcefully, nevertheless his comments on the centrality of Statehood clearly reveal where his sympathies lie.

¹⁷⁶ Forsyth, *op. cit.*, pp.6-7.

¹⁷⁷ *Ibid.*, p.5.

¹⁷⁸ *Ibid.*, p.4.

In this manner, the idea of a ‘rubicon’ of sovereignty transfer now emerges in plain view in Forsyth’s work. He says, for example, in identifying the subject of his study, the ‘union of States’ model:

‘... We will be concerned ... not with federal government as a mode of organizing a state, but with federal government as a type of *government founded upon a foedus or treaty between states*. It is the process by which a number of separate states raise themselves by contract to the threshold of being one state, rather than the organization that exists once this threshold has been crossed that is our focus of interest. A fully fledged federal state differs undoubtedly from a unitary state, but it is nevertheless still a state, and not a contractual union of states. In the context of our enquiry it will thus not occupy the centre of the stage, but rather serve as the boundary line or cut-off point at which unions change into something different’¹⁷⁹.

I seek to take forward these useful insights of Forsyth, in this thesis, developing them into a more rational and fully worked-out schema of federalism.

Let us now consider the implications of the nature of sovereignty as an indivisible authority concept, identified in Malcolm’s thought in the first section of this chapter and here found reinforced by Forsyth, for the prevailing schema of basic political forms. First, we may note that at present the notion of Statehood is introduced only incidentally, as an afterthought necessary to come to terms with the observed fact that political systems are, in practice, either one State or many States. In this way, the mainstream conception of federalism of Figure 6 seems to be reinterpreted as in Figure 8, which has the effect of causing the *sui generis* gap to open up:

¹⁷⁹ *Ibid.*, pp.2-3.

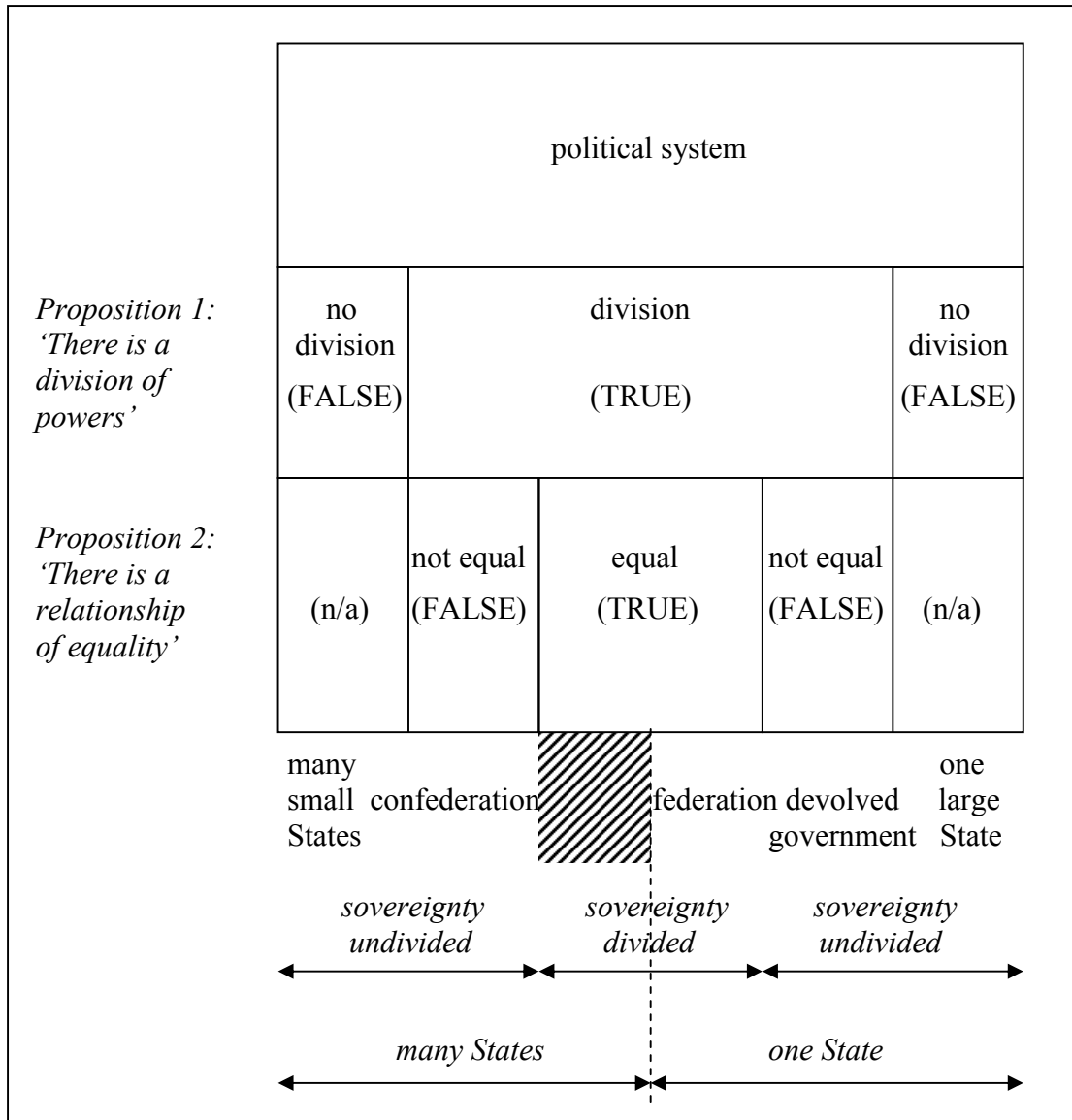


Figure 8 - The Prevailing Incidental Application of Statehood

The dissonance between ideas of divided sovereignty and Statehood, simultaneously present, is immediately apparent in Figure 8. The failure to understand Statehood and sovereignty as intimately related concepts - the former the institutional expression of the latter, and the discrete nature of the former of necessity implying indivisibility in the latter - is seen to be responsible for the 'black hole' created in the conceptual framework. If, however, we instead take a more rigorous approach, formally integrating Statehood as a core proposition, the taxonomical structure unfolds a

complete framework of basic political forms in a more orderly manner, as in Figure 9.

Three propositions are seen to give rise to a schema comprising six political forms.

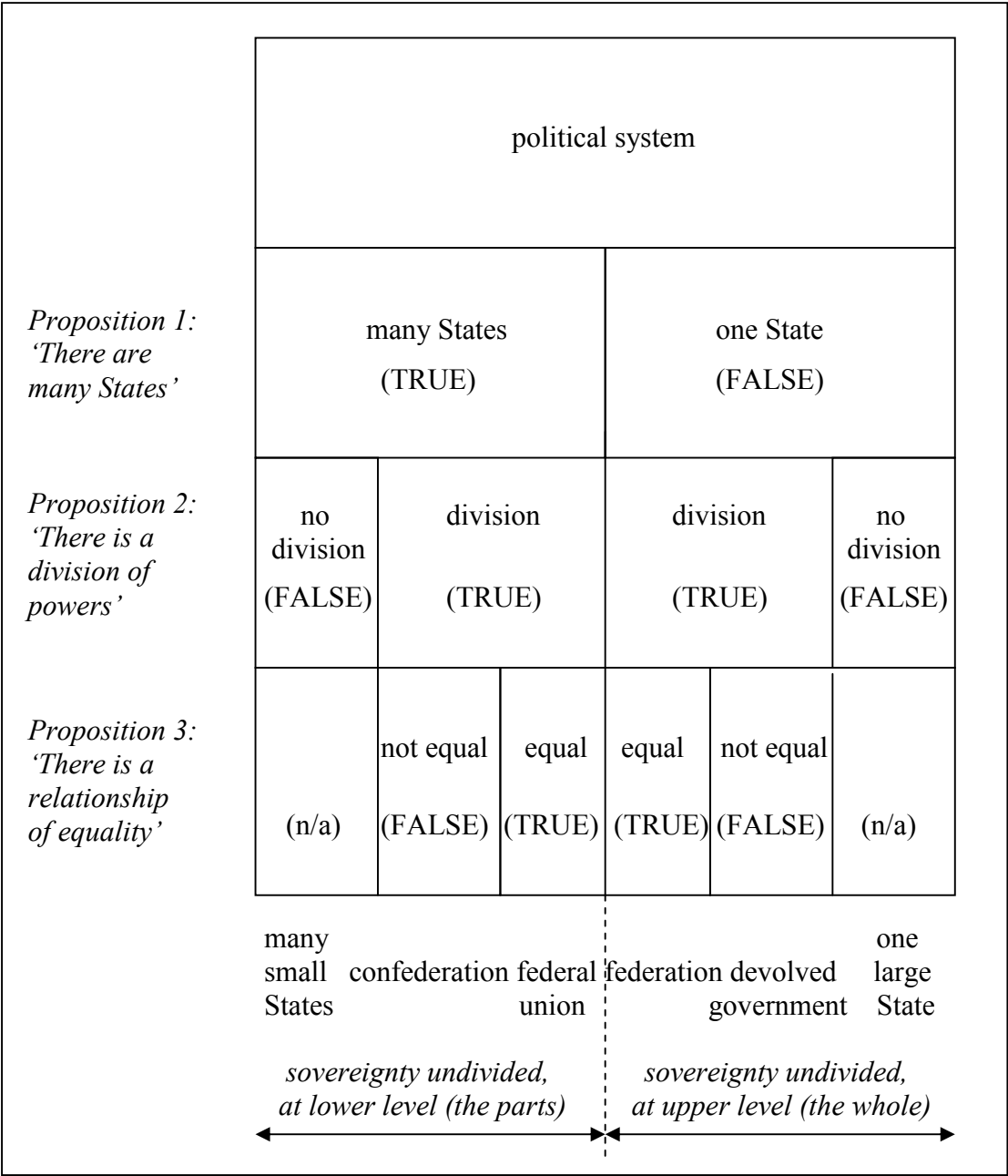


Figure 9 - The Proposed Formal Application of Statehood

Here, we come to see the merit of Sartori’s argument that the ‘... *genus et differentiam* unpacking of concepts’ remains ‘... a major, non-replaceable, logical backbone of scientific (empirical) enquiry’. For we can now appreciate the worth of

the claim that it ‘... helps us detect - via the unnamed cases - our cognitive voids’¹⁸⁰. In the light of Figure 9, it can be seen that the *sui generis* territory reflects just such an unnamed political structure. We may appropriately conceive it as the territory of the ‘union of States’ or the ‘federal union of States’ (following Forsyth) - this being the logical multi-State counterpart of the single State federal form, the federation / federal State. Further, reflecting the reinstatement of an indivisible conception, sovereignty is understood to be located undivided with either the several component parts or the single whole. As was noted earlier, the precise repository in each case is the political community, the people (either many or one, respectively).

A revised framework of basic political forms, at the end of this transition, therefore, looks as in Figure 10 below. This may be contrasted with the prevailing confused view, as in Figure 4 on page 65.

¹⁸⁰ Sartori, Giovanni ‘The Tower of Babel’ in Collier, David and Gerring, John (Eds.) *Concepts and Method in Social Science: the Tradition of Giovanni Sartori* (Routledge, 2009), p.71.

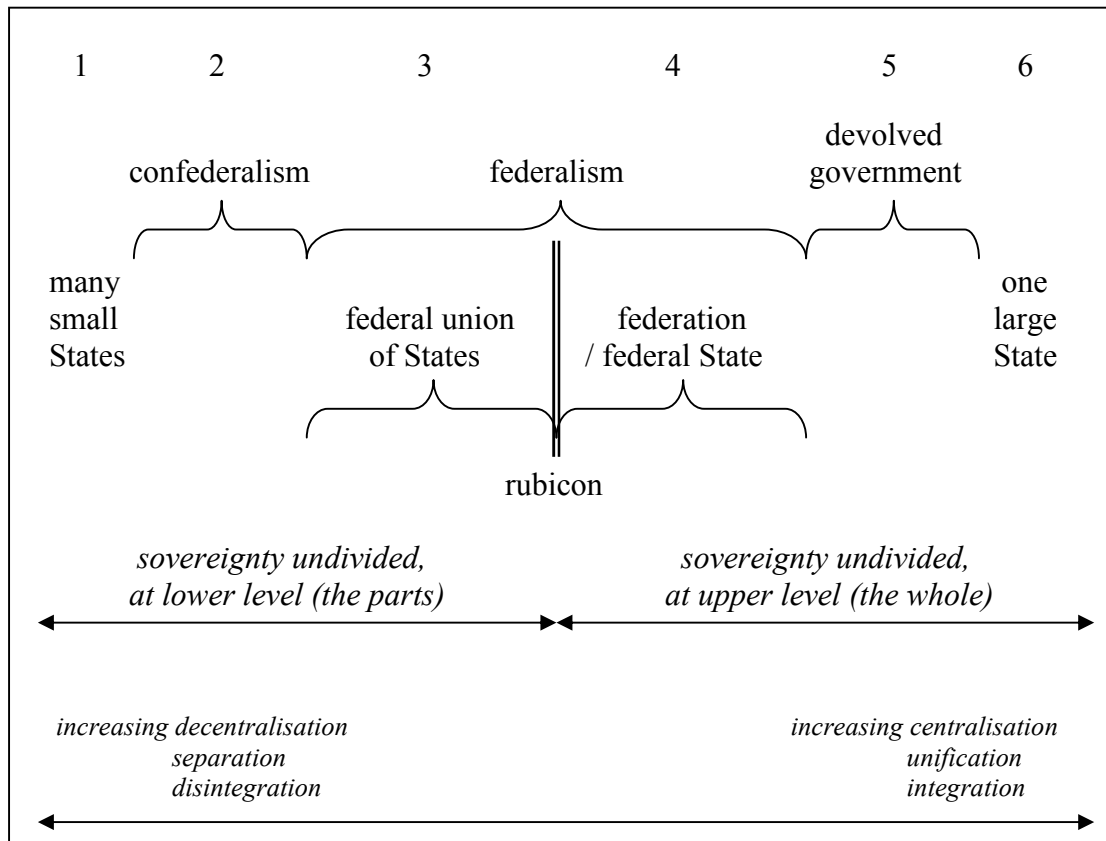


Figure 10 - A Revised Framework of Basic Political Forms

Following on from this analysis, a table of the attributes of the six forms can now be derived from the taxonomical unfolding of Figure 9, as shown in Figure 11 below, the contents here being simply abstractions of the relevant constitutive properties.

	<i>Proposition 1: 'There are many States'</i>	<i>Proposition 2: 'There is a division of powers'</i>	<i>Proposition 3: 'There is a relationship of equality'</i>
1. many small States	YES	NO	n/a
2. confederation	YES	YES	NO
3. federal union	YES	YES	YES
4. federation	NO	YES	YES
5. devolved government	NO	YES	NO
6. one large State	NO	NO	n/a

Figure 11 - Attributes of the Six Basic Political Forms

Let us take, as an example, the structure of devolved government. This form does not exhibit the first characteristic, many States, as it occurs within a single unitary State. It does exhibit the second, a division of powers among two levels of government. It does not exhibit the third, a relationship of equality between the levels, since the sub-unit governments stand in a subordinate relationship to the general government.

Definitions of the six forms may then, in turn, be constructed from this information¹⁸¹:

- | | |
|-------------------------|--|
| 1. many small States: | a political system composed of many States, in which the powers flowing from sovereignty are not divided between two levels of government |
| 2. confederation: | a political system composed of many States, in which the powers flowing from sovereignty are divided between two levels of government, and the general government is subordinate to the regional governments |
| 3. federal union: | a political system composed of many States, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status |
| 4. federation: | a political system composed of one State, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status |
| 5. devolved government: | a political system composed of one State, in which the powers flowing from sovereignty are divided between two levels of government, and the regional governments are subordinate to the general government |
| 6. one large State: | a political system composed of one State, in which the powers flowing from sovereignty are not divided between two levels of government |

¹⁸¹ It is acknowledged that the first and last forms, many small States and one large State, are not proper 'political systems'. Since they represent the extremes of full disintegration and full integration respectively, governing powers remain concentrated at one or other level. However, they are included here for the sake of methodological completeness, being the limits of the spectrum of possibilities. It is also recognised that in reality there are only five distinct types of basic political structure - not six - since those at either extreme represent simply smaller and larger versions of the same form.

This framework, it seems, establishes the solid foundations necessary for conducting the enterprise of comparative politics in a scientific manner. For the taxonomical unfolding here furnishes a range of conceptual containers that are mutually-exclusive and jointly-exhaustive. On this basis, it may be said to supply ‘... an orderly series of well-sharpened categories’, and, therefore, as Sartori was seen to argue in Chapter 1, ‘... the basis for collecting adequately precise information’¹⁸².

¹⁸² The framework may, perhaps, be complemented by further refinements, extending the block diagram to lower levels of abstraction through the application of additional propositions. In particular, one suggestion may be to apply an ‘extent’ criterion to the division of powers of the second and fifth categories, ‘league / confederation’ and ‘devolved government’ respectively, thus making a schema of eight forms. The former could, in this way, be sub-divided into ‘international organisation’ and ‘league / confederation’ categories; and the latter into ‘devolved government’ and ‘decentralisation’ categories. In order of increasing integration, the eight classes would then be: 1. many small States, 2. international organisation, 3. league / confederation, 4. federal union, 5. federation, 6. devolved government within a unitary State, 7. decentralisation within a unitary State, 8. one large unitary State.

Throughout this thesis, for the purposes of simplification, I treat the first form, many small States, as consisting exclusively of unitary States. As the example of the EU shows clearly, however, the component units of a system of regional integration may themselves be systems of devolved government within a unitary State (as, for example, in the cases of the UK and Spain) or federal States (as in the cases of Austria, Belgium and Germany).

Sartori, Giovanni ‘Concept Misformation in Comparative Politics’ in Collier and Gerring, *op. cit.*, pp.19-20.

III. Towards a Definition

So what does this elaboration imply, then, for the definition of federalism? We observe that the concept encompasses the whole middle span of the integratory spectrum, embracing its two structural manifestations, single State and multi-State, the federal State and the federal union of States. It is thus seen to represent the higher level generic concept. We therefore need to ascend the ladder of abstraction one level. This may be achieved by simply omitting the number of States criterion from the definitions of the two federal political forms, as this is no longer a distinguishing attribute. On this basis, the definition of federalism can be constructed out of the remaining two attributes of a division of powers and equality of status between the two levels of government, as follows:

federalism:	a form of government in which the powers flowing from sovereignty are divided between two levels of government that are of equal status ¹⁸³
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This would seem an adequate and parsimonious definition. However, we have not quite reached our objective yet. For to achieve a coherent definition of a concept, the attributes of the concept must themselves be well understood (and hence defined). Towards this end, we may note, first, that the attribute of a division of powers can at this stage be ignored; for equality of status is seen to imply, of necessity, the prior existence of a division of powers between two levels of government - that is, the former realm is a sub-set of the latter. The salient attributes of federalism thus in the end are seen to reduce down simply to the single one of equality of status. It will be

¹⁸³ It would seem important, in order to complete the definition, to add two further attributes to those already stated: democracy and the rule of law. For polities without these would not qualify as federal systems in practice. In order to avoid further complication, let us take them to be implicit in what we mean by a 'political system', the starting point of our taxonomical unfolding.

tentatively proposed in this section that there are three necessary and sufficient conditions that come to define this concept:

1. Constitutional entrenchment of the powers of the regional governments.
2. The direct effect of the law of the general government.
3. The use of majority-voting in the decision-making of the general government.

To set about identifying these features, we may employ a process of inductive reasoning, drawing inferences on the basis of evidence (as was seen advocated by the rationalist school). We need, it seems, first of all to observe: (a) the features of political systems which exhibit equality of status between the two levels of government, and (b) the features of other political systems where the relationship is unequal. By comparison of these two types, we may then locate the critical attributes that distinguish them¹⁸⁴.

Let us begin by considering, in this regard, a simplified system of regional integration in which several small States come together, first at a fairly low level of co-operation in a confederation or league. As the level of integration tightens, the mark distinguishing federalism (the model of a federal union of States) from confederation is seen to be a change in the relationship between the two levels of government, so that the upper level now becomes a co-equal with the governments of the component States. For this to happen, it seems, the common government needs to be endowed with the appropriate capability to act as a genuine second level of government in its own right, gaining sufficient independence from the component units to be considered

no longer a subordinate, but now a co-ordinate actor. As the level of integration continues to deepen, and the system moves through the middle zone of federalism with the growing centralisation of powers towards the other bound, the situation is reversed. At this point, the mark distinguishing federalism (the model of a federal State) from devolved government within a unitary State now becomes the right of the component unit governments to remain as genuine governments, and hence as co-equals with the common government. For this right to be maintained, for the sub-units to continue in existence and maintain their sphere of competence rather than be simply ‘swallowed up’ by the common government at will, it seems they must retain control over the procedure for constitutional change.

We can be confident about this last characteristic: the constitutionalised protection of the sub-units from the general government (i.e. from unilateral abolishment from above). Burgess brings out the clear academic consensus in this regard, when he says:

‘... the gist of recent scholarly analyses ... is that it is constitutional autonomy which matters rather than the particular division of powers between central and local governments. ... the constituent units in a federation have the constitutionally-endowed right of existence together with the right to an area of legislative and administrative autonomy. Constitutional entrenchment is, therefore, the key to their political, economic and cultural self-preservation. Indeed, it is the guarantee of their very survival as states within a larger state’¹⁸⁵.

This view seems well understood and firmly established. Hueglin and Fenna, for example, characterise the difference between the devolution (or decentralisation) of

¹⁸⁴ It will be apparent, here, that I am advocating a kind of ‘reverse-engineering’ of the concept from observed examples of it. This is, I submit, a valid path down which to proceed. For political science presently encounters the paradoxical situation that, although we may have difficulty putting our finger on what federalism is exactly, nevertheless practical instances of federal systems - and hence of equality of status - are seen to exist in the real world. Thus, inductive reasoning may prove to be a helpful line of inquiry in this case. The question we need to ask of empirical study, therefore, is what attributes bring about a structural parity between two levels of government.

powers observed in the United Kingdom and the federal division seen in Canada in the following terms:

‘... The United Kingdom is a unitary state. Parliament holds supreme legislative power. Local government ... has ... significant administrative and regulatory responsibilities. However, these powers exist only as long as and to the extent that Parliament so decides; they are *delegated* powers that can be withdrawn at any time.

By contrast, Canada is a federal state. Legislative powers are divided between the national government and the provincial governments, and this division of powers is guaranteed by the Constitution. Neither level of government can unilaterally alter the powers of the other’¹⁸⁶.

It is in precisely this manner, too, that Wheare marks off his federal principle, which it will be recalled he sees animating the modern America, from an arrangement of devolved government. The latter form he observes operating in the Union of South Africa from 1909 (and continuing in the Republic of South Africa from 1962), where the Union Parliament had the power to ‘... override the provincial councils at any time, to increase or decrease their powers, or to abolish them altogether’. Due to the

¹⁸⁵ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.26.

absence of constitutional protection this implied for the sub-units, he is led to demarcate federalism as a fundamentally different form: ‘... There is clearly no question here of regional governments being co-ordinate with the general government as in the United States’¹⁸⁷.

Burgess notes that King’s definition of federalism stresses the central importance of establishing a place for the regional governments in the ‘decision procedure’ of the central government ‘... on some constitutionally entrenched basis’ (see footnote 137 on page 65) - this being, indeed, interpreted as its chief feature. The critical element needed to bring to life the idea of constitutional protection that is the distinguishing mark of federalism in relation to devolved government, however, is more particularly the participation of regional sub-units in the procedure for *constitutional* decision-making - that is, for *constitutional amendment*. This is, for example, observed to be the case under the US Constitution, where proposed changes to the document require the consent of three-quarters of the States (after agreement in Congress) to enter force.

¹⁸⁶ That the characterisation of a unilateral right of the central government to withdraw powers applies to regional bodies under devolution, in addition to local governments under decentralisation, would appear shown in the case of the UK by the British government’s suspension of devolved powers to the Stormont Parliament of Northern Ireland in 1972. The more recent devolution of powers to Scotland, Wales and Northern Ireland over the past two decades is based upon the same principle of the sovereignty of the Westminster Parliament.

A 2003 House of Commons Library research paper states clearly the position: ‘... Devolution is the process of devolving power from the centre to sub-national units. It is different from a federal system of government, since under the doctrine of parliamentary sovereignty devolution is in theory reversible and the devolved institutions are constitutionally subordinate to the UK Parliament’. It notes the 1997 White Paper *Scotland’s Parliament* setting out the new constitutional arrangements in the following terms: ‘... The UK Parliament is and will remain sovereign in all matters: but as part of the Government’s resolve to modernise the British constitution, Westminster will be choosing to exercise that sovereignty by devolving legislative responsibility to the Scottish Parliament without in any way diminishing its own powers’. Somewhat less explicitly, the Scotland Act 1998 that formally inaugurated the new order notes only (in Section 28.7) that the right of the Scottish Parliament to legislate for Scotland ‘... does not affect the power of the Parliament of the United Kingdom to make laws for Scotland’.

House of Commons Library *An Introduction to Devolution in the UK*, Research Paper 03/84, November 2003,

URL=<http://www.parliament.uk/commons/lib/research/rp2003/rp03-084.pdf>.

Hueglin, Thomas and Fenna, Alan *Comparative Federalism: a Systematic Inquiry* (Broadview, 2006), p.32.

¹⁸⁷ Wheare, Kenneth *Federal Government* (Oxford University Press, 1963), p.7. Originally published in 1946.

This provides the vital guarantee against the unchecked usurpation of powers by the general government and hence, in the final analysis, unilateral abolition of the sub-units. By contrast, in arrangements of devolved government, no such guarantee exists.

Friedrich confirms the validity of our conclusion here, saying:

‘... Effective separate representation of the component units for the purpose of participating in legislation and the shaping of public policy, and, more especially, effective separate representation in the amending of the constitutional charter itself may be said to provide reasonably precise criteria for a federal as contrasted with a merely decentralized order of government’¹⁸⁸.

Turning now to the features distinguishing federalism from confederalism, we are concerned to establish those that mark out the general government as a genuine second level of government in its own right. We need to pin-point those elements that bring about a qualitative shift of relationship, that transform it from being a mere subordinate or agent of the member States, taking instructions only and doing only what they allow it to do (as typically the secretariat of an international organisation), to a co-principal also now giving instructions which are then binding on the member States to implement. The general government must, it seems, possess certain key capacities in order to function effectively in this regard and stand as an equal with the sub-unit governments. It must have the requisite elements for an ‘own life’, an

¹⁸⁸ Friedrich, Carl *Trends of Federalism in Theory and Practice* (Pall Mall, 1968), p.6.

independent existence as an autonomous ‘actor’, itself contributing to the shaping of policy for the polity as a whole¹⁸⁹.

We can be clear about one tool that is necessary to give substance to this notion: the ability of the general government, within its sphere of competence, to pass laws that act directly on the individual, not just on the States. Wheare appears to consider this element to be the central differentiating feature in his schema. For example, when elaborating the difference between the two American systems of government, early and later, the confederal Articles of 1781 and the federal Constitution of 1789, he says of the former:

‘... The principle of organization upon which this American association of states was based, was that of the subordination of the general government to the regional governments. It is illustrated by the degree to which the general government was authorized to operate upon the state governments only and not directly upon the people’¹⁹⁰.

However, it seems that the direct effect of law is a *necessary* but not a *sufficient* condition for equality of status. For the example of the EU appears to demonstrate that a further element is required to breathe life into a second fully-functioning level of government: the use of majority-voting in decision-making within the common sphere. Prior to the entry into force of the SEA in 1987, in the then EC, general level

¹⁸⁹ It is a commonly identified theme in the literature today that, in the case of the EU, the general level of government has acquired a significant degree of ‘actorness’ in its own right. Kelemen brings out the thinking of such ‘supranationalist’ scholarship. In contrast to the State-centric nature of ‘inter-governmentalist’ accounts, he says, ‘... Supranationalist perspectives ... argue that the EU is far more than an international regime. While it is not a state in any traditional sense, it does constitute a unique body politic in its own right. This “multilevel Euro-polity” surrounds member states, creating constraints and opportunities that influence state preferences and strategies’. He concludes that, like the intergovernmentalists, ‘... many supranationalists describe these phenomena using the language of principal-agent theory. However, where intergovernmentalists claim that member state principals are able to exercise control over their supranational agents, supranationalist scholars argue that due to difficulties in monitoring and sanctioning, member states cannot keep their supranational agents under control’.

Kelemen, Daniel *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004), pp.4-7.

law had acted directly upon individuals within the member States for over two decades¹⁹¹. Nevertheless, this had proved insufficient to establish a basis of equality between the two levels of government. For it had been shown still very hard to achieve accord on new common legislation and policy under the unanimity rule, which had paralysed the whole system and rendered it ultimately ineffective. Through QMV after the SEA, however, the source of the legislative blockage had been removed and an effective régime instituted in the core common competences concerning matters relating to the single market¹⁹².

The principle involved here appears to be that for the general government to operate effectually, it must be able, within its own domain, to both execute *and make* policy. This seems an entirely logical proposition, as these elements are seen to be two sides of the same coin: endowing the general government with the capacity of independent action.

From the SEA onwards, the member States of the EU have from time to time inevitably had to accept and implement policy internally with which they have disagreed, when ‘out-voted’ in the Council of Ministers. Somewhat counteracting this effect, there does exist a fairly strong sense of solidarity among the officials of the

¹⁹⁰ Wheare, *op. cit.*, p.4.

¹⁹¹ In the 1960s, the European Court of Justice had developed the basis for a uniform legal order analogous to those found in federal systems elsewhere in the world through its case law, in particular its rulings on primacy and direct effect. In this regard, national law was made subordinate to European law where a conflict occurred; and European law no longer required transposition into national law to have domestic effect.

On primacy, see the Judgement of 15 July 1964 in Case 6/64, *Costa vs. Enel*, European Court Reports 1964, p.585.

On direct effect, see the Judgement of 5 February 1963 in Case 26/62, *Van Gend en Loos*, European Court Reports 1963, p.1.

member States within this institution, and a clear concern borne out of mutual sympathy to reach compromise acceptable to all wherever possible. National governments also regularly adopt modified policy positions in early-stage discussions, as a pre-emptive strategy to avoid later being isolated when there is a clear likelihood of ending up in a minority position. Despite these two factors tending to reduce the number of instances where out-voting actually occurs, however, the underlying reality of the situation is that national governments in the EU are much more constrained today in their formal policy options than before the unanimity block was removed. For the sake of heightened efficiency, they have - voluntarily - surrendered a large measure of control over the system, and arguably are now as much affected by European level decisions as affect them. The relationship between the two levels of government, national and European, thus looks much more like one of 'peers', than of the 'principal and agent' of former times.

Recognition of this key aspect I find too often missing in the literature at present, which seems to prevent a balanced view of the nature of the polity being developed¹⁹³. State-centric accounts stress the continued predominance of the member States within the system, and in so doing they frequently fail to give due weight to the federal aspect. Such accounts tend to emphasise the on-going 'dependence' of the European level of government upon the national. The impression is thus given that the

¹⁹² We may note that the use of QMV had, in fact, been provided for much earlier in the founding Treaties of Rome of 1957, in fields such as customs duties, agriculture and transport. However, as Pinder notes, de Gaulle's backlash against the Community institutions in the mid-1960s, in particular the European Commission and the European Parliament, and his staunch defence of 'vital national interests' had caused theory and practice to diverge: '... the Luxembourg "compromise", which might more accurately have been called the Luxembourg veto, led to the general use of the unanimity procedure in the Council for about two decades'. Pinder, John *European Community: the Building of a Union* (Oxford University Press, 1995), p.93.

former remains a subordinate actor in relation to the latter. This assessment omits the counter-balancing respects in which the European level now has an *independent* character, and so may be seen to constitute a genuine second level of government in its own right. The notion of dependence, it seems, has a number of different aspects to it, which confuses matters somewhat. In particular, we can distinguish between operational dependence and constitutional dependence. Federal governments, in a number of instances, almost entirely rely upon the sub-units for implementation of their laws (that is, they may be ‘governments-lite’ and hence operationally dependent), but nevertheless remain co-ordinate actors with the regional governments (thus constitutionally independent). In the German federal system, for example, the federal government is dependent on the Länder for the execution and administration of most of its policies; but this does not prevent the relationship between the two levels being understood as one based on a structural parity between them. Certainly, the operational dependence is much heavier in the case of the EU, which lacks the power to tax and is wholly reliant on the agencies of the member States for enforcement of its law and for the conduct of most of its policies; but this may simply be a reflection of the highly decentralised type of federalism which it has come to practice at this still early stage in its life. Federalism, after all, can encompass a wide variety of structural permutations. While I am not attempting to claim here that the European level of government is superior to the national level, I do suggest that it can no longer be legitimately characterised as subordinate. Rather, in view of the quite large degree of autonomy attained, and the corresponding effect that EU policy

¹⁹³ This may be because it is within the body representing the member States, the Council of Ministers, that the majority-voting takes place. This has the effect of shielding from view the disenfranchisement of the States individually that has occurred. Nevertheless, the Council voting by QMV is a very different animal from the Council voting by unanimity. In its former character, it is best considered an essentially supra-national (or ‘European’) institution and no longer an inter-governmental (or ‘national’) one.

measures often escape the control of national governments in a broad swathe of policy, the two levels now appear constitutionally independent actors and of co-ordinate status.

The maintenance of a unilateral right of secession by the component elements of a union of States could be regarded as problematic to the notion of equality of status. For it could, on one view, be seen as undermining the prerogatives of the common authority. Alternatively, it could simply be interpreted as an inevitable structural feature of the form, being inherent in the voluntarism that characterizes it. Exemplifying the latter view, Nicolaidis sees the existence of a right of withdrawal in the case of the EU as reflecting ‘... faithfulness to the principle of federal liberty’, and testifying to ‘... the nature of the bond that unites the peoples of Europe’. In thus marking the EU ‘... as a federal union rather than a federal state’, she says, it gives acknowledgement to ‘... the widely shared intuition ... that the peoples involved in the EU adventure are together by choice, a choice repeatedly made, and would continue to make sense apart’¹⁹⁴. I share this perspective. Wheare, too, appears sympathetic, saying that while the idea of a right of the sub-units to nullify general level legislation is certainly incompatible with federalism, a right to secede may not be:

‘... I doubt whether it can be maintained that a right to secede unilaterally is inconsistent with the federal principle as a matter of logic. It must be distinguished from another right, the right to nullify the laws of the general government. ... Now this doctrine is contrary to federalism. It does place the general government, as a matter of law, in a subordinate position to the regional governments. ... The right to secede does not make the general government the agent of the states as does the right to nullify; on the contrary it recognizes that the general government is to be

¹⁹⁴ Nicolaidis, Kalypso ‘Constitutionalizing the Federal Vision?’ in Menon, Anand and Schain, Martin (Eds.) *Comparative Federalism: the European Union and the United States in Comparative Perspective* (Oxford University Press, 2006), p.71.

either co-ordinate with a state government ... or is to have no connection with it'¹⁹⁵.

In summary, then, we can see that the relevant attributes defining equality of status and demarcating the central zone along an integratory pathway exhibit a certain asymmetry; that is, they appear different whether approached from the more integrated or less integrated ends of the spectrum. An underlying symmetry, however, is seen to lie in their common employment to test whether genuine second tiers of government are established at either the lower or upper levels. The requirement for proper governments at both levels is seen to define equality of status, and thus also the concept of federalism. This is illustrated in Figure 12 below:

¹⁹⁵ Wheare, *op. cit.*, pp.86-7.

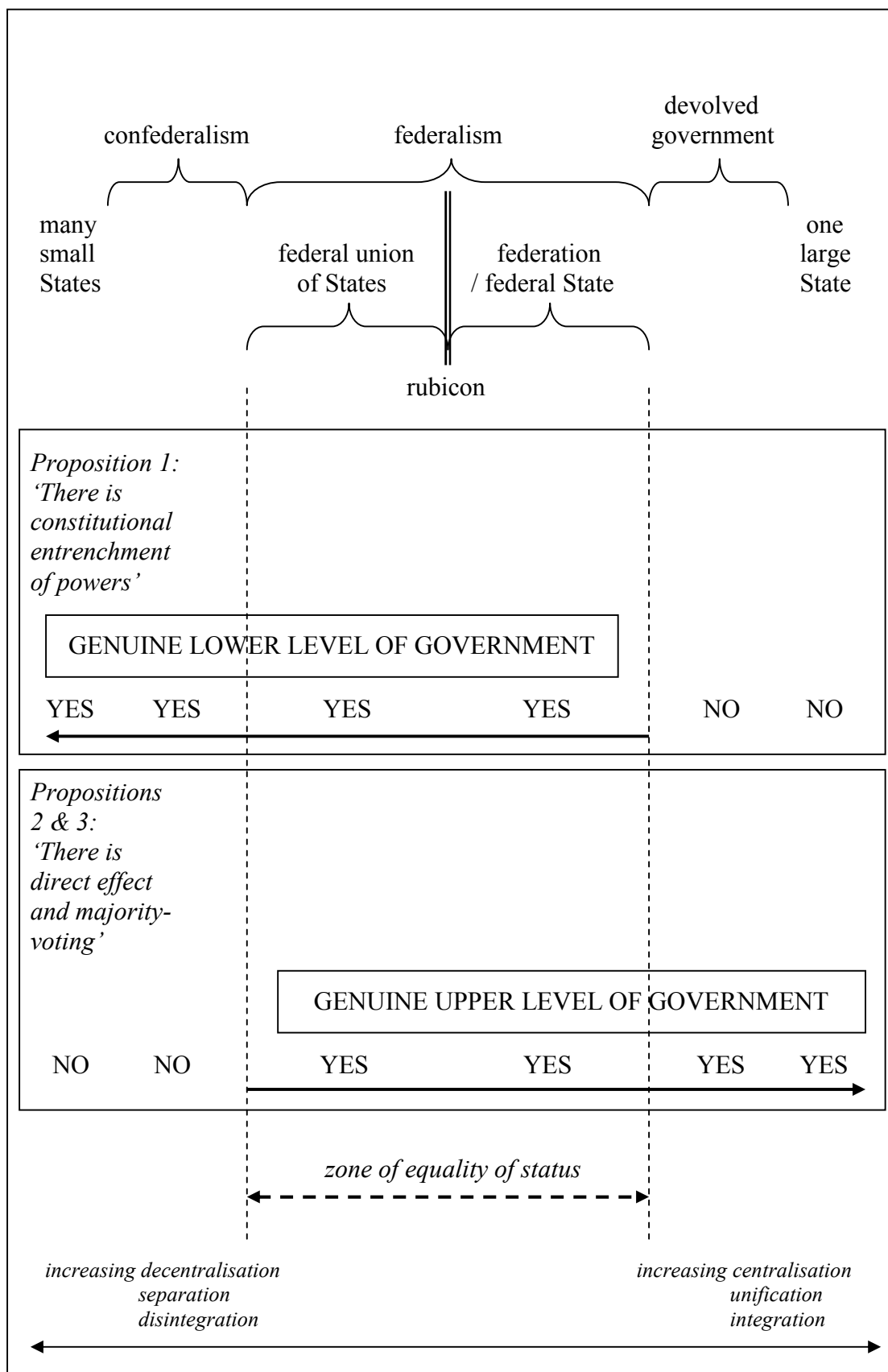


Figure 12 - Defining Equality of Status

Conclusions

In this third chapter, we have considered how a valid federal concept may be constructed from first principles. First, we established the core meaning of sovereignty as an indivisible authority notion. Secondly, we saw how the component parts of the definition may be combined. Thirdly, we identified a definition of federalism as ‘a form of government in which the powers flowing from sovereignty are divided between two levels of government that are of equal status’.

The concept of equality of status, it was seen, in the end alone comes to define federalism. A federal system, then, it was tentatively advanced, is one in which (i) the powers of the regional governments are constitutionally-entrenched, and the law of the general government is both (ii) made through the use of majority-voting in decision-making and (iii) directly-effective within the regions in its execution. With all three of these properties, it seems, a polity is properly considered to be federal. Lacking any one of them, it is not.

Having thus established the main features of the conceptual reworking of federalism envisaged in this thesis, we have reached our destination in Part I. We are now ready to embark on Part II of the journey, tracing the historical development of the federal idea from its inception through to the present day. This should allow us to see where the main themes identified in this first part initially emerge and how they gradually play out over time. We begin by looking for the earliest roots of the concept in Chapter 4.

Part II

The Historical Development of the Federal Idea

Chapter 4

The Origins of the Federal Idea

‘... The origin of the federal idea is wreathed in mist’, observes Davis as he begins his investigation of the evolution of the concept from its genesis. He urges caution on the reader, suggesting an expectation of finding all the scattered shards that ‘... need only the potter’s skill to bring them back to their original form’ is probably too optimistic: ‘... for the explorer, there is no register of births for political ideas, no birth names, no book of dates’¹⁹⁶.

In spite of this unpromising back-drop, academic thought does, nevertheless, seem to be having quite some success in piecing together the clues left by history, with authors such as Burgess¹⁹⁷, Elazar¹⁹⁸ and Hueglin¹⁹⁹ offering insightful accounts of the development of federalism, complementing that offered by Davis. A common point of reference of near universal consensus amongst scholars is the identification of Johannes Althusius’ *Politics Methodically Set Forth (Politica Methodice Digesta)* as the first formal elaboration of a theory of political federalism²⁰⁰. Elazar and Hueglin

¹⁹⁶ Davis, S. Rufus *The Federal Principle: a Journey Through Time in Quest of a Meaning* (University of California Press, 1978), p.2.

¹⁹⁷ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000).

¹⁹⁸ Elazar, Daniel ‘Federalism’ in Sills, David (Ed.) *The International Encyclopedia of the Social Sciences* (Macmillan and Free Press, 1968).

¹⁹⁹ Hueglin, Thomas *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfrid Laurier University Press, 1999).

²⁰⁰ Burgess, Davis, Elazar, Emerson, Follesdal, Forsyth, Friedrich, von Gierke and Hueglin are all found in accord on this point. Riley, however, is a dissenting voice, seeing in Althusius’ writings more a system of medieval constitutionalism than of federalism.

Riley, Patrick ‘Three 17th Century German Theorists of Federalism: Althusius, Hugo and Leibniz’ in Elazar, Daniel (Ed.) *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University of America Press, 1987), pp.76-80.

even go so far as to call Althusius ‘... the real father of modern federal theory’²⁰¹ and ‘... the first modern theorist of federalism’²⁰² respectively.

Althusius published his major work in 1603, shortly after Jean Bodin had published his *Six Books of the Republic* in 1576. Davis notes that to some extent Althusius’ thought represented a reaction against the centralising programme that Bodinian philosophy, perceived as overly-simplistic and reductionist, was then urging on nations in the name of order and stability:

‘... whether by the force of repulsion or resistance, his (Bodin’s) catalytic influence on federal theory cannot be ignored. By defining the state in the exclusivist terms of sovereignty, he compelled all those who sought to legitimize the deviants, and principally the Germanic Empire, to come to terms with either his formulation of the concept or its application to particular cases’²⁰³.

Elazar holds a similar perspective of the confrontation between two opposing currents of thought:

‘... Statism ... was given its fullest intellectual formulation in the work of Jean Bodin. ... At the same time that Bodin was presenting his statist ideas, Johannes Althusius was presenting a competing theory of federalism ... His classic work, *Politica Methodice Digesta*, ... presented a theory of polity building based on the polity as a compound political association established by its citizens through their primary associations on the basis of consent rather than as a reified state, imposed by a ruler or an élite: the Bodinian model. ... For a brief time the Althusian model competed with that of Bodin, at least in the German-speaking world. By the later part of the seventeenth century, however, it was clear that the statist model would win and Althusius and his federalist ideas were relegated either to the realm of the antiquarian or the utopian, or simply forgotten. ... Statism triumphed overall and sequentially country by country where the issue was raised over (the next) 300 years, with one major exception. Between 1765 and 1795 in the

²⁰¹ Elazar, Daniel ‘Federalism’ in Sills, David (Ed.) *The International Encyclopedia of the Social Sciences* (Macmillan and Free Press, 1968), p.363.

²⁰² Hueglin, *op. cit.*, p.113.

²⁰³ Davis, *op. cit.*, p.46.

new United States of America, federalism was reinvented, first as a modern confederation then as a modern federation²⁰⁴.

Bodin and Althusius were both writing at a time of flux, on the cusp between the pre-modern and modern epochs. As Elazar notes, following the Peace of Westphalia of 1648, the new era in Europe would come to be dominated by the nation State, with Bodinian philosophy triumphant. The initial flourishing of federal thought found in Althusius would recede into the background, awaiting almost three centuries for its rediscovery. His writings in the early seventeenth century nevertheless provide us with a firm marker point in the development of federal theory.

What happened in the development of the federal idea prior to the time of Althusius is less clear. Religious and political thought were inextricably bound together before and running into the early part of the modern era, and this certainly seems to have been the case concerning federalism, as McCoy and Baker note:

‘... In the sixteenth, seventeenth and eighteenth centuries, the era when the institutions of the modern world were taking shape, federal theologians dealt with political as well as ecclesiastical issues and political philosophers concerned with societal covenants dealt also with religious issues’²⁰⁵.

One relatively recent school of thought, known as covenant theory, locates the very origin of the federal compact in the bible, in particular in ‘... the original relationship between God and man’²⁰⁶ in the garden of Eden. This school thus argues that there was a strong theological influence upon the growth of federalism. It is also possible, however, to see federalism as essentially secular in origin, stemming from the Latin root of the word.

²⁰⁴ Elazar, Daniel ‘The United States and the European Union: Models for their Epochs’ in Nicolaidis, Kalypso and Howse, Robert (Eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001), pp.32-4.

This chapter is divided into two sections. The first section investigates the secular and religious roots of the federal idea. The second section considers the first political concept of federalism developed in the writings of Althusius.

I. Secular and Religious Roots

We consider first the secular root. Davis brings out the connection between the Latin word *foedus*, meaning treaty, pact or agreement, and the key idea of mutuality that lies at the heart of the federal principle:

‘... somewhere near the beginning of it all is the idea of *foedus*, the first traceable linguistic resemblance to the *foederal* phenomenon of Rome and after. And the lexicographic association of *foedus* with *covenant*, and of its cognate *fides* with faith and trust, provide us with the first crucial clue. ... in the idea of covenant, and the synonymous ideas of promise, commitment, undertaking, or obligating, vowing, and plighting one’s word to a course of conduct in relation to others, we come upon a vital bonding device of civilisation.

Thus, the idea of covenant betokens not merely a solemn pledge between two or more people to keep faith with each other, to honour an agreement; it involves the idea of cooperation, reciprocity, mutuality, and it implies the recognition of entities - whether it be persons, a people, or a divine being²⁰⁷.

He sees the earliest federal arrangements as existing in simple treaties of alliance or association between communities for mainly defensive, but sometimes offensive, purposes. He observes Schwarzenberger identifying the earliest of such examples in the Treaty of Peace, Alliance and Extradition concluded in the fourteenth century BC between the Egyptian Pharaoh Rameses II and the King of Cheta. Thus, the secular root of the concept of federalism can arguably be considered ancient.

²⁰⁵ Cited in Burgess, *op. cit.*, p.6.

²⁰⁶ Burgess, *op. cit.*, p.5.

²⁰⁷ Davis, *op. cit.*, p.3.

Interestingly, Davis also brings out an aspect of compulsion apparent in usage of the term by Roman times: ‘... if Rome conquered a world by the force of arms, it was by the treaty of alliance, *foedus*, or the plurality of treaties (*foedera*), and the aid of those sworn into an alliance (*con-federati*)²⁰⁸ that Rome conducted its diplomacy of security and aggrandisement’²⁰⁹. He notes that Livy identified three types of treaty resulting from Roman foreign policy: treaties of friendship, truce or conquest. The first two led to an arrangement where the parties were on an equal footing, a *foedus aequum*; the last led to a patron-client relationship, a *foedus iniquum*.

Davis argues that it is in particular types of treaty, treaties of alliance, that the germ of the federal idea really arises: ‘... It is in the treaty that extends beyond the simple regulation of conflict ... the treaties of alliance which, by their very nature, draw communities into closer association with each other, that we begin to discern the faint shadows of new political entities, and hence come closer to our concern’²¹⁰. He observes, however, that Western scholarship has so far been rather selective (he implies perhaps erroneously) in choosing to observe only two moments in history when such new political formations have come into being: the ancient Greek city-States and the alliances of cities and emerging States in medieval Europe.

The Achaean League of 251 - 146 BC, a permanent league of independent States, was the classic Greek association, according to Elazar. He believes that, aside from Aristotle’s criticism of such associations, however, the great Greek political theorists were reluctant even to consider the example of federalism that confronted them

²⁰⁸ We observe here a possible root of the word ‘confederation’. As Davis notes later in his book, the terms federal and confederal were - confusingly - considered synonyms for many centuries, before the current distinction we employ today emerged. In this root, we see that there was no sign of a difference at origin.

In Latin, the prefix ‘con-’ is used to indicate joint action, co-operation or something done together.

Ibid., pp.8, 79.

²⁰⁹ *Ibid.*, p.8.

because it ‘... contradicted their conception of the small, unified polis as the only basis upon which to build the good régime’²¹¹.

The medieval leagues among the commercial towns of central Europe, such as the Lombard League in Northern Italy and the Hanseatic League in Northern Germany, were formed for purposes of mutual defence and association. Significantly, the first confederation of Swiss cantons was born for such reasons in 1291, and Switzerland remains today the world’s most enduring federal polity.

In addition to these two well recognised instances of new political entities, Elazar identifies the much earlier tribal political system of the ancient Israelites as one further central example of a federal arrangement, which lasted for two hundred years until disputes over leadership and succession led to the installation of a limited monarchy. He finds this view corroborated by many seventeenth century theorists, but most scholars consider this link somewhat tenuous today²¹².

Elazar also draws our attention to the little-known *fuero* system installed in the Christian States on the Iberian Peninsula during the years of reconquest in the fifteenth century. Here, he sees a merging of ‘... contractual elements from feudalism with political mechanisms from the commercial confederacies’²¹³ in the liberal arrangements created to encourage resettlement. These included, in the case of three States under the crown of Aragon, their own constitutions and representation in the overall Aragonese government - a clear if somewhat primitive early example of multi-level governance on a federal basis. He believes that, despite the demise of these

²¹⁰ *Ibid.*, p.7.

²¹¹ Elazar, Daniel ‘Federalism’ in Sills, David (Ed.) *The International Encyclopedia of the Social Sciences* (Macmillan and Free Press, 1968), p.362.

²¹² *Ibid.*, p.361.

²¹³ *Ibid.*, p.362.

arrangements under monarchy in 1469, the Hapsburg heirs to the Spanish crown ‘... applied Iberian principles to the organisation of their other European possessions’²¹⁴.

Thus, according to Elazar, the important example of confederalism in the United Provinces of the Netherlands, that lasted for two hundred years prior to the Napoleonic era, was indirectly inspired by the *fuero* system; and this example, in turn, drew inspiration from the earlier commercial confederacies. For this author, then, the federal links in the flow of historical examples are properly understood to form a single continuous chain of progressively evolving development.

We turn now to the religious root. Covenant theory is the biblical perspective of federalism widely associated with the authors Elazar and Ostrom. Elazar sees the covenantal idea as a major source of inspiration for *The Federalist Papers* and the US Constitution, reflecting a strong religious current underlying the political life of the American colonies prior to Independence. If we may, perhaps, be sceptical about tracing the lineage of federalism all the way back to biblical times, nevertheless the religious theme does seem to have been important in the development of American federalism. Burgess makes the crucial link between its influence here and earlier European thought. He traces the covenantal root back to continental Europe prior to the departure of the first settlers for America, following the work of McCoy and Baker, two specialists in theology²¹⁵.

Burgess notes McCoy and Baker identifying the 1534 theological treatise of Heinrich Bullinger *The One and Eternal Testament or Covenant of God* as the ‘... fountainhead of federalism in the specific sense that it is a basic source of federal

²¹⁴ *Ibid.*, p.362.

²¹⁵ McCoy, Charles and Baker, Wayne *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition* (Knox, 1991).

thought among theologians, political philosophers and practising leaders in church and state'²¹⁶. As successor to Ulrich Zwingli, Bullinger was leader of the Reformed Church of Zürich from 1531 to 1575, and his *Testament* became a major influence upon Protestantism in the sixteenth century²¹⁷. It contained the basic federalistic model of a 'compound' natural order of society constructed from the bottom up, beginning with the primary social entities of the family, the village and the vocational association. The idea of covenant, central in Bullinger's religious thought, spilled over into the realm of the political, offering a programme for the organisation of the whole of civil society:

'... In the *Testament*, Bullinger regarded the covenant as the divine framework for human life, both religious and civil. The Scripture in its entirety taught the covenant and its conditions; the moral law was a restatement of these conditions, and the magistrate had been designated to enforce the covenant's conditions among God's people. In short, the divine covenant between God and his people was to be replicated on earth as the very essence of human organisation and civil society'²¹⁸.

Burgess identifies how Bullinger's philosophy had travelled to England and Scotland by the end of the sixteenth century, becoming a '... hallmark of the Reformed tradition'²¹⁹. He sees McCoy and Baker making the deduction that it was '... this federal tradition, with explicit theological, ethical and political dimensions, that was taken to the new world by the Puritans and used as a model for the colonies of New England'²²⁰. Hueglin also believes this link to have existed, noting in particular the Pilgrim fathers' strong contacts with the Netherlands and Dutch Calvinism (they had

²¹⁶ Burgess, *op. cit.*, p.6.

²¹⁷ Reformism, Calvinism and Presbyterianism together constitute one of the two principal branches of Protestantism emerging from the Reformation, united by their adherence to the doctrine of John Calvin of Geneva. The other main branch, Lutheranism, grew out of the teachings of Martin Luther in Germany.

Ibid., p.7.

²¹⁸ *Ibid.*, p.6.

²¹⁹ *Ibid.*, p.6.

spent the decade prior to departure in 1620 in exile at Leiden)²²¹. Whilst many different influences no doubt impacted upon the development of American federalism over time, it seems clear that this one was significant among them. Katz points to ‘... the federal theology that John Winthrop brought with him to Massachusetts’²²² as being one important root. As one further small but perhaps central fragment of evidence, we know that John Witherspoon, a Scottish Presbyterian federal theologian and philosopher at the College of New Jersey (later Princeton University), taught James Madison, a principal influence on the Philadelphia Convention and one of the authors of *The Federalist Papers*²²³.

On the mother continent, Burgess sees Reformist thinking as influencing the writings of Althusius in the genesis of the tradition of federalism he terms the ‘continental European’ tradition. He contrasts this with the ‘Anglo-American’ tradition, which grew to incorporate other influences such as the Western liberal enlightenment

²²⁰ *Ibid.*, p.7.

²²¹ Hueglin, *op. cit.*, p.16.

²²² Katz, Ellis ‘The Development of American Federalism, 1763 - 1865’ in Bosco, Andrea (Ed.) *The Federal Idea, Vol. 1: the History of Federalism from the Enlightenment to 1945* (Lothian Foundation, 1991), p.48.

²²³ Burgess, *op. cit.*, p.8.

thinking of writers like Locke²²⁴. He sees the former's more pluralist and communitarian development of the concept stemming directly from Althusius' immersion in Calvinism, and from Bullinger in particular:

‘... Althusius must continue to be regarded as the first great European theorist of modern federalism but ... his own intellectual development was shaped and moulded by a religious, political and philosophical climate which already expressed, admittedly embryonic, elements of a federal tradition. Bullinger's *Testament* of 1534 therefore provided the philosophical assumptions and moral imperatives essential for the crystallisation of Althusius's own federal political ideas. It was the intellectual backdrop essential to their early evolution’²²⁵.

Together, therefore, Bullinger and Althusius stand at an important cross-roads in the evolution of federal thought, representing its concretisation in formal theory for the first time - only shortly after to be followed by a division of the single current into two distinct streams, as the idea travelled the globe, mixing with other ideas, influences and, not least, events. The American branch would lead to the invention of modern federalism, based primarily on a liberal individualist philosophy. In contrast,

²²⁴ Merriam comments that ‘... Locke, in particular, was the authority to whom the Patriots paid greatest deference. ... Many of the phrases of the Declaration of Independence may be found in Locke's *Treatise*’. By contrast, he says, ‘... The French radical influence upon the Revolution was comparatively small’.

He notes that Locke's thinking was in the ‘*Naturrecht*’ (or ‘natural rights’) school of political thought, ‘... an old and long accepted theory, - a theory indeed upon which rested the legitimacy of the English political system of that day’, after the Glorious Revolution of 1688 had instituted a limited or constitutional monarchy. He explains: ‘... The fundamental principles of the political theory of the “Fathers” were similar to those of the English revolutionists in the seventeenth century. The leading propositions in this philosophy were these. Before the establishment of civil government, men exist in a “state of nature,” are subject only to the “law of nature,” and possess a number of so-called “natural rights.” How far these rights extend every man determines for himself, and each enforces his own judgement. Government is created by means of a contract in which every one surrenders enough of his natural rights to permit the establishment of an organized authority, - “a common umpire.” But in case the government becomes oppressive, the people may then exercise the reserved right of resistance and overthrow the established authority’.

As the first to elaborate a full theory of the ‘social contract’ in 1689, Merriam observes, it was ‘... Locke who worked out the fundamental principles of the English, American, and French revolutions of the seventeenth and eighteenth centuries’. The spirit of this reasoning, he concludes, was ‘... decidedly individualistic. The starting-point was the independent and sovereign individual, endowed with a full set of natural rights. He consents to give up a part of these natural rights to form a government by means of a contract’.

Merriam, Charles *A History of American Political Theories* (Transaction, 2008), pp.47, 90-5, 336. Originally published in 1903.

the less dominant European branch, more corporatist in character, would also be influenced in stages by Proudhonian federalism, personalism (writers like Mounier, Marc and de Rougement) and the papal encyclicals issued by the Catholic Church in the late nineteenth and early twentieth centuries. In this way, the two paths, though starting from a common source, would over time steadily diverge²²⁶.

II. The First Political Concept: Althusius' *Politics*

The rescuing of Althusian thought from obscurity in the scholarship is a relatively recent phenomenon. It was the German jurist and legal historian von Gierke who initiated the rehabilitation in his *Johannes Althusius and the Development of Political Theory* (*Johannes Althusius und die Entwicklung der Naturrechtlichen Staatstheorien*) (1880). A further revival of interest was sparked by Friedrich's republication of a Latin edition of the *Politics* (from here forward, we will refer to *Politics Methodically Set Forth* by this abbreviation) in 1932, with an extensive introduction in English. Later works by Carney, Riley and Hueglin have followed in

²²⁵ Burgess, *op. cit.*, p.8.

²²⁶ We should note that a number of scholars (among them Burgess and Hueglin) suspect that Althusius' works also crossed the Atlantic to influence the Anglo-American branch, over the near two century interval between their publication and the Declaration of Independence. Although Hueglin finds no direct evidence that a copy of *Politics Methodically Set Forth* crossed with the Mayflower, he points to a possible connection in the then novel use of the word 'Consociation' in the Articles of the 1643 New England Confederation ('... We therefore do conceive it our bounder duty, without delay to enter into a present Consociation amongst ourselves, for mutual help and strength in all our future concernments'). This, he thinks, could well have drawn from Althusius' extensive use of the Latin word '*consociatio*' in his text, to refer to his central concept of 'association'.

Friedrich helps set the matter in context, saying: '... a very definite road leads from Althusius' concept of a cooperative group to American institutions, particularly federalism ... We are here not talking of influences, necessarily, but of two flowers, stemming from the same root'. He then cites Figgis, who offers perhaps the most apt assessment: '... How far American federalism was developed from these sources, it would be hard to say. But the close connection of Puritanism with Dutch Calvinism must have prepared the ground'.

Articles of the 1643 New England Confederation in Brigham, William (Ed.) *The Compact, Charter and Laws of the Colony of New Plymouth* (Dutton and Wentworth, 1836), p.308. Old English updated.

Burgess, *op. cit.*, p.9.

Friedrich, Carl 'Introduction' in Althusius, Johannes *Politica Methodice Digesta* (Harvard University Press, 1932), p.xix. Originally published in 1603.

Hueglin, *op. cit.*, p.16.

the post-war period. If von Gierke's perspective was that of a lawyer (he emphasised the contractual and natural law principles of Althusius' thought as its chief features), Friedrich highlighted for the first time the concept of the 'symbiotic association' as central to his writings, and emphasised their connection with Calvinism. It is the latter perspective that we follow more closely in this section. First, however, let us examine the environment and influences that shaped the man and provided the context in which his system of thought emerged.

Althusius was born at Diedenhausen in Westphalia, Germany, in (c.)1557. Carney tells us that he studied the writings of Aristotle at the University of Cologne in 1581 and went on to receive a doctorate from the University of Basel in civil and ecclesiastical law in 1586, writing a thesis on intestate inheritance²²⁷. He published his first book *On Roman Law (De Arte Jurisprudentiae Romanae)* in the same year. At some stage during his studies, he spent time in Geneva, the home of Calvinism.

Upon receiving his doctorate, Althusius moved back to Germany to the Reformed Academy at Herborn, becoming a member of the faculty of law there. Herborn had been founded only two years earlier by Count John of Nassau and had become immediately successful, attracting an international student body. Nine years later, Althusius, then a professor of law, was made Councillor to the Count. Two years after that, and after a period of theological study at the University of Heidelberg, he was made Rector of the Herborn Academy. In 1601, he published a volume on ethics, *On Civil Intercourse (De Civile Conversatione)*; but it was his publication in 1603 of the first edition of the *Politics* that brought him first to wide attention²²⁸.

²²⁷ Carney, Frederick 'Translator's Introduction' in Althusius, Johannes *Politica Methodice Digesta* translated by Frederick Carney (Eyre & Spottiswoode, 1964), pp.xiv-xvi. Originally published in 1603.

²²⁸ *Ibid.*, p.xv.

According to Carney, the *Politics* seems to have been ‘... instrumental in securing for Althusius a most attractive offer to become Syndic (or legal adviser) of Emden in Eastern Frisia’²²⁹. This city lay in North-West Germany, on the frontier with the United Provinces of the Netherlands. As one of the first cities in the Germanic Empire to embrace the Reformed faith (in 1526), it had become a veritable ‘Geneva of the North’, with strong links to the Dutch Reformed Church, and as a leading seaport it was in close communication with England (it gave refuge to a number of English during the Catholic reaction under Mary Tudor). Growing conflicts with its Lutheran provincial lord in the struggle for self-government, however, led the City Council of Emden to seek ‘... an exceptionally able leader to guide its negotiations and destiny’²³⁰. Johann Alting, the son of Emden’s leading clergyman, happened to be one of a number of students from the city at the time studying law under Althusius at Herborn. He apparently sent home copies of the *Politics* as soon as it was published. Althusius’ ideas on government received a swift and favourable reception, and led to his invitation to become Emden’s Syndic.

Althusius accepted the offer in 1604 at the age of 47. He led the city for the next 34 years until his death in 1638. In this second part of his life, he wrote *The Decalogue (Dicalogicae)* (1618), which Carney terms ‘... an immense work that seeks to construct a single comprehensive juridical system out of Biblical law, Roman law, and various customary laws’²³¹. However, it was the *Politics*, of which he published two new and much enlarged editions in 1610 and 1614, that in Friedrich’s words formed ‘... the culminating point of his life’²³².

²²⁹ *Ibid.*, p.xv.

²³⁰ *Ibid.*, p.xvi.

²³¹ *Ibid.*, p.xvi.

²³² Friedrich, *op. cit.*, p.xxix.

Both Carney and Friedrich see Althusius' system of thought as strongly influenced by Ramist method, after the celebrated but controversial sixteenth century French logician, Peter Ramus; hence the title *Politics Methodically Set Forth (Politica Methodice Digesta)*²³³. It is this doctrine that leads Althusius to attempt to keep the focus of his study, political science, separate from other legal, theological and ethical considerations, which he considers a source of confusion. Of other writers paying less strict observance to this principle, Althusius observes: '... I miss in these writers an appropriate method and order. This is what I especially seek to provide, and for the sake of which I have undertaken this entire labour'.²³⁴

Hence, Burgess' observation that Althusius presents the first study of political as distinct from theological federalism appears correct²³⁵. However, Althusius does recognise the inevitable partial overlap of the separate disciplines. In particular, he stresses the difficulty of disentangling law and politics on the question of sovereignty²³⁶.

The approach central to Ramism pervading Althusius' philosophy is the descent from general propositions to their application in specifics in a thorough and consistent manner, providing a highly - some might argue, unnaturally - structured framework. Carney notes that Ramus had written that those who think wisely and methodically on a subject '... descend from the most general idea to the various divisions thereof, and

²³³ Friedrich says that Ramus' philosophy of '... presenting one's judgements and conclusions in their natural sequence and with lucidity' particularly suited the Reformist, someone who '... wanted to find an idea and get it across, who wanted to employ his mind in order to understand and control the world about him. It seems like a logic just made for Calvinists, and the moulding influence which it exercised upon the mind of Althusius is apparent at every point'.
Ibid., pp.xx, lxii-lxiii.

Carney, *op. cit.*, p.xvi.

²³⁴ Althusius, Johannes *Politica Methodice Digesta* translated by Frederick Carney (Eyre & Spottiswoode, 1964), p.2. Originally published in 1603.

²³⁵ Burgess, *op. cit.*, p.7.

²³⁶ Althusius, *op. cit.*, pp.3-5.

thence to the particular cases it comprehends'²³⁷. The key general proposition that Althusius makes at the very start of the first chapter of the *Politics*, entitled 'General Elements of Politics', concerns the object of politics being 'sympiotics'. This premise guides his whole work:

'... Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called 'sympiotics'. The subject matter of politics is therefore association, in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life'²³⁸.

The echoes with the theological roots of federalism, in the idea of mutuality that lies at the heart of a covenant, are clearly strong in Althusius' conception of politics. Yet although God plays a role underscoring the entire system²³⁹, the idea of covenant we find in Althusius is essentially secular - stripped of its religious overtones, in keeping with the division of disciplines that Ramist logic implies.

Althusius' world-view is the antithesis of individualism; following the idea of mutuality, it is a corporatist vision, wholeheartedly embracing the existence of 'society' and acknowledging mankind's interdependence. The mutual communication

²³⁷ Carney, *op. cit.*, p.xviii.

²³⁸ It is interesting to compare here Althusius' words with those of Madison, in opening the preface to the latter's notes of the debates in the Philadelphia Convention: '... the weakness and wants of man naturally lead to an association of individuals, under a common authority whereby each may have the protection of the whole against danger from without, and enjoy in safety within, the advantages of social intercourse, and an exchange of the necessities & comforts of life'. Although the similarities appear strong, one can only speculate as to a connection between the two, in the absence of firm evidence of a link. Did Madison own a copy of the *Politics*? This would be interesting to know and is a crucial piece in the jig-saw puzzle of the historical development of federalism. Further research among Madison's papers may possibly reveal the answer to this question. Althusius, *op. cit.*, p.12.

Madison, James *Notes of Debates in the Federal Convention of 1787* (Norton, 1987), p.3. Originally published in c.1840.

²³⁹ Althusius notes the existence of divine authority in a number of instances, for example, in supporting the elevated position of society's leaders: '... God made Adam master and monarch of his wife, and of all creatures born or descendant from her. Therefore all power and government is said to be from God'.

Althusius, *op. cit.*, p.15.

to which Althusius refers is seen as involving three components: the production of things (i.e. goods), services and common rights. These are considered the means by which individuals' needs are met and the social life of the whole is established and conserved.

Althusius is not so concerned with theories about the rights of individuals, however. Rather, what concerns him is merely the effectiveness with which things, services and common rights are 'communicated' to the people. This, in his view, requires strong rule. Althusius' primary focus is, therefore, on meeting collective human needs and 'symbiotic association' is the means by which this is achieved:

'... as long as he (man) remains isolated and does not mingle in the society of men, he cannot live at all comfortably and well while lacking so many necessary and useful things. As an aid and remedy for this state of affairs is offered him in symbiotic life, he is led, and almost impelled, to embrace it if he wants to live comfortably and well, even if he merely wants to live'²⁴⁰.

Carney notes that whilst necessity is a central part of Althusius' theory, so too is consent, a '... common agreement about the necessary and useful purposes to be served by the association, and the means appropriate to fulfil these purposes'²⁴¹. Social necessity is thus balanced by social volition.

Through his theory of association, Althusius builds a picture of an ordered society, structured from the bottom up. All associations are either simple and private (the family and collegium) or mixed and public (the city, province and commonwealth). The basic human association occurs within the family, '... the most intense society, friendship, relationship and union, the seedbed of every symbiotic association'²⁴². The

²⁴⁰ *Ibid.*, pp.12-3.

²⁴¹ Carney, *op. cit.*, p.xx.

²⁴² Althusius, *op. cit.*, p.23.

collegium is its civil counterpart, being a vocational association or craft guild organised on a voluntary basis out of commercial necessity. In contrast with the family, the collegium is transitory and can be disbanded.

Althusius' system is structured in the manner of Russian dolls, one inside the other. Thus, the simple and private associations, the family and collegium, are members of the next higher order, the city or community (the lowest mixed and public association). Significantly, it is the associations themselves which are members of the city or community, not individuals, and Althusius stresses this point: '... The members of a community are private and diverse associations of families and collegia, not the individual members of private associations. These persons, by their coming together, now become not spouses, kinsmen, and colleagues, but citizens of the same community. Thus passing from the private symbiotic relationship, they unite in the one body of a community'²⁴³.

At the next level up, we have the province bringing together villages, towns and cities. This was a level omitted by Althusius in his first edition of the *Politics*. Beyond the province, we arrive at the 'universal' public association, the commonwealth or realm (*consociatio symbiotica universalis*).

Riley draws the following conclusion from considering this schema:

'... it becomes increasingly clear that what Althusius is getting at is not "federalism" in any modern sense ... (i.e.) ... the modern notion of the federal state, in which central and regional governments, both of them states, exercise ordinary legal power directly over individuals ..., but collegial, city and provincial autonomy within a hierarchical system which recognizes a highest political power acting only on the next-highest level of the symbiotic association, and not directly on citizens or *collegia*. ...

²⁴³ *Ibid.*, p.35.

Althusius was really describing and defending a system of medieval constitutionalism²⁴⁴.

There may, however, be a connection - a lineage - from one to the other. The now more mainstream federalist interpretation of Althusius' *Politics*, led today by Hueglin, argues that

‘... By conceptualizing ... (the) ... organized body of the people as a plural and ascending order of power-sharing and co-operation, he very definitely must appear as a theorist of federalism’²⁴⁵.

Hueglin directly acknowledges that Althusius did not develop a theory of the modern federal State, but argues instead that he developed ‘... a general system of politics based on ... principles of federalism in a much wider sense’²⁴⁶. These principles he identifies as a pluralisation of governance, a general consent requirement and a commitment to social solidarity. With federalism defined more broadly as a ‘... general form of social organization’²⁴⁷, Hueglin is thus led to present Althusius as ‘... a theorist of what might be called “societal” rather than “governmental” federalism’²⁴⁸.

Perhaps key, from an institutional standpoint, in supporting and justifying the federalist narrative - as distinct from the medieval constitutionalist - is that in Althusius we do find for the first time a genuine vertical linkage of the political hierarchy of decision-making, in terms of a coherent idea of representation. As Hueglin points out:

‘... Essential for the federal process of governance is that the smaller units not only retain substantial rights of self-governance

²⁴⁴ Riley, *op. cit.*, pp.75-8.

²⁴⁵ Hueglin, *op. cit.*, p.115.

²⁴⁶ *Ibid.*, p.2.

²⁴⁷ *Ibid.*, p.109.

²⁴⁸ *Ibid.*, p.113.

but are also represented in the legislative processes of the larger and more encompassing units. In the old order, such representation had not been a matter of principle, and it had always been contested²⁴⁹.

In this incremental adaptation of the old medieval system of government, then, it may be correct to say that the first outlines of federalism, the spirit of federalism, can be discerned.

Another novel feature, and perhaps the more immediately striking, in Althusius' system is that the commonwealth alone is attributed sovereignty ('rights of sovereignty', or *jura majestatis*). Thus, here, the bottom-up character of Althusius' conception of social life is called into question by a very contrasting top-down influence, as von Gierke points out: '... It is ... remarkable that in Althusius this federalistic structure appears in conjunction with that same sharply defined and concentrated idea of sovereignty'. He captures the resulting inherent tension well: '... everything depended on whether and how far, within the unitary State, the exclusive sovereignty of the whole, which is thereby characterised as a State, was compatible with a separate and independent communal life of the partial societies'²⁵⁰.

Althusius' designation of an office of 'supreme magistrate' fits with both the indivisible conception of sovereignty prevailing in political theory at the time (the American invention of 'divided sovereignty' had not occurred in the seventeenth century) and the observed fact, both within the Germanic territories and the Empire as a whole, of lords, princes or monarchs in station. The new idea he introduces to accommodate this actuality is that the holder of the office is considered to exercise only a derived authority on behalf of the realm, or more particularly the organised

²⁴⁹ *Ibid.*, p.3.

body of the people. In this manner, Althusius is not led by his schema to take issue with Bodin over the concentrated nature of sovereignty (he emphasises, like Bodin, that sovereignty is all the time a singular and indivisible power), but rather he differs over its location. He openly confronts Bodin on this point in the preface to the first edition of the *Politics*:

‘... Bodin clamours that these rights of sovereignty cannot be attributed to the realm or the people because they come to an end and pass away when they are communicated among subjects or the people. He says that these rights are proper and essential to the person of the supreme magistrate or prince to such a degree - and are connected so inseparably with him - that outside of his person they cease to exist, nor can they reside in any other person. I am not troubled by the clamours of Bodin, nor the voices of others who disagree with me, so long as there are reasons that agree with my judgement. Therefore, I maintain the exact opposite, namely, that these rights of sovereignty, as they are called, are proper to the realm ...’²⁵¹.

Thus, whilst in Althusius the same idea of a single final authority charged with securing stability and order within the realm or State is found, nevertheless it is a key distinguishing feature that the ruler is considered but an agent of the sovereign people,

²⁵⁰ Gierke (von), Otto *The Development of Political Theory* (Fertig, 1966), pp.257, 263. Originally published in 1880.

²⁵¹ Althusius, *op. cit.*, pp.4-5.

rather than a possessor of sovereignty in person as of right. The implied shift of emphasis here is clearly no small matter²⁵².

In keeping with this idea of responsible and accountable authority, as Riley notes, Althusius presents a picture of qualified and limited rulership, with the supreme magistrate bound by oath to uphold the laws of the realm. He is appointed by ‘ephors’, the greater men of the commonwealth acting as representatives of the people, and can be removed by them should he become tyrannical²⁵³.

Friedrich notes that in the early seventeenth century, a battle for power between the ‘estates’ (the nobility, the squirearchy and the cities) and the provincial lords was raging, and almost everywhere was characterised by the victory of the former over the latter²⁵⁴. Hence, the cities grew more or less independent at this time; and he sees Althusius as the provider of the intellectual justification for this evolution, ‘... the theorist of the developed Germanic City States’²⁵⁵. The rationalisation of the movement towards independence that Althusius’ *Politics* provided seems clear, as does his elaboration of a theory of popular sovereignty, a feature a number of authors have commented upon - a century and a half before Rousseau.

²⁵² Althusius expresses a sharp conception of indivisible sovereignty: ‘... the universal power of ruling (*potestas imperandi universalis*) is called that which recognizes no ally, nor any superior or equal to itself. And this supreme right of universal jurisdiction is the form and substantial essence of sovereignty (*majestas*) or, as we have called it, of a major state. When this right is taken away, sovereignty perishes. ...’

This power of the realm (*potestas regni*), or of the associated bodies, is always one power and never many, just as one soul and not many rules in the physical body. The administrators of this power can be many, so that individuals can each take on a share of the function of governing, but not the plenitude of power. And these individuals are not themselves in control of the supreme power. Instead they all jointly acknowledge such a power in the consent and concord of the associated bodies. Whence jurists have declared the rights of sovereignty and of the realm (*jura majestatis et regni*) to be indivisible, incommunicable, and interconnected, so that whoever holds one holds them all. Otherwise two superior entities would be established in one imperium. But a superior entity can have no equal or greater superior. And imperium and obedience cannot be mingled. ...’

Ibid., pp.65-6.

²⁵³ Hueglin, *op. cit.*, pp.131, 183.

²⁵⁴ No more so was this true than in Emden, where the Calvinist city’s struggle with its Lutheran provincial lord, Count Enno, was about more than religion alone.

²⁵⁵ Friedrich, *op. cit.*, p.xix.

The power of the city States, however, could not last in the face of the growth of national territorial States from the mid-seventeenth century onwards; and thus Althusius became ‘... associated with what turned out for the time being to be the losing cause on the continent of Europe: popular government, i.e. participation of the people in the government through estates’ assemblies, and, more generally, the constitutionally organized community’²⁵⁶.

We now turn to consider the implications of Althusius’ philosophy for the relationship between federalism and sovereignty. It seems clear from the analysis thus far that his scheme of thought did, indeed, to some extent emerge in reaction to the centralising programme urged by Bodin, as was suggested at the start of the chapter. However, to move from this judgement to the presentation of Althusian federalism and Bodinian Statism as polar opposites, as is commonly implied in the literature today, does represent something of an over-simplification (reference the quotation from Elazar on page 111 calling them ‘competing’ theories). For whilst federalism is widely understood today to mean ‘shared’ or ‘divided’ sovereignty (see the definition Heywood offers on page 60), Althusius is seen to hold an ‘indivisible’ conception of sovereignty, forcefully expressed (see footnote 252 on page 130), just as Bodin does. Thus to paint Althusius as the ‘father of federalism’, without any further qualification, appears somewhat misleading.

It should be acknowledged that Elazar does appear to take steps in this direction, saying that Althusius’ ‘... retention of hierarchical principles ... flawed the federal character of his work and reflected the empirical roots of his analysis’²⁵⁷. However, in the end, this does not seem sufficient explanation to justify so selective a reading of

²⁵⁶ *Ibid.*, pp.xiix-xix, xxix.

²⁵⁷ Elazar, *op. cit.*, p.363.

the man. Further, Elazar's perspective of a total absence of hierarchy in federalism appears hard to sustain. For the many federations in existence around the world today are recognised to be federal States, implying an ultimate sovereignty in 'the State' as a whole - what Althusius would have interpreted as the final or constituent power residing in the collective body of one people.

We can and should be clear that Althusius does have a concept of the State, within which his proto-federal schema sits. The only difference between Althusius and Bodin concerning sovereignty lies in to whom each attributes it, the former locating it with the people and the latter attributing it to the person of the monarch.

The conception of federalism prevailing today, which as we shall see in coming chapters was largely shaped by the American experience of integration, did not exist in the time of Althusius. The federal vision he depicted *co-existed* with the idea that sovereignty was indivisible. In a similar vein to Elazar, therefore, Burgess must be over-stating matters when he argues that Althusius had a 'shared' or 'divided' concept of sovereignty:

'... Neither Althusius nor Proudhon construed sovereignty as particularly problematical. Since they did not accept the notion of indivisible sovereignty extolled by Bodin, they were able to conceive of sovereign power as both shared and divided'²⁵⁸.

Admittedly, Althusius is not completely clear on how his bottom-up, organic construction of society would interact with the top-down attribution of sovereignty to the people or commonwealth (and their delegation of authority to the supreme magistrate); and, as von Gierke has pointed out, the issue is plainly vital. Nevertheless, only to take away from reading Althusius the implied bottom-up

²⁵⁸ Burgess, *op. cit.*, p.15.

component of his schema, and to ignore the formally-stated top-down element, appears an oversight. It tells, at best, only one half of the story.

In view of the still open issue of the nature and location of sovereignty in processes of regional integration and disintegration today, it seems important to provide a full and factually-grounded account of Althusius' position. In arguments between those supporting 'divisible' and 'indivisible' conceptions of sovereignty, we observe that Althusius' *Politics* most clearly supports the latter view. It is suggested here that it may well, in fact, be helpful to recall this point in current academic discussions. For Althusius clearly believed that such a conception could be compatible with ideas of power-sharing and multi-level governance.

Either Althusius was wrong on the nature of sovereignty, and our current definition of federalism is right; or Althusius was right, and it is our definition of federalism that is misplaced. It cannot be both. To date, we have assumed the former without questioning our assumptions.

Friedrich points out that Althusius was very much concerned with '... the problem of final decision (sovereignty)'²⁵⁹. He says:

'... we are ... concerned with the constituent power in the all-inclusive community, the *universalis consociatio symbiotica*, the state. ... Althusius considers this highest power a natural attribute of the organized community, and obviously he does not look upon such a community as organized once and for all but as being continuously occupied in staying organized, so to speak. And it is this organizing and re-organizing function to which the highest or ultimate power (*summa potestas* or *majestas*) in a community is directed. Evidently, then, this power is indivisible, incommunicable and inalienable by its very nature'²⁶⁰.

²⁵⁹ Friedrich, *op. cit.*, pp.lxxvi, xcii.

²⁶⁰ *Ibid.*, p.xc.

He goes on directly from this to attack the view that any idea of a divisible sovereignty can be found in Althusius:

‘... It is therefore wrong to suggest that the notion of double sovereignty, of a *majestas realis* and a *majestas personalis*, can be traced to Althusius’²⁶¹.

Friedrich sees this latter deduction erroneously made by von Gierke, continuing:

‘... The doctrine of double sovereignty ... had great vogue in Germany well into the second half of the seventeenth century, because of its usefulness in interpreting the constitutional law of the Empire. To me it seems the antithesis of Althusius’ monistic tendency. It would be easier to trace it to Bodin ..., whom Althusius challenges on the same ground on which the doctrine of double sovereignty was challenged later on: “If according to Bodinus *majestas* is of two kinds, on the one hand belonging to the state (*regni*), on the other hand belonging to the king (*regis*), then I ask which of the two is the higher”’²⁶².

This distinction leads Friedrich to see Althusius as ‘... much more absolutist at bottom than Bodin ever was, only it is not an absolutism of the prince or the mass, but absolutism of the organized community, of the state’²⁶³. Again, here, we see grounds for challenging the current fashion for depicting Althusius as the opponent of Statism, when for example his writings are characterised by Hueglin as a ‘... potentially sensational anti-absolutist theory of political community and federalism’²⁶⁴.

²⁶¹ *Ibid.*, p.xc.

²⁶² Friedrich explains that although Bodin had directed much of his effort at overcoming the ‘illogical duplicity’ of troubling dualistic structures such as the German Empire by insisting that sovereignty was indivisible and attributing it to the monarch, nevertheless he had ‘... fumbled as he introduced or rather retained the distinction between *majestas regis* and *majestas regni*. Althusius accepted Bodin’s insistence upon the indivisibility of majesty, but attributed it to the people as organized in Estates’.

Ibid., pp.xxxi, xc.

²⁶³ *Ibid.*, p.xcii.

²⁶⁴ Hueglin, *op. cit.*, p.18.

Conclusions

In this fourth chapter, we have searched for the origins of the federal idea. First, we identified the early secular and religious roots of the concept. Secondly, we observed the first explicitly political theory of federalism, free of religious connotations, developed in the writings of Althusius.

From the analysis, we can see that Althusius' popular sovereignty concept sits as easily with the notion of sovereignty's indivisibility as Bodin's personal sovereignty of the monarch. We can also take away from the *Politics* the understanding that Althusius' emphasis on the constituent power - the final power with the authority to organise and reorganise, found in the body of the people - gives his conception of sovereignty a distinctly ultimate sense.

We observe in the *Politics* the first formal political expression of the federal idea - if not the word itself²⁶⁵ - and the concepts inherent to it, such as the notions of covenant, mutual obligation and representation, together with the tree or Russian doll structure

of society familiar in all modern federal systems. This multi-layered political order, it is argued, is seen to exist within a clear concept of the State.

With the fading into obscurity of Althusius' writings upon the rise of the centralised nation State and the triumph of Bodinian thought following the end of the Thirty Years' War, the federal vision also recedes into the background of political theory. It is not until the American attempt at integration, following independence from Great Britain a hundred and forty years later, that the federal idea resurfaces; but when it does so, it does so in a most powerful and concrete manifestation, with consequences which will reverberate around the world over subsequent centuries. It is to investigate this novel experiment in political unity that we turn next, in Chapters 5 to 7.

²⁶⁵ Althusius prefers the word *pactum* to characterise his internal concept of a bond among the members of a society flowing from the idea of symbiotic association, reserving *foedus* for external alliances established through treaties between States. He considers such ties to fall into two types: the complete confederation (*confoederatio plena*) and the partial confederation (*confoederatio non-plena*). Friedrich says that these can be seen to represent the modern federal State and confederation of States respectively (though Riley more convincingly argues that the former refers to complete mutual absorption in a unitary State). Friedrich sees the difference between the two forms as turning upon whether the confederates retain their sovereign rights or not. Here, again, we see Althusius' indivisible conception of sovereignty, together with its implied perspective of the *abrogation* or *transfer* of sovereignty at some critical juncture.

Althusius says: '... Such confederation with a foreign people or another body is either complete or partial. A complete confederation is one in which a foreign realm, province, or any other universal association, together with its inhabitants, are fully and integrally coopted and admitted into the right and communion of the realm by a communicating of its fundamental laws and right of sovereignty. To the extent that they coalesce and are united into one and the same body they become members of that one and same body. ... A partial confederation is one in which various realms or provinces, while reserving their rights of sovereignty, solemnly obligate themselves one to the other by a treaty or covenant made preferably for a fixed period of time. Such a partial confederation is for the purpose of conducting mutual defence against enemies, for extending trust and cultivating peace and friendship among themselves, and for holding common friend and enemies, with a sharing of expenses'.

Althusius, *op. cit.*, pp.84-5.

Friedrich, *op. cit.*, p.lxxxvii.

Riley, *op. cit.*, p.79.

Chapter 5

The Impact of the American Debate (I)

If Althusius can be said to have invented the modern federal idea, it was the young nation of America that gave that idea its first practical expression. This took the form, embodied in the US Constitution, of a wholly original ‘compound polity’ comprising two distinct levels of government, both for the first time acting directly upon the individual. This pioneering model would go on to provide the basic template for all other federal systems following behind throughout the nineteenth and twentieth centuries.

The American prototype itself has stood the test of time well and it remains today the principal point of reference for scholars and practitioners alike. As Diamond tells us:

‘... The American Republic has been regarded by nearly all modern observers as *the* example of a federal government. Indeed the various modern definitions of federalism are little more than slightly generalized descriptions of the American way of governing’²⁶⁶.

Likewise, Wheare, in keeping with his observations noted in Part I, sees America and modern federalism as umbilically connected:

²⁶⁶ Diamond, Martin ‘The Federalist’s View of Federalism’ in Benson, George (Ed.) *Essays in Federalism* (Institute for Studies in Federalism, 1961), p.21.

‘... The modern idea of what federal government is has been determined by the United States of America. ... Many consider it the most important and the most successful example’²⁶⁷.

On this basis, a full and thorough study of the intellectual debate that took place as the American integration process happened appears indispensable to our inquiry into the conceptual and terminological evolution of the federal concept. The coming three chapters each look at one stage of its progressive development in detail. This fifth chapter begins the task by uncovering the motive forces upon Independence that led to the decision to draft a Constitution at the Philadelphia Convention in 1787. Next, Chapter 6 analyses the practical and conceptual metamorphosis that occurred in this transition. Lastly, Chapter 7 considers how the resulting polity evolved in the years after ratification, and in particular how it was affected by the defining event of the Civil War of 1861 - 65.

We embark on the journey here, then, by attempting to identify the forces driving Americans to form their own Constitution and strong national government at the end of the eighteenth century. The chapter is divided into three sections. The first section reviews the Anglo-American discourse on the nature and location of sovereignty that took place over the twenty year period prior to the Declaration of Independence in 1776. The second section considers the character of the first American union formed upon separation from Great Britain under the Articles of Confederation (in force from 1781 to 1789). The third section identifies the specific weaknesses in this initial construction that created difficulties and led to calls for a deeper form of unity.

²⁶⁷ Wheare, Kenneth *Federal Government* (Oxford University Press, 1963), p.1. Originally published in 1946.

I. The Anglo-American Discourse on Sovereignty Prior to Independence

As was seen in the last chapter, the philosophy that had come to dominate political thought by the eighteenth century was the idea of sovereignty, one and indivisible. This had emerged from the widespread desire of the time to quell internal conflict, through the centralisation of all power at a single point and the elimination of competing centres, following the medicine prescribed by Bodin and Hobbes. As Wood observes:

‘... The eighteenth century’s conviction that there must be in every state, if it were to be a state, an indissoluble supreme power from which there could be no appeal was a necessary concomitant of the growth of the nation-state with its emphasis on centralization of authority and its obsession with order. A state with more than one independent sovereign power within its boundaries was a violation of the unity of nature; it would be like a monster with more than one head, continually at war with itself, an absurd chaotic condition that could result only in the dissolution of the state’²⁶⁸.

Authors thinking on these lines generally attempted to apply the source of ultimate power to the monarch, the only conceivable unitary authority in modern States. For Britain, as Wood points out, the same basic idea of a unitary source of all power manifested itself, but in slightly amended form:

‘... as the seventeenth-century upheavals had made clear, ... legal sovereignty could reside only in Parliament where the three estates of the realm were wonderfully combined’²⁶⁹.

It was in this way, therefore, that the principle of sovereignty operated and was rationalised in Britain after the Glorious Revolution of 1688: a single sovereign power of King in Parliament; Crown, Lords and Commoners combined in one body; monarchy, aristocracy and democracy united. This was the backcloth of thinking with

which the British came to the debate on how the American colonies should be governed.

The indivisibility of sovereignty was, similarly, the difficult starting assumption with which the American colonists had approached the question: ‘... The theory of sovereignty’, notes Wood, ‘... pervaded the arguments of the whole Revolutionary generation from the moment in the 1760’s when it was first raised through the adoption of the federal Constitution in 1787’. It was, he says, ‘... the single most important abstraction of politics in the entire Revolutionary era’²⁷⁰.

McKay brings out how this idea had fitted in with the actual practice of American life for well over a century:

‘... From the very beginning, the British Americans had displayed a marked degree of independence and self-sufficiency. In the 13 colonies, and especially in New England, the local community became virtually the only meaningful level of government’²⁷¹.

In the seventeenth century, the early settlers had fused English village traditions with religious ideology in a template for ‘the good life’, with an almost total lack of formal governing apparatus²⁷². In this way, a culture of small-scale and informal self-rule had gradually taken root, in an environment largely free from external influence. As McKay suggests, this state of affairs depended upon a marked degree of forbearance on the part of the imperial governors:

‘... Although such communities were partly transformed by economic development and population increases during the eighteenth century, the essential independence of the colonies

²⁶⁸ Wood, Gordon *The Creation of the American Republic 1776 - 1787* (University of North Carolina Press, 1969), pp.345-6.

²⁶⁹ *Ibid.*, p.346.

²⁷⁰ *Ibid.*, p.345.

²⁷¹ McKay, David *American Politics and Society* (Blackwell, 2001), p.41.

²⁷² *Ibid.*, p.41.

continued to be expressed through local governments and, later, colonial assemblies whose activities were largely tolerated by Crown-appointed governors. ... This description implies a colonial rule which was essentially distant and benign²⁷³.

The arrival of a more assertive British monarch in George III in 1760, however, set the scene for the logic of this whole edifice to be tested²⁷⁴. Some among the colonists initially sought a compromise between the conflicting demands of home and imperial rule through taking a pragmatic case by case approach to the distribution of governing powers. Wood says the colonists had at first ‘... sought to make all sorts of exemptions from the imperial power of Parliament’²⁷⁵, in order to justify the assumption of law-making powers locally, whilst not seeking fundamentally to challenge the doctrine of parliamentary sovereignty. However, the ‘problem of sovereignty’ concerned sooner or later drawing the unavoidable conclusion that, where conflict occurred, ultimate authority must be deposited in a single site:

‘... Every new institution and new idea sooner or later had to be reconciled with ... (the) ... powerfully persuasive assumption that there could be but one final, indivisible, and incontestable supreme authority in every state to which all other authorities must be ultimately subordinate; “for otherwise, there could be no supremacy, or subordination, that is no government at all”’²⁷⁶.

It seems clear to this point that, despite difficulties accommodating the idea, mainstream American political thought on the nature of sovereignty was at this time not fundamentally different from contemporary thinking prevailing in Europe.

Wood sees the Americans’ initial attempts to draw a dividing line between the differing spheres of authority of Parliament and of the colonies as efforts to rationalise a potential solution to the whole question through appealing to actual past practice.

²⁷³ *Ibid.*, p.41.

²⁷⁴ *Ibid.*, p.42.

²⁷⁵ Wood, *op. cit.*, p.353.

First, they placed the line between control over ‘external’ and ‘internal’ taxation (the former being the prerogative of Parliament, the latter that of the colonies). When this distinction collapsed, it having become apparent that the external duties instituted by the Townshend Acts of 1767 were as much a revenue raising exercise as the internal Stamp Act of 1765 had been, some ventured a replacement: a distinction between the colonists’ power to tax themselves and Parliament’s superintending power to regulate imperial trade²⁷⁷. However, by 1773, even this thinking was coming under strain. Though some continued to press for moderation, an increasing number were becoming exasperated by the apparent futility of successive attempts at reconciling the irreconcilable. The principles of parliamentary sovereignty and local self-government, it was growing ever more evident, were simply incompatible, and there seemed no way of escaping this conclusion. Wood captures the mood of heightening frustration:

‘... While some ... continued to “assert, a line there must be” between Parliament and the colonial legislatures and to argue that “sovereignty over these colonies must be limited,” others, despairing of breaking the unbreakable and separating the inseparable, began rapidly in 1773 - 74 to concede ... that America must be either totally under parliamentary authority or under no parliamentary authority at all. Apparently there was no middle ground’²⁷⁸.

The Massachusetts House of Representatives gave voice to the growing feeling of disenchantment when it declared:

²⁷⁶ *Ibid.*, p.345.

²⁷⁷ Of note is the wording of the Declaratory Act of 1766, which had repealed the highly unpopular stamp duty placed on all legal documents and newspapers. The Act has stated that Parliament, in spite of this retreat, nevertheless ‘... had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever’.

Ibid., p.349.

²⁷⁸ *Ibid.*, p.350.

‘... “If there be no such line” between the supreme authority of Parliament and the total independence of the colonies ... “the consequence is, either that the colonies are the vassals of the Parliament, or that they are totally independent”²⁷⁹.

The conclusion steadily being drawn was thus unmistakable: since the colonies could in no way be the vassals of a remote legislature (in which they were not represented), they must assume their own legislative authority.

This rationalisation for the casting-off of the yoke of imperial rule has much bearing upon the nature of the political entities that resulted after Independence. For as has become clear from the above discussion, the Anglo-American debate was very much framed in terms of an indivisible conception of sovereignty and the consequent impossibility of having two sets of laws ruling in the same territory:

‘... Two legislatures in the same state, said Hamilton, “can not be supposed, without falling into that solecism, in politics, of *imperium in imperio*”²⁸⁰.

The phrase ‘*imperium in imperio*’ (‘supreme power within supreme power’²⁸¹) appears to have been common currency in American political discourse at this time. Wood cites the Massachusetts Tory Daniel Leonard using the term in a similar context, and makes a number of other references to it throughout his work²⁸². John Adams was of a similar mindset, his words here bringing out the same fundamental idea:

‘... Two supreme authorities could obviously not exist in the same state, said Adams, “any more than two supreme beings in one universe.” Therefore it was clear, concluded Adams, “that our

²⁷⁹ *Ibid.*, p.344.

²⁸⁰ *Ibid.*, p.352.

²⁸¹ This translation is confirmed by McDonald.

McDonald, Forrest *States’ Rights and the Union: Imperium in Imperio, 1776 - 1876* (University Press of Kansas, 2000), p.viii.

²⁸² Wood, *op. cit.*, p.351.

provincial legislatures are the only supreme authorities in our colonies”²⁸³.

From this conclusion, to which the logic of indivisible sovereignty forced them, we can now comprehend the situation prevailing upon Independence as the colonists saw it. While the legislative sovereignty of the British Parliament was rejected, the principle of legislative sovereignty itself was not, being simply ‘transplanted’²⁸⁴ to the colonial sphere. The State legislature was now recognised to be the location of supreme authority in each former colony²⁸⁵.

Far from abandoning the notion of indivisible sovereignty, the colonists fully embraced the concept, in fact turning it round and using it as a principal weapon in their argument against imperial rule²⁸⁶. This, therefore, forms the backdrop to the union constituted under the Articles of Confederation. The perspective provides firm justification for the view that the latter, as understood by their framers, gave birth to what was in character simply a league among a number of sovereign and independent States. This is the convincing conclusion to which Wood’s analysis leads him:

‘... when the Americans came in 1776 to erect their own confederated empire, most did so with an overwhelming conviction, as Samuel Adams told the Carlisle Commission in 1778, “that in every kingdom, state, or empire there must be, from the necessity of the thing, one supreme legislative power, with authority to bind every part in all cases the proper object of human laws.” Despite the original contributions to political thought in the 1760’s made by the Americans and despite their long experience with different spheres of authority, there was in 1776 little theoretical comprehension among most Whig leaders of any

²⁸³ *Ibid.*, p.351.

²⁸⁴ *Ibid.*, p.352.

²⁸⁵ Goldsworthy records that later in his life Madison wrote that after the revolution, ‘... the legislative power was maintained to be as complete in each American Parliament, as in the British Parliament’. Cited in Goldsworthy, Jeffrey ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Walker, Neil (Ed.) *Sovereignty in Transition* (Hart, 2003), p.425.

²⁸⁶ Wood, *op. cit.*, pp.352-3.

possibility of a divided sovereignty, of any possibility, in other words, of two legislatures' existing in the same state'²⁸⁷.

II. The Articles of Confederation: Forming a League Among Sovereign States

The most common appreciation in the scholarship of the Articles fits with the preceding assessment. For example, Plano and Greenberg say: '... The Confederation was a league of sovereign states'²⁸⁸; Kramnick judges that '... From 1776 to 1787 America under the Articles was no more than a loose alliance of sovereign and independent states'²⁸⁹; and Goldsworthy observes that '... The Articles of Confederation were essentially a compact among the states, which preserved their separate sovereignties'²⁹⁰.

This perspective is not unproblematic, however, not least in view of the Articles' claim to be 'perpetual'²⁹¹, and a limited number of exclusive competences being attributed to the union level, in particular the power to make war and peace (along with a generalised principle of majoritarian decision-making for such competences). Nonetheless, as an overall appreciation, it appears supported by four particular features which immediately stand out. First, the text has the appearance and form of a treaty, the States clearly being the contracting parties (The Preamble begins: '... To all whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting'). Secondly, the agreement requires ratification by

²⁸⁷ *Ibid.*, p.353.

²⁸⁸ Plano, Jack and Greenberg, Milton *The American Political Dictionary* (Western Michigan University Press, 1962), p.18.

²⁸⁹ Kramnick, Isaac 'Editor's Introduction' in Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), p.18. Originally published in 1788.

²⁹⁰ Goldsworthy, *op. cit.*, p.426.

all thirteen States for both entry into force and subsequent amendment²⁹². Thirdly, the union is directly referred to as a ‘league’ (Article 3: ‘... The said States hereby severally enter into a firm league of friendship with each other’). Fourthly, and the feature most commonly cited by commentators, Article 2 makes explicit reference to the maintenance of the sovereignty of the States (‘... Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled’).

This understanding is reinforced by the views of Americans as recorded at the time. They considered the former colonies, for example, to be very diverse in character and spread over a huge geographic extent. In consequence, a man’s colony was understood to be the entity to which he had historically come to owe his primary allegiance. As Kramnick notes of the immediate post-Independence era:

‘... Most Americans agreed with John Adams, who wrote, looking back on that period: “no one thought of consolidating this vast continent under one national government.” There was, after all, little historical experience of unity among the colonies. They had separate histories, separate cultural, religious and institutional traditions. ... There were far closer ties between Boston and London, for example, or South Carolina and London, than there were between Boston and South Carolina’²⁹³.

Wood holds a similar view:

²⁹¹ The second paragraph of the Preamble to the Articles leads with the words: ‘Articles of Confederation and perpetual Union between the States of Newhampshire ... and Georgia’. The word also appears in Article 13, which reads: ‘... the Union shall be perpetual ...’; and this phrase is repeated in the last line of the conclusion.

Scott, James (Ed.) *The Declaration of Independence, The Articles of Confederation and The Constitution of the United States* (Oxford University Press, 1917), pp.13, 21-2.

²⁹² McDonald confirms: ‘... Amendments to the Articles had to be unanimous, inasmuch as it was for practical purposes a treaty’.

McDonald, *op. cit.*, p.10.

²⁹³ Kramnick, *op. cit.*, p.18.

‘... few in 1776 conceived of the thirteen states’ becoming a single republic, one community with one pervasive public interest. ... the climate and the economic and social interests of the separate states, as the Americans themselves emphasized and foreign observers verified, seemed so varied, the habits and character of the people, particularly between North and South, appeared so different, that a continental republic with a single government coalescing all the states was as nearly impossible of establishment in 1776 as the erection of a monarchy. A man’s “country” was still his state’²⁹⁴.

The perspective is also consonant with the prevailing political theory of the age. According to the mainstream Lockean social contract view of government, McDonald observes, prior to Independence the colonies had been thought to have ‘... thirteen real compacts in the form of charters that gave them existence as political societies’; and the dominant thinking had been that if the King had breached any of these, ‘... sovereign authority would have devolved not upon the colonists as a whole but upon the people of New Hampshire as one political society, those of Massachusetts as another, and so on’²⁹⁵. Thus, the conception in the minds of most Americans upon separation from the mother country was that the former colonies were now States, sovereign and independent in their own right; and this notion fits exactly with the assumption of legislative supremacy from Britain by each of the State legislatures already identified. It was in this mindset, observes Wood, that the State representatives had signed the Declaration of Independence, a declaration by ‘thirteen united States of America’, which had proclaimed that as

‘... Free and Independent States they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do’²⁹⁶.

²⁹⁴ Wood, *op. cit.*, p.356.

²⁹⁵ McDonald, *op. cit.*, p.8.

²⁹⁶ Scott, *op. cit.*, pp.6-7.

Wood goes on to make a persuasive argument supporting the league view and, if there were any doubt, apparently making it conclusive. For all the limitations placed upon the States subsequently by their membership of the over-arching Confederation, he says, potentially limiting their sovereignty, this was anyway more theory than actual practice. The ensuing chaos leading to pressure for further deepening of the union was, he notes, in part a reflection of the States' very own violation of the Articles. Referring to the independence ascribed to the States in the Declaration of Independence, he observes:

‘... the Articles of Confederation, for all the powers it theoretically gave to the Congress, did not in fact alter this independence. ... The states not only jealously guarded their independence and sovereignty by repeated assertions and declarations, but in fact assumed the powers of a sovereign state that Independence had given them, even in violation of the Articles of Confederation, making war, providing for armies, laying embargoes, even in some cases carrying on separate diplomatic correspondence and negotiations abroad. The Confederation was intended to be, and remained, a Confederation of sovereign states’²⁹⁷.

A counter-argument to this view - that the Articles formed something stronger than a league - comes from the coherence achieved under the emergency conditions of war against Britain. Wood sees strong nationalistic sentiments prevailing in 1776, ‘... perhaps more of a feeling of oneness among thirteen disparate states than at any time in history’²⁹⁸. He highlights how the Continental Congress, formed in 1774, had throughout the on-going war been a powerful body, which had

‘... exercised an extraordinary degree of political, military, and economic power over the colonists - adopting commercial codes, establishing and maintaining an army, issuing a continental currency, erecting a military code of law, defining crimes against the Union, and negotiating abroad. It also through its encouragement and resolves was centrally responsible for the

²⁹⁷ Wood, *op. cit.*, pp.356-7.

²⁹⁸ *Ibid.*, p.355.

colonies' assumption of new governments and the final break from England'²⁹⁹.

Yet, in spite of Congress' (as the Continental Congress had been restyled by the Articles) war-time pre-eminence, when the fighting ceased upon the surrender of the British garrison at Yorktown in October 1781, the fragile sense of common national identity quickly evaporated; and, in tandem, Congress went into decline, as the imperative to make it function disappeared:

'... Congressional power, which had been substantial during the war years, now began precipitously to disintegrate, and delegates increasingly complained of the difficulty of gathering even a quorum. By the middle eighties Congress had virtually ceased trying to govern'³⁰⁰.

Kramnick here confirms Wood's assessment:

'... With the cessation of hostilities ... the Continental Congress, the one power at the center, became virtually impotent, with all effective power residing in the states'³⁰¹.

So it seems that the idea that the Congress had constituted a powerful centre before and during the early years of the Articles, and hence that the latter had represented something more than a league among sovereign States, is undermined by the fact of Congress' growing weakness in the years between 1781 and 1787. The swift fading of any national feeling upon victory and the resumption of decentralised government, together with the States' own violation of the Articles, all serve to illustrate that the more normal mode of governance under the Confederation was State-centred; and it was precisely this league character that was the central factor leading to the first union's eventual seizing-up.

²⁹⁹ *Ibid.*, p.355.

³⁰⁰ *Ibid.*, p.359.

³⁰¹ Kramnick, *op. cit.*, p.18.

III. Pressures for Reform

Let us now consider the structure and powers of the Confederation in greater detail, as this will assist us in identifying the particular flaws in the political system which resulted in paralysis and created the pressures for reform.

In terms of its structure, the institutional design of the Confederation was broadly that of a typical inter-State treaty arrangement. First, the legislature of the Confederation, Congress, was unicameral, with the States alone represented (there was no second chamber for popular representation). Secondly, each State had one vote, of equal weight to the others, independent of size. Thirdly, there were neither executive nor judicial branches. All three features serve to underline the essentially State-based character of the framework.

In considering the voting mechanism within the legislature, however, we see a first element of majoritarianism introduced, which begins to move the character away from a strictly inter-governmental relationship founded on unanimity (or ‘consensus’) alone. A super-majority of nine out of the thirteen States was required in Congress for all legislative decisions³⁰². This aspect is usually overlooked by scholars, probably because legislative impotence was a more salient feature of the Confederation in practice. For even when a law was passed, there was still a strong likelihood that one or more States would fail to implement it through internal legislative blockage - a state of affairs which Noah Webster characterised with an apt metaphor:

³⁰² *Ibid.*, p.19.

‘... So long as any individual state has power to defeat the measures of the other twelve, our pretended union is but a name and our confederation but a cobweb’³⁰³.

The structural deficiency in this regard was seen at the time to lie in the principle of legislation for the States in their collective capacities, rather than directly for individuals. The requirement for federal-level law to be passed a second time by each State legislature to take domestic effect (as is typical of international treaties) was singled out by the authors of *The Federalist Papers* as the ‘great and radical vice’³⁰⁴ in the system. Their rationale was that, as Hampsher-Monk notes, ‘... if states were not willing to follow or enforce federal law it was effectively inoperable’³⁰⁵.

From an organisational perspective, too, the administration of Congress’ business was lacking in efficiency and direction. Whilst there was provision for a Committee of the States to sit when Congress was out of session, this body had only competence to take decisions in the least sensitive areas. As Bowles notes, this was ‘... a prescription for a government with neither authority nor power’³⁰⁶.

Such were the two principal structural defects of the Articles: legislative incapacity and administrative inertia. Turning now to look at powers, as has already been noted, the Confederation was endowed with the key competence of foreign policy: declaring war on a third party (Article 9 reads: ‘... The United States in Congress assembled, shall have the sole and exclusive right and power of determining peace and war’). However, in many respects, the States still seem to have considered their external relations a matter of concurrent power with the union, leading to a situation of overlap and general confusion. Confirming Wood’s perspective above, Bowles says:

³⁰³ Cited in Hampsher-Monk, Iain *A History of Modern Political Thought* (Blackwell, 1992), p.203.

‘... Each State exercised virtually sovereign powers, even asserting its right to formulate independent foreign policies, and to raise armies and navies. Ministers in London and Paris acted simultaneously on behalf of individual States rather than the United States as a whole’³⁰⁷.

Other fields designated specifically of exclusive competence included regulating the value of coin, fixing standards for weights and measures, overseeing Indian affairs and running a post office (Article 9). Control of paper currency, however, was a shared competence, and the States could (and did) issue their own. Bowles notes that in 1786 alone seven States printed their own money, causing widespread alarm among creditors³⁰⁸.

Crucially, the Confederation lacked competence in the two areas of commerce and taxation. This was a reflection of perceived former imperial oppression in precisely these domains. As John Dickinson from Delaware noted, Americans on Independence had been ‘... in no mood to give a faraway, central régime in the United States what they were busy denying to a faraway central régime in Britain’³⁰⁹. Later, in 1781, the States blocked a proposal for a limited federal tax (a 5% levy on imports) that had been passed by Congress. Requiring amendment to the Articles, and therefore unanimity among the States, the measure was stymied by Rhode Island and never enacted. Two subsequent attempts to pass similar measures in 1783 and 1784 also fell by the wayside³¹⁰. In the absence of an independent source of revenue, funding the Confederation through a system of requisitions from the States rendered the financing of union activities uncertain and precarious.

³⁰⁴ Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), No. 15, p.147. Originally published in 1788.

³⁰⁵ Hampsher-Monk, *op. cit.*, p.203.

³⁰⁶ Bowles, Nigel *Government and Politics of the United States* (Palgrave, 1998), p.10.

³⁰⁷ *Ibid.*, p.10.

³⁰⁸ *Ibid.*, p.11.

So in terms of powers, then, the Confederation appears not ill-equipped in general for the tasks it faced, though there were a number of important gaps and areas of ambiguity.

Wood brings out the mutual suspicions and jealousies that had prevented any closer form of unity at this time, in particular highlighting the fears of the small States of large State domination, and the fears of the South of the North. On this basis, he argues, the first union was probably as powerful a body as could have been hoped for in the circumstances:

‘... What is truly remarkable about the Confederation is the degree of union that was achieved. The equality of the citizens of all states in privileges and immunities, the reciprocity of extradition and judicial proceedings among the states ..., the elimination of travel and discriminatory trade restrictions between states, and the substantial grant of powers to the Congress in Article 9 made the league of states as cohesive and strong as any similar sort of republican confederation in history - stronger in fact than some Americans had expected’³¹¹.

In spite of inter-colonial differences, rapidly after the cessation of hostilities with Britain the initial union came to be seen as inadequate to meeting Americans’ needs. In the space of only ten years, Americans grew to realise that they in fact held more ambitious goals for a harmonious common life together than they had at first thought. They also fairly swiftly came to accept the logical corollary that their union had to be equipped with adequate means, in terms of both structure and powers, to deliver upon agreed ends. In many respects, therefore, what occurred at this time was an evolution from abhorrence of ‘government’ - having been oppressed under the rule of another - to the realisation that government was, indeed, necessary to prevent anarchy; and,

³⁰⁹ Cited in Hampsher-Monk, *op. cit.*, p.201.

³¹⁰ Kramnick, *op. cit.*, p.20.

³¹¹ Wood, *op. cit.*, p.359.

therefore, that the American people needed to constitute their own strong political order spanning the whole nation.

As Kramnick brings out, the major theme that ran through *The Federalist Papers*, in advocating in 1787 and 1788 ratification of the successor to the Articles, the US Constitution, was the need for a victory of ‘government’, ‘authority’ and ‘power’, over ‘liberty’ - the latter the spirit which had prevailed in 1776. *Federalist No. 26* spoke of a ‘... zeal for liberty more ardent than enlightened’³¹² upon Independence, and the need now for the ‘... greater energy of government’³¹³; and *Federalist No. 63* spoke of ‘... liberty ... endangered by the abuses of liberty’³¹⁴. In his speech to the State of New York ratifying convention of 1788, Alexander Hamilton, one of the authors, made direct reference to what he believed had been the prime source of earlier errors, in the denial to the Confederation of powers that had been denied to the British in the name of freedom:

‘... In the commencement of a revolution which received its birth from the usurpations of tyranny, nothing was more natural than that the public mind should be influenced by an extreme spirit of jealousy. To resist these encroachments, and to nourish this spirit, was the great object of all our public and private institutions. The zeal for liberty became predominant and excessive. In forming our Confederation this passion alone seemed to actuate us, and we appear to have had no other view than to secure ourselves from despotism. The object certainly was a valuable one, and deserved our utmost attention; but Sir, there is another object, equally important, and which our enthusiasm rendered us little capable of regarding. I mean a principle of strength and stability in the organisation of our government, and vigor in its operations’³¹⁵.

The difficult question waiting to be resolved, of course, was how to construct such an energetic nation-wide order without wholly disenfranchising the States. Time would

³¹² Madison, Hamilton, and Jay, *op. cit.*, No. 26, p.196.

³¹³ *Ibid.*, p.197.

³¹⁴ Madison, Hamilton, and Jay, *op. cit.*, No. 63, p.373.

show that what was required was less a strengthening of the existing Articles, than a radical rethinking of the entire system and some new basic principles to replace those that had been shown unsound. As Edmund Randolph from Virginia put it near the start of the Convention, the authors of the Articles ‘... had done all that patriots could do, in the then infancy of the science of constitutions and confederacies’³¹⁶. The need was now for new ideas and innovative ways of conducting politics.

To this point in the discussion, we have identified the pressures for reform in terms of weaknesses in both structure (legislative incapacity and administrative inertia) and powers (principally the lack of authority over commerce and taxation, and exclusive control of foreign affairs). To move on now, however, to examine the Philadelphia Convention and the remarkable adaptations in the art of government produced there, would be to overlook one key piece in the puzzle: the failure of the State governments to act responsibly. Gaining such insight is vital in understanding the motivations of the Convention delegates and the authors of *The Federalist Papers*. Kramnick makes the point plainly:

‘... From the perspective of historical hindsight it is easy enough to see the obvious defects of the Articles of Confederation which led to demands for its reform and ultimately to its replacement by the Constitution in 1787. The Congress of the central government could not deal with individual citizens but only with states in their corporate capacity. It could not tax individuals or regulate their commerce. It could not carry out a foreign policy without the goodwill of states that perceived themselves as sovereign and independent. All of this was clear cut and formed a highly persuasive brief moving many to want change. But equally important on the road to Philadelphia and the Constitutional Convention was the activity of the state legislatures. Indeed, for

³¹⁵ Cited in Kramnick, *op. cit.*, p.16.

³¹⁶ Cited in Hampsher-Monk, *op. cit.*, p.201.

some the abuse of power by state legislatures was the principal reason America needed a new Constitution³¹⁷.

Wood sees the chaos in the State governments as even more central a motive force than Kramnick:

‘... In the end it was not pressure from above, from the manifest debility of the Confederation, that provided the main impulse for the Federalist movement of 1787; it was rather pressure from below, from the problems of politics within the separate states themselves, that eventually made constitutional reform of the central government possible³¹⁸.

Bowles considers that the ‘particular and proximate’ causes of the undermining of the Articles lay in separate taxation by the States and growing indebtedness³¹⁹. Regarding the former, the State of New York imposed a tax on all ships sailing through her waters to the States of New Jersey and Connecticut, causing such resentment that war between the States seemed possible³²⁰. There were numerous other examples of competing and conflicting tariffs. One such concerned the taxing of shipping on the Potomac River between Maryland and Virginia, settled in 1784 by James Madison of the latter State, who brought the parties together and established a commitment to tariff uniformity³²¹. The interests of the neighbouring States, however, still remained to be settled, and Madison therefore sought and secured a call from the Virginia legislature to all the States for a meeting to discuss giving Congress the power to regulate commerce. A convention was held at Annapolis, Maryland, in the summer of 1786, but only five States attended. However, Hamilton, as one of the delegates, managed to obtain agreement on a proposal to all thirteen States for a second meeting

³¹⁷ Kramnick, *op. cit.*, p.26.

³¹⁸ Wood, *op. cit.*, p.465.

³¹⁹ Bowles, *op. cit.*, p.10.

³²⁰ *Ibid.*, p.10.

³²¹ Kramnick, *op. cit.*, p.29.

with a much wider mandate: to consider all the financial, commercial and political problems facing the union³²². This proposal called for a convention

‘... to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the union’³²³.

Bowles’ second cause, debt, perhaps more tellingly reveals the disorderly situation prevailing in the States by this time. Kramnick sets the scene, noting how the widened popular franchise after Independence had led to the passing of much unwise and ill-considered legislation in the conditions of an economic slump:

‘... At the end of the war most of the states were in severe financial crises, trying to pay off war debts and to collect long overdue taxes. There were also war damages to repair. Large numbers of individuals, especially farmers, were in debt to merchants, bankers and storekeepers. In state after state the new men in the legislatures passed paper money acts providing cheap money, debtor relief legislation, legislation setting aside contracts, laws confiscating property and laws suspending the ordinary means for recovering debts’³²⁴.

It was not simply the redistributive nature of these acts that disturbed many among the old élite. The annihilation of all debts seemed to many critics to be the anarchic end of these ‘new men’ in the legislatures, threatening to property rights in general and thereby the entire basis of the economic system. Just as concerning, a number of legislatures had taken over the administration of justice, overturning the decisions of

³²² *Ibid.*, p.29.

³²³ *Ibid.*, p.29.

³²⁴ *Ibid.*, p.25.

the judiciaries and thus bringing all power into their own hands. The State legislatures, it seemed to many, had become ‘tyrants in liberty’s cloak’³²⁵.

The issue reached crisis point in the autumn and winter of 1786, in what came to be known as Shays’ rebellion. Former army captain Daniel Shays led a mob of farmers and other hard-pressed rural debtors, who sought to prevent the Massachusetts courts from sitting to pronounce against them. When ordered to disperse and declared outlaws, they attempted to capture a federal arsenal. After being hunted down, fourteen of the leaders were sentenced to death, but all were either pardoned or let off with short prison terms³²⁶. As Kramnick notes, the Shaysites did not aim to destroy the State government or even to confiscate property; they merely sought relief from their debts. It was both their uprising and the manner of their treatment that caused widespread alarm and ‘... fuelled the mood of crisis’³²⁷. General George Washington was said to be particularly disturbed and it was this that enabled Madison and others to convince him to come to Philadelphia, where he would preside over the deliberations.

Wood notes that now reforming the Articles took on an added urgency and began to seem like the most promising if not the only way both to rein in the wayward States and restore energy and efficiency to the administration of the Union as a whole:

‘... By 1786 - 87 the reconstruction of the central government had become the focal point of most of the reform sentiment that had earlier been concentrated on the states. ... The ability of America to sustain any sort of republican government seemed to be the issue. ... once men grasped ... that reform of the national government was the best means of remedying the evils caused by the state

³²⁵ It is in this context - of tempering the excesses of the States - that Madison’s concern with the consequences of ‘faction’, most prominently in *Federalist No. 9* (‘The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection’), can best be understood.

Ibid., p.25.

³²⁶ *Ibid.*, p.27.

³²⁷ *Ibid.*, p.28.

governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier³²⁸.

Let us leave the last word here to Madison. As a leading Philadelphia delegate, his commentary affords us a good indication of the principal motivations impelling the Conventioneers into action at this time. His focus is plainly on the evils resulting from the malfunctioning of politics within the States. The vices coming out of the State governments, he says,

‘... so frequent and so flagrant as to alarm the most steadfast friends of Republicanism, ... contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects’³²⁹.

Conclusions

In this initial chapter on the American debate, we have established the forces impelling movement towards a stronger form of unity at the close of the eighteenth century. First, we observed that indivisible sovereignty was the dominant political conception in the American mind upon Independence. Secondly, we saw the nature of the first union, under the Articles of Confederation, as a league among sovereign States. Thirdly, we identified the pressures for reform that resulted from weaknesses inherent in this political form, in terms of both structure and powers.

By 1787, it was clear, the time had come for an end to the ‘politics of liberty’, as practised by the State legislatures, and a revolution in favour of ‘government’; and for the move from a league to something more than a league. Exactly what form this new

³²⁸ Wood, *op. cit.*, p.466.

³²⁹ Cited in Wood, *op. cit.*, p.467.

order would take, however, was yet to be decided - and it is this that constitutes the subject of our next chapter, Chapter 6.

Chapter 6

The Impact of the American Debate (II)

We turn now to consider the evolution that occurred in the adoption of the US Constitution at the Philadelphia Convention, in both its practical and conceptual aspects³³⁰. The chapter is divided into three sections. The first section examines the character and role of *The Federalist Papers*, the major work of political thought of the period. The second section investigates the set of starting assumptions that the founding fathers held about the nature of political structures. The third section analyses the novel governmental framework agreed in a ‘great compromise’ among the parties: a ‘compound polity’ combining two established modes of government to form a wholly new third type.

I. The Character and Role of *The Federalist Papers*

The Federalist Papers were a series of eighty-five articles originally published in newspapers in the State of New York, with the objective of convincing the electorate of this State to support the new Constitution in their subsequent ratifying convention. Perhaps rather surprisingly, in view of its immediate function as a tool of practical political debate, this work has stood the test of time as treatise on the basic principles of modern democratic government. Such ideas as republicanism (representative government), the separation of powers, checks and balances, and the protection of minorities are themes lucidly expounded in the text, which hold a remarkable degree

of freshness and relevance to the modern eye over two centuries after they were first set to paper.

Karmis and Norman comment that *The Federalist Papers* are today ‘... widely recognized as the first and most influential theoretical reflection on the new type of federal arrangement inaugurated in the United States’³³¹. In this connection, Kramnick sees the work as ‘... the one product of the American mind that is rightly counted among the classics of political theory’, adding that over time it has ‘... transcended its polemical origins’³³². Hampsher-Monk even holds it in sufficiently high esteem as to include it in his history of modern political thought, alongside such greats as Hobbes, Rousseau, Mill and Marx³³³.

The Federalist Papers were in fact the work of not one but three hands, writing under the collective pseudonym of ‘Publius’. Alexander Hamilton, aged thirty-two, was an ambitious and dashing young lawyer and former officer in Washington’s army. He was the inspiration and driving force behind the project, being himself a New Yorker and concerned to secure the ratification of his home State (which was of special significance to the process as a whole, as the city of New York was then the seat of Congress under the Articles). He was assisted in the task of drafting principally by James Madison, who came up from Virginia to help in the quest for New York’s ratification. The most industrious of the Convention members and arguably the

³³⁰ The Convention sat from 25 May to 17 September 1787.

³³¹ Karmis, Dimitrios and Norman, Wayne (Eds.) *Theories of Federalism: a Reader* (Palgrave, 2005), p.103.

³³² Kramnick, Isaac ‘Editor’s Introduction’ in Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), pp.11-2. Originally published in 1788.

³³³ Hampsher-Monk, Iain *A History of Modern Political Thought* (Blackwell, 1992).

‘Father of the Constitution’, Madison was thirty-six years of age³³⁴. John Jay, at forty-two, was the eldest of the three contributors. A distinguished New York lawyer and former Secretary of Foreign Affairs under the Articles, Jay was forced to retire through ill-health in the winter months of 1787 - 88.

Hamilton wrote fifty-one of the papers, Madison twenty-six and Jay five. The remaining three were penned by Hamilton and Madison jointly. The collection was printed first in the *Independent Journal* and then in at times up to four New York newspapers simultaneously. It was published continuously from 27 October 1787, a month and a half after the close of the Convention, to 4 April 1788, the first seventy-seven articles appearing at the prodigious rate of two or three a week. The entire collection was subsequently reprinted in two bound volumes in March and May of 1788³³⁵.

It is important to sound a note of caution on interpreting *The Federalist Papers*. Hampsher-Monk elaborates several reasons for this. In addition to possible problems of coherence resulting from co-authorship, he emphasises the pragmatic nature of the articles as propaganda, commenting that

‘... the authors’ approach to issues was determined by how salient they were in the public debate. As a result they often defended positions they themselves had opposed in the convention and used

³³⁴ Kramnick makes clear that it is Madison we have to thank for providing a detailed record of the Philadelphia Convention’s proceedings. Since the meetings were held in camera, his notes afford succeeding generations the only consistent way of piecing together an account of actual events. Madison’s preparation prior to the Convention was similarly meticulous, working throughout the winter and spring of 1786 - 87 to gather material, build up his own knowledge and draft essays for circulation among the delegates. He had fellow Virginian Thomas Jefferson, then Ambassador in Paris, send over ‘... crates of books on world governments, the law of nations, history and political theory’. The reason that the ideas underpinning the Constitution, and as subsequently rationalised in *The Federalist Papers*, appear so well grounded in both theory and past practice seems evident. Kramnick, *op. cit.*, pp.29, 31.

³³⁵ Volume I (Numbers 1 to 36) was published on 22 March and Volume II (Numbers 37 to 85) on 28 May. The eight outstanding articles were then published individually afterwards between 17 June and 15 August. *Ibid.*, p.76.

arguments they themselves rejected because they hoped (or knew) they would be persuasive³³⁶.

This, he suggests, makes an appreciation of the context of the time central in understanding the true meaning of the work. It also serves to place a caveat upon making too direct a link between *The Federalist Papers* and the reasoning of the Constitution's framers, as the American judiciary has subsequently been apt to do³³⁷. The former was, after all, concerned to build an argument and make a case on one side of a heated debate against a vocal, if more weakly organised, opposition³³⁸. As Hampsher-Monk puts it:

‘... Practical politicians and lawyers too, believed - and continue to believe - that it helped them to understand the reasoning of the framers of the American constitution, the first, and longest lived, modern, written constitution. Whether it does so or not is another matter. *The Federalist* was written to persuade a contemporary electorate, not to clarify for posterity the intentions of the founders’³³⁹.

Yet Madison and Hamilton had both participated in the Philadelphia Convention (the former more so than the latter). Indeed, Madison had played a central role in deliberations through his drafting of the Virginia Plan, which had formed the basis for

³³⁶ Hampsher-Monk, *op. cit.*, p.200.

³³⁷ Patrick, Pious and Ritchie note that, following Chief Justice John Marshall's several rulings around 1820 that *The Federalist Papers* were entitled to great respect in the interpretation of the US Constitution, it has become standard procedure in American law and politics to make reference to the text in this connection. They say: ‘... Ever since the founding period, lawyers, judges, politicians, and scholars have used *The Federalist* to guide their decisions about issues of constitutional government’. Patrick, John, Pious, Richard and Ritchie, Donald *The Oxford Guide to the United States Government* (Oxford University Press, 2001), p.237.

³³⁸ The so-called ‘Anti-federalists’ published articles attacking the Constitution. Major contributions to the debate came from authors writing under the pen-names Brutus, Cato, Centinel and A Federal Farmer.

See Storing, Herbert (Ed.) *The Complete Anti-Federalist* (University of Chicago Press, 1981).

³³⁹ Hampsher-Monk, *op. cit.*, p.200.

the final text³⁴⁰. Little wonder, then, that he later considered that *The Federalist Papers* may

‘... fairly enough be regarded as the most authentic exposition of the text of the Federal Constitution, as understood by the Body which prepared and the authority which accepted it’,³⁴¹.

As far as problems of co-authorship are concerned, Kramnick believes the concern here is more imaginary than real (a view echoed by Patrick, Pious and Ritchie³⁴²), though this remains a point of contention among scholars. He says:

‘... “Publius” spoke in one voice despite the varied personalities and contrasting styles of the three individuals who contributed to the persona, and despite the future dramatic falling-out of Hamilton and Madison. Between October, 1787, and June, 1788, the three authors were of one mind, as they had been throughout the 1780s. A consistent perspective informs all the contributions to *The Federalist*: the manifest inadequacy of the Confederation and the self-evident desirability of a national solution. Each of the three writers pursued these common themes in areas that particularly interested them. Hamilton wrote of an energetic and vigorous state. He wrote of taxes, war, armies and the Presidency. Madison was preoccupied with the institutionalization of checks and balances and with curbing legislative supremacy. Jay, in his more limited role, wrote of foreign affairs’,³⁴³.

Hampsher-Monk is probably correct to stress the importance of a full understanding of context in reading and interpreting *The Federalist Papers*; but the problems encountered here do not seem insurmountable. If tactical arguments were deployed in the text on an occasional basis from purely pragmatic motives, the main themes and arguments concerning the principles animating the Constitution do not appear to have been compromised in their essentials.

³⁴⁰ Kramnick, *op. cit.*, p.32.

³⁴¹ Cited in Kramnick, *op. cit.*, p.81.

³⁴² Patrick, Pious and Ritchie, *op. cit.*, p.236.

³⁴³ Kramnick, *op. cit.*, p.79.

Of relevance to our concern in this thesis is one particular instance of apparent confusion in the body of the text, stemming from co-authorship, related to identifying the character of the novel entity that had been created. As we shall shortly uncover, the conceptual change instituted would be accompanied by some seemingly inconsistent argumentation - perhaps only natural, as the meanings of terms began to shift and move away from their earlier established foundations.

II. Starting Assumptions of the Founding Fathers

To make sense of the argument made in *The Federalist Papers* concerning the evolution that occurred at Philadelphia, it is important to establish clearly what was the initial set of starting assumptions regarding political forms held by the founding fathers. To this end, it is imperative to site oneself in the period and grasp the then still primitive state of political science as a discipline. One among the framers' own acknowledgement of the then '... infancy of the science of constitutions and confederacies' prior to the Philadelphia experiment has already been noted. It is only with a full appreciation of the early concepts and terminology prevailing in the late eighteenth century that *The Federalist's* discussion of what took place can be properly interpreted and followed.

Allied to indivisible sovereignty being the dominant philosophy of the age, political theory in that era had focussed principally on illuminating the nature of the State. This was in the context of the grip of the old Holy Roman Empire having gradually weakened in Europe and power having become centralised in the hands of monarchs³⁴⁴. Only very rarely had theorists touched upon wider forms of relationship that might exist *among* States. Two scholars who did, however, albeit briefly, were

Pufendorf and Montesquieu. The latter seems to have been well known to the American framers, his ideas being referenced to substantiate certain key arguments in *The Federalist Papers*. The writings of both authors shed light upon mankind's basic perspective on the world of political structures beyond the nation State prevailing up to 1787, and will be considered here in turn.

For Pufendorf, writing in *The Law of Nature and Nations (De Jure Naturae et Gentium)* (1672), political structures could be divided into two forms: 'regular States' and 'systems of States'. Of the former category he says:

‘... There are but three forms of a regular state, based upon the subject proper of the supreme sovereignty, according as that subject is one simple person, or one council, composed of a few, or of all the citizens’³⁴⁵.

Thus, the three forms of regular State he identifies are respectively monarchy, aristocracy and democracy; and those who hold the ‘reins of government’ are the monarch, the nobles and the people.

For his second category, systems of States, Pufendorf provides the following definition:

‘... We speak of systems of states when more than one are so held together by some special and strict bond that they appear to form one body, each of whose members, however, retains supreme sovereignty over its own affairs’³⁴⁶.

He attempts to reconcile this bipartite schema with a third type of structure observed in practice - that of the ‘irregular State’, defying classification by the traditional axiom

³⁴⁴ Karmis and Norman, *op. cit.*, p.25.

³⁴⁵ Cited in Karmis and Norman, *op. cit.*, p.35.

³⁴⁶ *Ibid.*, p.40.

of sovereignty (the two examples he gives being the Roman Republic and the Germanic Empire³⁴⁷). Of this apparently paradoxical class, he says:

‘... in general it should be observed that they vary from a regular state in that not everything appears to proceed from one soul and will, nor is each and every person to be controlled by virtue of sovereignty. And they differ from systems in that they are not, like these, composed of distinct and perfect states’³⁴⁸.

If we ignore for purposes of simplification the last category, which is an arguably incoherent form pre-dating the advent of the ordering notion of sovereignty, we may illustrate Pufendorf’s mental framework of basic political forms visually as in Figure 13 below. We may note that since the concept of Statehood underlies each form situated along the pathway, being its organising principle, the framework elaborated can more strictly be considered to represent ‘basic political forms founded on the State’.

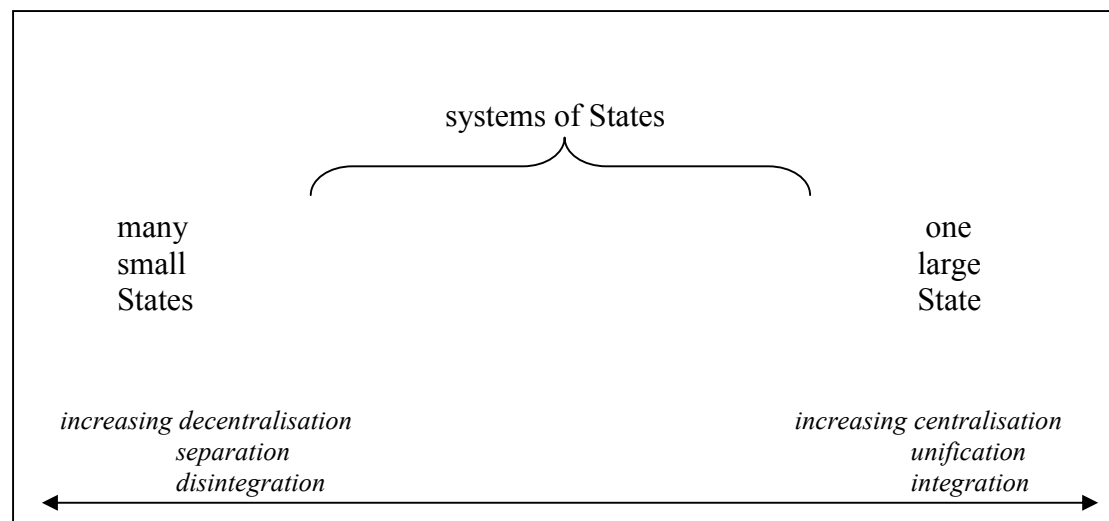


Figure 13 - Pufendorf’s Framework of Basic Political Forms

³⁴⁷ Pufendorf is perhaps best remembered for his characterisation of the Imperial Germany of the seventeenth century as a ‘monstrosity’, when writing under the pseudonym Severinus de Monzambano in *The Constitution of the German Empire (De Statu Imperii Germanici)* (1667): ‘... We are therefore left with calling Germany a body that conforms to no rule and resembles a monstrosity’.

Cited in Hueglin, Thomas *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfrid Laurier University Press, 1999), p.114.

³⁴⁸ Cited in Karmis and Norman, *op. cit.*, p.35.

In Pufendorf's worldview, if the few anomalies are excluded, there are but two possible types of political structure: the State and the system of States. Both are based upon the 'supreme sovereignty' of the State. The system of States is the most integrated structure of unification that is envisaged at this time, short of complete absorption of the many small unitary States into a single large unitary State; hence, it is shown to occupy the entire centre spectrum of the diagram³⁴⁹.

Turning now to Montesquieu, this author was the most important political thinker in France in the mid-eighteenth century³⁵⁰. As he was writing only a few decades prior to the Philadelphia Convention, it is unsurprising that of the two men his more recent works appear to have had the greater influence upon the American mind³⁵¹. His *The Spirit of the Laws (L'Esprit des Lois)* (1748) nevertheless presents a similar worldview of political structures to the earlier writings of Pufendorf.

³⁴⁹ Interestingly, Pufendorf does begin to consider what might be viewed today as derogations from full State sovereignty, when describing the class of system within 'systems of States' characterised as '... several states bound to each other by a perpetual treaty'. He says of this class, usually formed for defensive purposes, there is common agreement that '... one or other part of the supreme sovereignty should be exercised at the consent of all'. Hence a clear restriction on State sovereignty is here implied. The idea of a *division* of sovereignty, thus tentatively expressed, finds further reflection in his later observation that '... it is convenient that the individual states reserve for themselves liberty in the exercise of those parts of supreme sovereignty, the manner of conducting which is of little or no interest, at least directly, to the rest'.

Although what Pufendorf describes here appears to be pushing beyond the strong end of a league, his analysis nevertheless remains, in his own words, a theory of the unitary sovereignty of 'perfect states'. The idea of finding a divisible concept of sovereignty in Pufendorf should thus probably be discounted, as Forsyth confirms: '... The main issue which requires to be clarified ... (in Pufendorf's doctrine concerns) ... sovereignty. Did he think that in such a union sovereignty was divided? In answering this it is worth stressing first that Pufendorf, on the matter of sovereignty, stood in succession to Bodin and Hobbes ... For him the normal, or what he called the 'regular' state flowed outwards from a single centre ... (In a system of states,) ... the exercise of a part of sovereignty - the power of war and peace - was clearly made dependent on the consent of all, but sovereignty in the ultimate simple and indivisible sense was not renounced'.

As Forsyth seems to suggest here, Pufendorf's view can probably best be encapsulated in the idea that, while sovereignty itself in its ultimate sense is understood to be indivisible, the exercise of the powers flowing from sovereignty can be divided.

Ibid., pp.43-4.

Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), p.84.

³⁵⁰ Karmis and Norman, *op. cit.*, p.53.

³⁵¹ *Ibid.*, p.53.

In an often neglected argument, though one highlighted by the authors of *The Federalist Papers*, Montesquieu advocates that States join together in a model akin to Pufendorf's system of States to form a 'confederate republic', as a solution to the problem that 'democracies' tend to become corrupted beyond a certain size (he means here direct democracy of the Athenian type). As Karmis and Norman note, for examples of ideal confederate republics Montesquieu clearly has in mind the ancient Greek confederations of city-States³⁵². They understand his rationale for the form as being that it has the virtue of combining '... the best of small states with the best of large states, avoiding the disadvantages of both'³⁵³. Montesquieu makes the case in the following way, arguing that while small States are militarily too weak to survive, large States of the democratic or aristocratic type are prone to corruption, in-fighting and anarchy:

'... If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection. To this twofold inconvenience democracies and aristocracies are equally liable, whether they be good or bad. The evil is in the very thing itself, and no form can redress it. It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic. This form of government is a convention by which several small states agree to become members of a larger one, which they intend to establish. It is a kind of society of societies, that constitute a new one, capable of increasing by means of further associations, till they arrive at such a degree of power as to be able to provide for the security of the whole body'³⁵⁴.

³⁵² *Ibid.*, p.53.

³⁵³ *Ibid.*, p.53.

³⁵⁴ Cited in Karmis and Norman, *op. cit.*, p.55.

The Federalist Papers make direct appeal to Montesquieu - hailed as ‘the oracle’³⁵⁵ - when attempting to identify a definition of federalism, Hamilton concluding in *Federalist No. 9* that ‘... the definition of a *confederate republic* seems simply to be an “assemblage of societies,” or an association of two or more states into one state’³⁵⁶. This he uses as an important plank in constructing his key argument that the new US Constitution retains the essence of the federal form.

Yet, elsewhere Madison wholly rejects Montesquieu’s claim that democratic government can only function in small republics. The reliance on Montesquieu is therefore only partial. Madison instead argues that through representative rather than direct democracy, republican government is in fact well-suited to operate over a wide geographic extent³⁵⁷.

As concerns the nature and location of sovereignty within his confederate republic, Montesquieu is not completely clear, seeming to imply the creation of a larger State whilst simultaneously that the smaller units also remain States. It seems most likely that Montesquieu intended a Pufendorffian view - a system of States as in Figure 13 above - with the internal sovereignty of the constituent States remaining undisturbed,

³⁵⁵ Madison, Hamilton and Jay, *op. cit.*, No. 47, p.303.

³⁵⁶ The words ‘assemblage of societies’ and ‘society of societies’ are different translations of the same phrase. In Montesquieu’s original French it was ‘*société de sociétés*’.

Madison, Hamilton and Jay, *op. cit.*, No. 9, p.122.

Montesquieu cited in Diamond, Martin ‘The Federalist’s View of Federalism’ in Benson, George (Ed.) *Essays in Federalism* (Institute for Studies in Federalism, 1961), pp.30-1.

³⁵⁷ In *Federalist No. 14* (‘An Objection Drawn from the Extent of Country Answered’), Madison makes the point succinctly:

‘... The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, and applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is that in a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents. A democracy, consequently, must be confined to a small spot. A republic may be extended over a large region’.

Madison, Hamilton and Jay, *op. cit.*, No. 14, p.141.

fitting in with the received wisdom of the age. For he says, when discussing the worst case scenario of break up:

‘... The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty’³⁵⁸.

Majone supports this reading of Montesquieu, seeing the power to secede from his confederate republic as ‘... a fully acknowledged right of every member state’³⁵⁹.

This, then, appears the general state of political theory prior to the time of the great American experiment at the end of the eighteenth century. The understanding of federalism is consistent with the secular root in the word *foedus* meaning a treaty, pact or agreement, identified in Chapter 4, and referring simply to a diplomatic bond of mutual faith or trust between sovereign entities. This impression is reinforced by the writings of Locke, the author dominating American political thought throughout the revolutionary period. As Hampsher-Monk observes, in his *Two Treatises of Government* (1689), he had

‘... defined the “federative” power to be that which a state exercised externally in relation to other states, through treaty, war, etc.’³⁶⁰.

In his view, a federal government could simply

‘... be thought of as one which derived from a treaty amongst states, as well as one that dealt with the foreign policy of the resulting entity’³⁶¹.

³⁵⁸ Cited in Karmis and Norman, *op. cit.*, p.56.

³⁵⁹ Majone, Giandomenico ‘Federation, Confederation, and Mixed Government: A EU - US Comparison’ in Menon, Anand and Schain, Martin (Eds.) *Comparative Federalism: the European Union and the United States in Comparative Perspective* (Oxford University Press, 2006), pp.142-3.

³⁶⁰ Hampsher-Monk, *op. cit.*, p.232.

³⁶¹ *Ibid.*, p.232.

Echoing Majone's perspective, Hampsher-Monk goes on to bring out the crucial point concerning the source of final or ultimate authority, which might be thought to constitute the essence of sovereignty, that follows from this understanding. Right up to the time of Philadelphia, he says,

‘... “Federal” and its cognates had referred, as in Locke’s *Second Discourse*, to an attribute of a state’s authority - that of engaging in treaties (*Foedera*) with others; and federations were collections of states which had used (and might be thought still to retain) this power in uniting themselves’³⁶².

So in all federal relationships, then, any power a State had ceded it was its right to take back. For the State was seen as the sole (‘sovereign’) source of all authority - and each State recognised this quality amongst its peers, on a basis of reciprocity. Sawyer confirms this appreciation. In all associations up to that period, he says,

‘... the associating states usually claimed the right to qualify or withdraw their participation at any time, and political theory from the sixteenth century on tended to strengthen the basis for such claims by treating the power of retraction as an inevitable and indestructible aspect of the possession of “sovereignty”, which it was generally agreed remained with the associating states and did not pass to the common authority’³⁶³.

Supplementing Pufendorf, Montesquieu and Locke, we may also consider as a fourth author the lesser-known Vattel, whom Wood sees as influencing many in America at around this time. In his *The Law of Nations (Droit des Gens)* (1758), Vattel writes:

‘... several sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state. ... The deliberations in common will offer no violence to the sovereignty of each member’³⁶⁴.

³⁶² *Ibid.*, p.199.

³⁶³ Sawyer, Geoffrey *Modern Federalism* (Watts, 1969), pp.8-9.

³⁶⁴ Cited in Wood, Gordon *The Creation of the American Republic 1776 - 1787* (University of North Carolina Press, 1969), p.355.

As now seems clear, therefore, all systems of States up to 1787, however conceived, were understood to be in nature compacts between wholly sovereign and independent entities. Whatever depth and permanency was sought from such relationships, however far they pushed at the limits of a league, the sovereignty of the constituent parts was never thought to have been compromised; and a ‘federal’ bond was always considered to be as revocable as it was bestowable (i.e. at will). In neither respect was the essence of State sovereignty believed to have been transgressed.

III. The Invention of Modern Federalism at Philadelphia: a ‘Compound Polity’

We are now in a position to start investigating the evolution that occurred in America in 1787, beginning with the conceptual aspect. One of the clearest expositions of what happened at this time from the perspective of mutating concepts and terminology is provided by Diamond, and so we will begin by following the thread of his logic at some length here.

Diamond’s point of departure is to establish the modern understanding of federalism. He sees the essential federal characteristic as today thought to lie in

‘... “a division of political power” ... between member States and a central government, each having the final say regarding matters belonging to their respective sphere’³⁶⁵.

This appears similar to Wheare’s definition of the ‘federal principle’ (see page 50) - although he makes no direct reference to this author in this regard. With his core idea now established, Diamond is ready to lay the groundwork for his analysis of the American case. He does this by advancing a tripartite schema of political structures:

³⁶⁵ Diamond, *op. cit.*, p.22.

‘... There is a corollary to this sort of definition which has also come to be generally accepted. All college students are now taught that, in this respect, there are three kinds of government - confederal, federal, and unitary (national) - and that the United States exemplifies the middle term. This familiar distinction illuminates the definitions of federalism. In this view, a confederacy and a nation are seen as the extremes. The defining characteristic of a confederacy is that the associated states retain all the sovereign power, with the central body entirely dependent legally upon their will; the defining characteristic of a nation is that the central body has all the sovereign power, with the localities entirely dependent legally upon the will of the nation. In this view, then, federalism is truly the middle term for *its* defining characteristic is that it modifies and then combines the defining characteristics of the other two forms. A *federal* system combines states which *confederally* retain sovereignty within a certain sphere, with a central body that *nationally* possesses sovereignty within another sphere; the combination creates a new and different thing to which is given the name federal. To this statement of the modern view of federalism - that the United States is the example of the federal division of sovereignty, a form lying between and combining the confederal and national extremes - must be added only the following. It is further thought that the invention of federal government was the great contribution of the Founding Fathers to the art of government’³⁶⁶.

Diamond’s location of ‘modern federalism’ as the central form in this three-fold schema, between the ‘confederal’ and the ‘unitary’ (or ‘national’) forms, is illuminating. This is, indeed, the current mainstream understanding of the nature of federalism within the discipline, as was noted in Chapter 2 (see pages 50 to 61).

Diamond also identifies here the common conception that the American framers invented federalism. This is actually, he believes, a misconception. Whilst they can with justification be said to have invented *modern* federalism, as concerns the broader historical trajectory that the concept has followed, the truth is more accurately that they *reinvented* the federal form. He goes on to make the latter point a central part of

³⁶⁶ *Ibid.*, p.22.

his argument, though not using the specific word; he simply observes that the term ‘federal’ had an ‘older meaning’³⁶⁷.

In order to support this assertion, Diamond first sets about establishing that prior to 1787 the terms ‘confederal’, ‘federal’ and ‘league’ had been in current usage as synonyms. He draws from the dictionaries that he believes Hamilton, Madison and their readers used, in order to provide evidence of what was ‘... the common and traditional view of federalism’³⁶⁸ prevailing in the late eighteenth century. He finds a single idea:

‘Federal ... from foedus (faith) ... Relating to a league or contract.
Federacy ... A confederate.
Federation ... A League.
Federative ... Having power to make a league or a contract’³⁶⁹.

He then reinforces the point by reference to Dr. Johnson’s dictionary and *The Federalist Papers*:

‘... Dr. Johnson makes clear that the then common understanding of federalism involved no distinction between confederation and federalism. *The Federalist* similarly makes no such distinction. This is ... true of the entire work; federal and confederal are used as completely interchangeable terms. *The Federalist* agrees fully with the then common usage ... in seeing but one kind of federal mode. ... the traditional view ... (is) ... that the federal mode is characterized by a contractual, voluntary relationship of States and has, therefore, the status of a league’³⁷⁰.

³⁶⁷ *Ibid.*, p.38.

³⁶⁸ *Ibid.*, p.25.

³⁶⁹ Karmis and Norman find similar results in other dictionaries of the period. The 1798 edition of the *Dictionnaire de l’Académie française* defines *fédération* and *confédération* in identical terms, the former appearing as: ‘Alliance, union. See confederation’. The first American dictionary (*Webster’s* 1856 edition) ‘... defines both confederation and federation as a “compact” or “league” between “states or nations”’; moreover, in both cases, the United States of America is given as an example’.
Ibid., p.25.

Karmis and Norman, *op. cit.*, p.6.

³⁷⁰ Diamond, *op. cit.*, p.26.

This conception of the initial meaning of federalism in America clearly fits with the understanding of earlier authors like Pufendorf, Montesquieu, Locke and Vattel identified above. Perhaps rather surprisingly, in view of the central part that *The Federalist Papers* is widely thought to have played in the genesis of modern federalism, it is indeed also the case that this is the sole application of the term found in this text. The reason is, of course, that the terminological transition had not then taken place. It would follow behind the conceptual invention discovered at Philadelphia. So the text of *The Federalist Papers* exhibits only the older meaning of federalism.

Two brief examples will serve to illustrate the fact of a single federal mode operating throughout the text, with all of the terms confederation, confederacy, federation, federacy and league (together with their related adjectives and adverbs) being used in one and the same sense. *Federalist No. 39* sees opponents of ratification of the Constitution arguing that its framers

‘... ought with equal care to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states’³⁷¹.

An extract from *Federalist No. 6* reads:

‘... NEIGHBOURING NATIONS ... are naturally ENEMIES of each other, unless their common weakness forces them to league in a CONFEDERATE REPUBLIC’³⁷².

Now equipped with a better understanding of the terminology prevailing up to and during the Philadelphia Convention (and even, it turns out, quite some way beyond it), we can fully comprehend the main thrust of Diamond’s argument. He observes that a

³⁷¹ Madison, Hamilton and Jay, *op. cit.*, No. 39, p.256.

³⁷² Madison, Hamilton and Jay, *op. cit.*, No. 6, p.108.

change in usage of the term ‘federal’ (as distinct from ‘confederal’ and ‘league’) occurs at some stage after the Convention has given birth to its novel political form; and thus there was, he says, an older sense to the term that had existed prior to the great experiment. It is precisely to emphasise this point that he entitles his paper ‘The Federalist’s View of Federalism’. His argument here appears incontrovertible.

It appears to be Diamond’s central contention that it is important to ‘rediscover’ this earlier meaning of the term, conceived as more genuine for being the original root. Whilst I follow Diamond as far as identifying that a change has taken place (it does seem plain that the meaning of federalism underwent a metamorphosis), I part company with him when he sees advantages in undoing this conceptual and terminological change - even if such a rewinding of the clock were at all a plausible proposition. The question of applying a more decentralised approach to the art of federal government is, however, another matter entirely, and one given expression in much scholarly thought and practical policy implementation subsequent to Diamond’s time of writing in the early 1960s. Nevertheless, this remains a very different thing to suggesting that federalism, in conceptual terms, should revert to its older meaning as a league among sovereign States.

In spite of this weakness, Diamond’s basic observations from the literature of the period appear sound. He justifies his reasoning by pointing in particular to one passage from Madison in *Federalist No. 39*, which illuminates the whole matter. He says:

‘... Now what is strange is this. *The Federalist*, the great contemporary exposition of the Constitution, emphatically does *not* regard the Constitution as establishing a typically federal, perhaps not even a primarily federal system of government. *The Federalist* regards the new American Union as departing significantly from

the essentially federal character. The decisive statement is: “The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both.” ... our now familiar tripartite distinction was completely unknown to the men who made the Constitution. For them, there were but two possible modes: confederal or federal as opposed to unitary or national. In short, they had a very different understanding than we do of what federalism is. ... We now give the single word federal to the system the framers regarded as possessing both federal and national features. This means we now deem as a unique principle what *The Federalist* regarded as a mere compound³⁷³.

This is a very significantly altered light in which to understand the evolution that took place at Philadelphia. We can interpret it as shifting the structure originally styled interchangeably confederal, federal or league (i.e. Pufendorf’s ‘system of States’ - see Figure 13 on page 168) to one side in mankind’s mental framework of basic political forms, in revealing that a ‘compound polity’ combining federal and national features may exist³⁷⁴. It is this new structure that is from this point forwards understood to occupy the middle ground along an integratory pathway, as remodelled in Figure 14:

³⁷³ Diamond, *op. cit.*, pp.22-3.

³⁷⁴ *Federalist No. 62* offers an example of the use of the specific word ‘compound’ in the following: ‘... it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation’. Madison, Hamilton and Jay, *op. cit.*, No. 62, p.365.

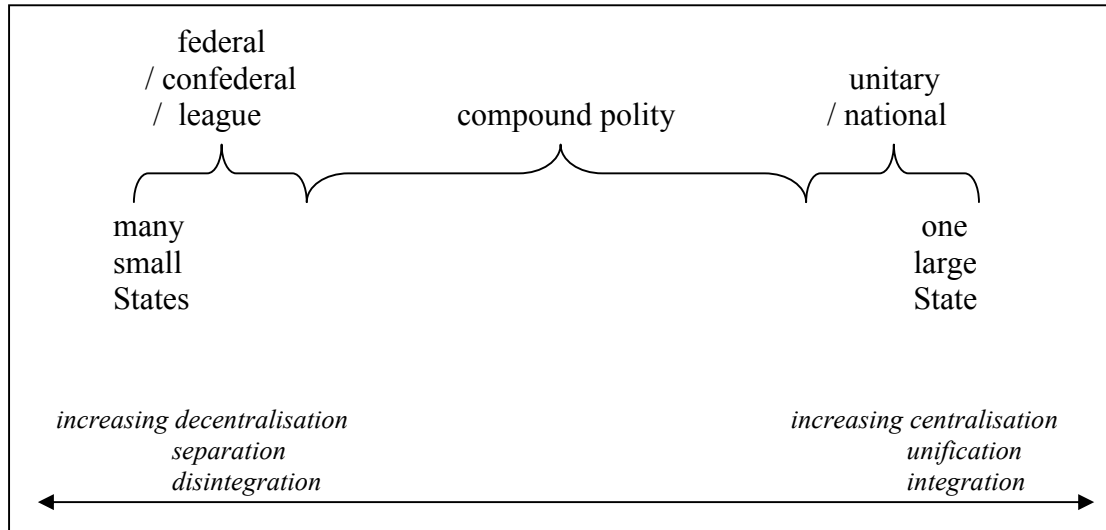


Figure 14 - The Framework of Basic Political Forms Post-Philadelphia

Gradually over time, in the years following the conceptual evolution at Philadelphia, the word ‘federal’ would come to encapsulate this new form. It would move from representing ‘old’ federalism to ‘modern’ federalism and thus would shift to the right in the diagram above - whilst the meanings of ‘confederal’ and ‘league’ would remain unchanged. It is in this sense that federalism was reinvented in America, as illustrated in Figure 15³⁷⁵.

³⁷⁵ Wheare identifies this change of nomenclature occurring. He identifies two possible options for the political scientist in seeking to come to terms with the evolution that took place at Philadelphia - a broadening of the federal concept or a wholesale shift. In the end, he selects the latter: ‘... The choice of the student is therefore to say one of two things. He may say that “federal” has widened its meaning since 1787 so far that it includes both principles of association - that of 1777 and that of 1787. Or, he may say, as I do, that since these two principles are distinct and different principles, and that since the United States is nowadays generally regarded as a federal government, it is appropriate to confine the use of the term “federal” to that principle embodied in the government of the United States under the Constitution of 1787’.

Clearly, the two ‘principles of association’ to which Wheare refers here reflect the difference between a league among States and a compound polity, the move from a relationship of ‘subordination’ to one of ‘co-ordinate’ status.

Wheare, Kenneth *Federal Government* (Oxford University Press, 1963), pp.4-5, 11. Originally published in 1946.

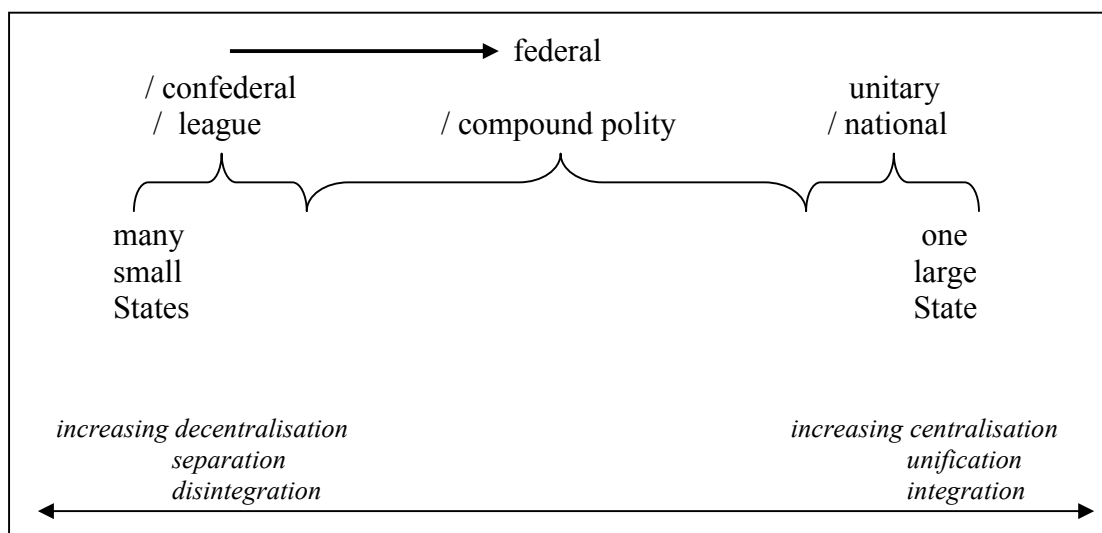


Figure 15 - The Framework of Basic Political Forms Post-Philadelphia (with Language Adjusted)

At this point in the analysis, a clarification of the categories employed in Figures 14 and 15 is helpful. For ease of understanding, the terms used in both diagrams thus far have followed the tripartite schema suggested by Diamond. However, it is argued here that it is appropriate to conceive of Diamond's 'unitary' or 'national' category as the mirror image of the league or system of States form, thus being more accurately styled a 'system of devolved government within a unitary State'. For a conditional delegation of powers downwards within a unitary State must be the logical counterpart of a conditional delegation of powers upwards in a league among States. This allows for a schema that is both rational and balanced in its symmetry, with the compound polity, the genuinely mixed construction, seen to occupy the central space. Diamond himself hints at this interpretation, though this one of his 'extremes' remains styled the 'unitary State'. For he mentions the existence of 'localities' (see the quotation on page 175); and if these are dependent on the will of the State (as he says), the implication must be that they are entrusted with a conditional grant of powers downwards, like the central organs of a league are upwards.

It also appears more sensible to cease referring to ‘national’ as the large State terminal end-point of an integratory pathway. For although this was, indeed, the potential limit in the American instance, it may not always be so. It is certainly possible to envisage a unitary State which is composed of two or more nations (even if today most such examples are moving in the direction of federal States). If we give effect to these two adaptations, the fully-amended schema now becomes as shown in Figure 16.

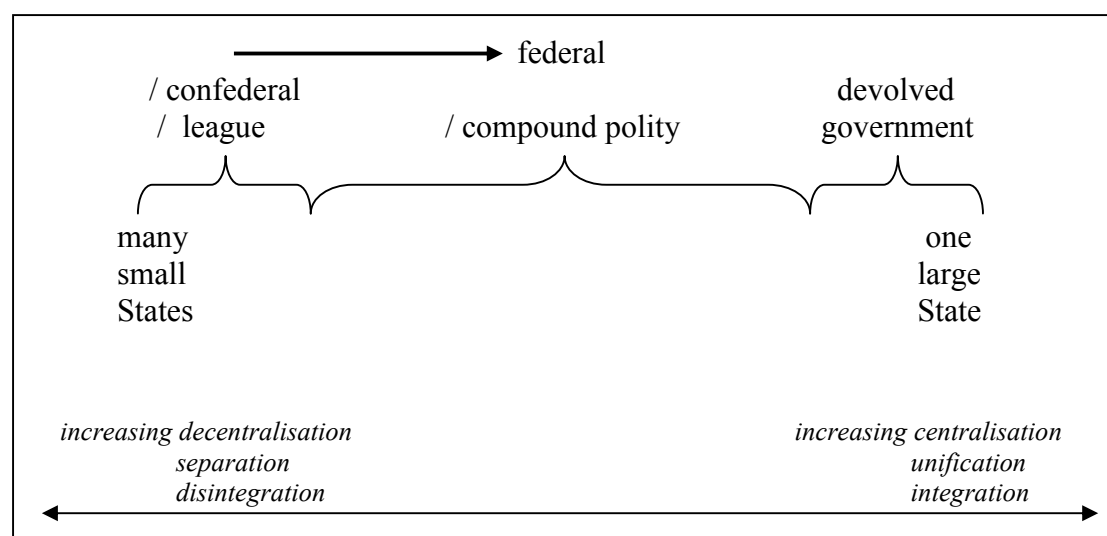


Figure 16- The Framework of Basic Political Forms Post-Philadelphia (Fully-amended)

Having to this point traced the broad outlines of the conceptual aspect of the evolution that happened at Philadelphia, we turn to consider its practical component.

We can now appreciate that the basic initial choice the framers faced, as they saw it, when gathered in the Convention, appeared to lie between the two equally unpalatable alternatives of: (i) a confederal or federal structure (i.e. a league, as had already been tried under the Articles of Confederation); or (ii) complete or ‘national’ consolidation within a single unitary State. The trick would be to create an intermediate structure of

government combining elements from both forms. The ‘great compromise’³⁷⁶ in the negotiations that took place among the several States, in this respect, came to turn crucially on the composition of the Senate, as Kramnick sees Madison confirming:

‘... The great contest in the Constitutional Convention, he wrote, was not over the degree of power to be granted to the central government, but rather “on the rule by which the states should be represented and vote in the government”’³⁷⁷.

The Convention had taken the so-called ‘Virginia plan’, presented by Edmund Randolph (Madison’s draft), as its basic working document. This proposal envisaged a bicameral legislature with a popular chamber and a chamber of the States, both constructed on a basis of State representation proportional to population. An alternative counter-proposal, the ‘New Jersey plan’, favoured by the smaller States, was put forward at a later stage by William Paterson of that State. This sought to preserve the principle of equality among the States, through a unicameral national legislature with each State possessing one vote (i.e. effectively the old Congress). The deadlock between these opposing visions was broken by what became known as the ‘Connecticut compromise’, a plan put forward by Roger Sherman. Under this proposal, the popular chamber, the House of Representatives, would be elected according to population, whilst in the second chamber, the Senate, the States would have an equal representation of two senators each regardless of size.

In this important way, the two contrasting principles of representation, proportionality and equality, were for the very first time combined. Equally critical to the birth of the compound polity and modern federalism, however, was the new arrangement by which not only the State governments, but also now the national government, acted

³⁷⁶ Plano, Jack and Greenberg, Milton *The American Political Dictionary* (Western Michigan University Press, 1962), p.19.

directly upon the citizen. Correcting the principal structural defect in the Articles, this gave rise to a wholly new context in which the private individual had a straight-line relationship with not one but two levels of government. Writing in *Democracy in America* (1835), de Tocqueville illuminates this aspect of the new entity for us with clarity:

‘... This Constitution, which may at first sight be confounded with the federal constitutions which preceded it, rests upon a novel theory, which may be considered as a great invention in modern political science. In all the confederations which had been formed before the American Constitution of 1789, the allied States agreed to obey the injunctions of a Federal Government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American States which combined in 1789 agreed that the Federal Government should not only dictate the laws, but that it should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this alteration produced the most momentous consequences. ... In America, the subjects of the Union are not States, but private citizens: the national Government levies a tax, not upon the State of Massachusetts, but upon each inhabitant of Massachusetts. All former confederate governments presided over communities, but that of the Union rules individuals; its force is not borrowed, but self-derived; and it is served by its own civil and military officers, by its own army, and its own courts of justice’³⁷⁸.

The sheer absence of precedent for what the founding fathers were doing at Philadelphia must not be overlooked. The State delegates were engaged in a game of bargaining not untypical of international negotiations today, whose outcome remains uncertain until the last moment; and the fruits of their labours were much more the result of pragmatic interest-based trade-offs than an exercise in theoretical purity. The ingeniously-balanced product of modern federalism was thus arrived at rather more by luck than by design.

³⁷⁷ Kramnick, *op. cit.*, p.33.

³⁷⁸ Tocqueville (de), Alexis *Democracy in America*, Vol. I (Schocken, 1961), pp.173-4. Originally published in 1835.

Seen in this light, perhaps it is understandable that the argument of *The Federalist Papers* on the question of the ‘federal’ character of the new Constitution should be a little murky (this is the area of inconsistency in the text mentioned above). For, quite simply, nothing like it had been seen before. Hamilton early in the series of articles, in *Federalist No. 9*, starts off by arguing that the Constitution remains firmly a federal text, by calling on Montesquieu:

‘... A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the States. ... The definition of a *confederate republic* seems simply to be “an assemblage of societies,” or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government’³⁷⁹.

Yet, in a later paper, *Federalist No. 39*, as was noted a moment ago, Madison is led to conclude that the Constitution represents a combination of the two principles, federal and national:

‘... The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both’³⁸⁰.

The divergence of views here appears marked. How can we best interpret the conflict? It serves well to keep in mind - as Hampsher-Monk cautions - that the papers were

³⁷⁹ Madison, Hamilton and Jay, *op. cit.*, No. 9, pp.121-2.

³⁸⁰ Madison, Hamilton and Jay, *op. cit.*, No. 39, p.259.

primarily a political tool, intended to fulfil the practical purpose of gaining rhetorical advantage. Whilst Madison's position appears the most rational, and is entirely consistent with the then existing state of political theory, recognition of the propaganda aspect helps us understand what Hamilton is trying to achieve. The authors of *The Federalist Papers* were engaged in a hard-fought battle with an opposition, which sought to derail ratification of the new Constitution. It was for this reason that they arrogated for themselves the title of 'Federalists' which had strongly positive connotations, when strictly-speaking the term belonged at that time to their opponents³⁸¹. The fact that they managed to achieve this coup - a early example of 'spin'³⁸² - put the newly-styled 'Anti-federalists' on the back foot from the start of the debate, the apparently negative (possibly even unpatriotic) overtones of their new labelling forcing them onto the defensive and making it hard for them to recover the initiative³⁸³.

Again, here, Diamond provides for us the appropriate context. There was a clear imperative, he observes, for the pro-ratification camp above all to satisfy the people of the several States, still cautious and highly conservative in defence of 'liberty' only a decade after Independence, that the Constitution did not create a single consolidated national government (i.e. a unitary State):

³⁸¹ Hampsher-Monk, *op. cit.*, p.199.

³⁸² Elazar describes the Federalists' appropriation of their opponents' term as a 'sleight of hand'. Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987), p.40.

³⁸³ Storing presents a counter-point to what he sees as the 'spirit of Federalist larceny' pervading the literature. By 1787, he argues, '... The term 'federal' had acquired a specific ambiguity that enabled the Federalists not merely to take but to keep the name'. In the period of the Articles, he says, the terms 'Federal' and 'Anti-federal' had been employed to characterise those for or against a strengthening of the first Union's institutions, and hence its capacity to act. He cites Bryan observing that '... The name of Federalists, or Federal men, grew up at New York and in the eastern states, some time before the calling of the Convention, to denominate such as were attached to the general support of the United States, in opposition to those who preferred local and particular advantages'. Use of the same expressions to refer to supporters and opponents of the new Constitution was, therefore, Storing asserts, simply a '... natural extension of the language ... (of the preceding years) ... which the Federalists fully exploited'. Storing, *op. cit.*, pp.9-10.

‘... Everything that *The Federalist* says about the federal aspects of the Constitution must be understood ... in the light of its great necessity: the demonstration that the Constitution should not be rejected on the grounds of inadequate regard for the federal principle’³⁸⁴.

Thus, in the light of the fundamental pre-requisite to prove, in the vital early phase of the political debate, that the text retained a federal character, we can now see what Hamilton is attempting to do: change the criteria by which federalism would be judged. Clearly, a new form of government was being created, but he was anxious to apply the old word ‘federal’, conveying decentralisation, to the new structure, in order to avoid the worse alternative that it be seen as a highly centralising ‘national’ consolidation into a unitary State (this was, admittedly, potentially the more misleading of the two conceptions).

In this we see the first ever movement towards a broadening of federalism, away from its original meaning as a league³⁸⁵. Burgess makes the point plain:

‘... It is important to remember that one purpose of ‘The Federalist’ was to attack the traditional understanding of federalism. It sought deliberately and (some would say) desperately to muddy the waters so that much less was required for a new political system to be deemed fully federal. Hamilton in particular

³⁸⁴ Diamond, *op. cit.*, pp.23-4.

³⁸⁵ Hamilton sets out on this path by identifying the two key criteria by which federalism was then thought to be determined: the principles of (i) legislation for the members in their collective capacities, and (ii) equality among the members in the common government. These are, indeed, the essential characteristics of a league.

To justify a broader usage of the term, he cites the Lycian confederacy as an example where such principles did not wholly apply and yet which was still thought of as ‘federal’. In support of this view, he makes reference to Montesquieu considering this polity an ‘excellent Confederate Republic’. From here, he proposes that the two criteria suggested are ‘... in the main, arbitrary ... (and) ... supported neither by principle nor precedent’. Exceptions such as Lycia, he says, ‘... serve to prove, as far as example will go, that there is no absolute rule on the subject’.

This is plainly a case of attempting to loosen the requirements for selection into a conceptual category - and hence a broadening of the concept itself. An alternative strategy would have been to leave the definition of ‘federal’, ‘confederal’ and ‘league’ unchanged, and christen a new label for the species of the hybrid compound polity (to include Lycia and America under the new Constitution). Clearly, however, this would not have had the same rhetorical advantages in the case immediately at hand; for, at times of turbulent change, it seems that man finds comfort and reassurance in pre-existing terms which he knows and with which he is already familiar. Madison, Hamilton and Jay, *op. cit.*, No. 9, pp.121-2.

was determined to create a federal test which the proposed new constitution could easily pass³⁸⁶.

With their essential point made and won early on, however, perhaps with some elements of stealth and bluntness of argument, the authors are prepared to concede later in the series of papers the more nuanced reality that the Constitution exhibits elements of both the federal and national character (Madison's argument), and apparently to abandon Hamilton's embryonic attempt at a redefinition.

Conclusions

In this second chapter on the American debate, we have considered the practical and conceptual aspects of the evolution that occurred at Philadelphia and was subsequently enshrined in the US Constitution of 1789. First, we identified the nature and role of *The Federalist Papers* as a tool of political debate, and thus as a work to be read today with an awareness of context. Secondly, we examined the starting assumptions of the founding fathers with regard to political systems and noted the original meaning of federalism as representing a league among sovereign States. Thirdly, we observed the agreement of a 'great compromise' at Philadelphia, combining two established modes of government, federal and national, to form a wholly novel third type: a 'compound polity'.

Time would show that the debate about the character of the new political order created was far from over upon completion of the ratification process. In fact, the journey to discover just how the compound polity would function and what it would mean in practice was only just beginning. It is a measure of the wholly uncharted

³⁸⁶ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.257.

nature of the territory into which Americans had stepped that even two of the Constitution's strongest supporters - Hamilton and Madison - would before long come to fall out dramatically, as their differing visions for the new polity would push them towards radically divergent positions as to how it should function. It is to the emerging split between the two camps they came to lead that we turn in the next chapter, Chapter 7, as we examine the slide towards Civil War and the eventual impact of this key event upon the development of modern federalism.

Chapter 7

The Impact of the American Debate (III)

The Civil War of 1861 - 65 appears to be a defining event in American political history. Yet it is one that has received relatively little mention in the literature on federalism in terms of how it fundamentally affected the character of the order. This seventh chapter seeks to address the weakness. To this end it is divided into four sections. The first section observes initial uncertainty over the nature of the entity emerging from the Philadelphia experiment. The second section identifies how, in this ambiguous setting, two rival and mutually-exclusive stand-points on the underlying political foundations of the Union were in the end invoked. The third section brings out how the eventual resort to force showed the idea of divided sovereignty, which had been thought central to the original bargain, to have been a fallacy. The fourth section sees the route to conceptual and terminological progress now unblocked, with America finally established as one particular variant of modern federalism: the modern federation or federal State.

I. Initial Uncertainty About the Nature of the Entity

Immediately after ratification of the US Constitution, the nature of the novel construction established remained uncertain. It was clearly a compound polity - what to modern eyes would justifiably be termed a 'federal polity' - in that it provided for a division of powers between two levels of government whose equality of status was entrenched within a constitutional framework. However, it was not in that period

proven beyond doubt to be a federation as we understand the term today (i.e. as meaning a single State, a federal State).

In parallel with this situation of conceptual limbo - and, indeed, a reflection of it - we find in the works of several authors of the period that the terminology associated with the evolving entity was also unable to move on until after the Civil War. There is thus exhibited, in the American case of integration, a time delay of almost a century between the initial creation of a political form and its final bedding-down in a settled conceptual and terminological framework.

Karmis and Norman point to this temporal mismatch when they say, of the dichotomy between the confederal and the federal, ‘... the *conceptual* distinction ... was established much earlier than the *terminological* distinction’³⁸⁷ (by this they mean that the general species of the compound polity was established, and distinguished from a league, quite some length of time before the terms confederation and federation eventually parted company, to allow the latter to come to describe the new entity - as in Figure 16 on page 182). Even as late as 1835, de Tocqueville confirms for us, no movement had occurred, and a way of characterising the new polity was then still to be found. As he makes plain in the passage below, the understanding prevailing at that time remained that the US was a compound of the federal and the national - identical to Madison’s characterisation in *The Federalist Papers* - being considered a hybrid of the two principal concepts pre-dating 1787 and unaltered from this starting point.

Also of relevance to our concern here, de Tocqueville muses upon the way mankind tends to deal with, and adapt to, new political discoveries. The normal course of events, he suggests, is a kind of muddling-through strategy initially, but in the end the

observed reality of evolved practice is put on a formal footing. This is evidently a less than ideal (or 'sub-optimal') approach; for although it 'gets things right' eventually, it could arguably have harmful consequences in the initial phase of ambiguity. Of topical concern to him is how to conceptualise the new American framework, then almost half a century old but still going unidentified. He compares the pre- and post-1787 structures and posits - correctly and with remarkable foresight - that a new labelling will eventually come:

'... The human understanding more easily invents new things than new words, and we are thence constrained to employ a multitude of improper and inadequate expressions. When several nations form a permanent league, and establish a supreme authority, which, although it has not the same influence over the members of the community as a national government, acts upon each of the confederate States in a body, this government, which is so essentially different from all others, is denominated a Federal one. Another form of society is afterwards discovered, in which several peoples are fused into one and the same nation with regard to certain common interests, although they remain distinct, or at least only confederate, with regard to all other concerns. In this case the central power acts directly upon those whom it governs, whom it rules, and whom it judges, in the same manner as, but in a more limited circle than, a national government. Here the term of Federal government is clearly no longer applicable to a state of things which must be styled an incomplete national government: a form of government has been found out which is neither exactly national nor federal; but no further progress has been made, and the new word which will one day designate this novel invention does not yet exist'³⁸⁸.

The solution, in time, of course, would be that the term 'federation' would strengthen meaning, to come to refer to this new form of compound polity, leaving behind its older association with the mere inter-governmentalism of a league. However, it would

³⁸⁷ Karmis, Dimitrios and Norman, Wayne (Eds.) *Theories of Federalism: a Reader* (Palgrave, 2005), p.6.

³⁸⁸ Tocqueville (de), Alexis *Democracy in America*, Vol. I (Schocken, 1961), pp.174-5. Originally published in 1835.

be another generation before this new terminology would finally take hold, awaiting first further conceptual clarification in the outcome of the Civil War³⁸⁹.

Entries from *Webster's Dictionary* published in 1856, a decade before this key turning point, suggest that even as late as seventy years after the innovation at Philadelphia the terms confederation and federation had still not yet definitively broken from their pre-1787 relationship as synonyms (see footnote 369 on page 176). As Thorpe points out, the 'old' language was common currency among Americans right up to 1861. The normal colloquial expression for the new entity throughout the pre-Civil War period, he observes, had simply been carried over unaltered from the time of the Articles, with the US remaining conceived in the plural:

‘... The phrase “confederated States” was the usual description of the Union during the first eighty-five years of its existence. Not until after the inauguration of Lincoln and the battle of Gettysburg did it become usual for men, even in public life, to speak of the United States as a Nation, and to drop the words confederate and confederacy, as descriptive of the Union. This use of Confederacy, instead of Nation, is repeatedly illustrated during the debates on the proposed amendment of 1861, and the use of Nation, instead of Confederacy, first became common in the debates in Congress on the enactment of the thirteenth, fourteenth and fifteenth amendments, in 1865 - 1868’³⁹⁰.

We detect the first signs of a theoretical advance emerging towards the end of the pre-Civil War period. Calhoun, whose *Discourse on the Constitution and Government of the United States* was published posthumously in 1851, clearly deploys a strengthened application of the word ‘federal’, moving beyond characterisation of the US as a hybrid of the federal and the national. The government of the US is, he says, ‘...

³⁸⁹ De Tocqueville also refers directly to the novel entity as a ‘new species of confederation’. This, it seems clear, in the light of his own words above, is simply an allusion to the older confederal model that had gone before (i.e. a league), in the absence of further conceptual or terminological progress - rather than any tentative initial attempt at remodelling terms and concepts on his part.

Ibid., p.175.

³⁹⁰ Thorpe, Francis *The Constitutional History of the United States* (Callaghan, 1901), pp.241-2.

Federal, on the one hand, in contradistinction to *national*, and on the other, to a *confederacy*³⁹¹. As Bennett notes, this ‘... definition of the term “federal” ... was slightly unlike any definition of the term that had previously been advanced’³⁹². Calhoun is certainly breaking new ground here; however, while his intention in this innovation appears to be to bring out the novelty of the creation of a genuine government, as compared with the mere ‘assembly of diplomatists’³⁹³ that had gone before under the Articles, the distinction is muddled somewhat as he insists that both a federal government and the government of a confederacy stand on the same bottom-up basis. He says: ‘... The term, “federal,” implies a league’; and ‘... federal, and confederated States, meant substantially the same thing’³⁹⁴. So the emerging trichotomy of forms is blurred by Calhoun’s own trenchantly decentralist States’ rights perspective.

A firmer theoretical distinction is found close to the start of the Civil War in Mill’s *Considerations on Representative Government* (1861). Mill has clearly read de Tocqueville. However, he departs from the latter’s conception of the modern America as an unidentified entity when making a comparative survey of ‘federal governments’ around the world, past and present, in choosing to include this polity within a now widening federal category. He uses the terms ‘federation’, ‘confederation’ and ‘federal union’ interchangeably, and all examples of an over-arching political order short of a unitary State are understood to be species within this single genus of the federal form. Thus, Mill’s federal concept is initially *enlarging*, rather than *shifting*. This he makes clear from the definition of federalism that he gives, which is seen to encompass both the forms of the league and the compound:

³⁹¹ Crallé, Richard (Ed.) *The Works of John C. Calhoun*, Vol. I (Appleton, 1851), pp.112-3.

³⁹² Bennett, Walter *American Theories of Federalism* (University of Alabama Press, 1964), p.132.

‘... There are two different modes of organizing a federal union. The federal authorities may represent the Governments solely, and their acts may be obligatory only on the Governments as such, or they may have the power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the German so-called Confederation, and of the Swiss Constitution previous to 1847. It was tried in America for a few years immediately following the War of Independence. The other principle is that of the existing Constitution of the United States, and has been adopted within the last dozen years by the Swiss Confederacy. The Federal Congress of the American Union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals’³⁹⁵.

No sooner has he established this definition, however, than he proceeds to denigrate the looser portion of the federal frame he has set up, praising the principle of legislation for individuals rather than States in their collective capacities as inherently superior:

‘... This is the only principle which has been found, or which is ever likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all the contingencies which render alliances precarious’³⁹⁶.

It is instructive to compare Mill’s definition of federalism with Wheare’s the following century (see footnote 375 on page 180), as this reveals the transition in political science that the concept has made over time from meaning (i) league only, to (ii) league and compound, and finally to (iii) compound only. Mill begins by broadening the frame, and Wheare completes the journey by restricting it. Mill pushes out the ladder in front, while Wheare pulls it up at the back. Thus, the *shift* in meaning

³⁹³ Crallé, *op. cit.*, p.163.

³⁹⁴ *Ibid.*, pp.117, 141.

³⁹⁵ As Mill highlights, by this time America had been joined as a compound polity by Switzerland, following the Sonderbund Civil War of 1848, which had clarified the secession issue there and instituted a stronger central government with directly-effective law.

Cited in Karmis and Norman, *op. cit.*, pp.165-6.

³⁹⁶ *Ibid.*, pp.165-6.

of the word within the discipline is made via the intermediate position of an *enlargement*.

It is difficult to pin down the usage of terms prevailing at any one moment when they are passing through a period of flux, and further when the approach of the specialist political scientist and the ordinary citizen may differ (with, indeed, variation among both groups). As has been seen, it might well mean that there are a number of concurrent usages present in academic and public debates. It does seem, however, that we can say with confidence that a distinction between the two words federal and confederal had not become firmly established by the time the American Civil War began in 1861.

We will return to the question of identifying exactly when and how the terminological break happens in the final section of the chapter. Let us turn now to examine the two competing interpretations of the nature of the American system of government that took hold in the circumstances of initial ambiguity over what had been created.

II. The Emergence of Two Rival Stand-points on the Foundations of the Union

‘... From the very first days of the Republic’, Merriam tells us, ‘... there was marked divergence of opinion in regard to the nature of the new Union’³⁹⁷. Such differences of view led Madison and Hamilton to take opposing sides as early as 1791, only three years after they had been such close and harmonious collaborators in pursuit of ratification. Their two rival visions for the compound, which can be loosely characterised as more decentralised and more centralised respectively, began to clash and time would steadily pull them further apart. Bowles paints the scene:

‘... After ratification, dispute persisted over what had been created; moreover, the Constitution’s brevity and imprecision left the question unresolved. ... Divisions arose. Alexander Hamilton and John Marshall (Secretary of State under Adams, and later Chief Justice) interpreted the Constitution as a broadly nationalist document by which a national government’s few enumerated powers were supplemented by implied powers both broad and deep. Hamilton approvingly detected the possibility of a powerful central government in the elasticity of the powers granted to it in Article I. By contrast, Madison and Jefferson (and much later, in starker form, John C. Calhoun) interpreted it as a compact between States, in each of whom sovereignty resided after 1789 as it had done before’³⁹⁸.

Throughout the Convention process Madison had been concerned to ensure checks and balances were built into the novel system, via both a vertical and horizontal separation of powers. This would prevent the emergence of ‘faction’, thus ensuring the protection of minorities, and help avoid a slide into tyrannical rule. Hamilton, by contrast, had been more concerned with the greater energy of government, keen to see the establishment of a national administration equipped with all the powers required to meet the challenges facing the young nation. Though their views had been broadly aligned in the ratification debates, nevertheless from the beginning there had been a discernible difference of emphasis and perspective among the two men; this now began to emerge more strongly into the daylight.

The first clear sign of a split came with the national bank dispute. Hamilton, as Secretary of the Treasury in Washington’s first administration, wanted to use the so-called ‘elastic’ clause in the Constitution (the ‘necessary and proper’ clause in Article

³⁹⁷ Merriam, Charles *A History of American Political Theories* (Transaction, 2008), p.252. Originally published in 1903.

³⁹⁸ Bowles, Nigel *Government and Politics of the United States* (Palgrave, 1998), p.278.

I.8³⁹⁹) to charter a national bank, in the absence of an explicit authorisation among the enumerated powers. He saw the power to charter banks as closely allied to the taxing and commerce powers granted to the federal government, and thus implicitly as a power given by the Constitution. Secretary of State Thomas Jefferson took a very different view, however, ‘... and vehemently rejected Hamilton’s theory of “implied powers”’⁴⁰⁰. When asked for his advice, he cited the Tenth Amendment, which had been annexed to the Constitution in the Bill of Rights of 1789, to make clear his opinion as to where such unenumerated powers properly lay:

‘... The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’⁴⁰¹.

He sounded the following warning, signalling the fundamental importance of what he believed now to be at stake - no less than constitutional government itself and hence also the principle of limited government:

‘... To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition’⁴⁰².

When Washington finally decided the bank dispute in Hamilton’s favour, Jefferson, Madison and others began to fear the wholesale destruction of the balance that had been so carefully crafted and weighed in the Convention, and even the collapse of republican government into despotism. They argued for respect for the letter of the

³⁹⁹ Article I.8 reads: ‘The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof’. Scott, James (Ed.) *The Declaration of Independence, The Articles of Confederation and The Constitution of the United States* (Oxford University Press, 1917), pp.33-4.

⁴⁰⁰ Heideking, Jurgen *Original Conceptions of American Federalism*, Paper presented at the ‘Theory of Federalism’ Seminar, Forward Studies Unit of the European Commission, Brussels, 24 - 26 October 1994, p.9.

⁴⁰¹ Scott, *op. cit.*, p.45.

law and for the drawing of a clear line of separation between the powers of the federal and State governments. Those of the latter could not simply be ridden over roughshod, many believed, particularly in the Southern States, as Heideking brings out:

‘... Contrary to the attitude of people like Hamilton and John Adams, who considered the state governments as subordinate entities, these voices claimed for the states a right to defend themselves against any encroachment on their privileges and to put the federal government in its proper place. They tried to bolster this position by the historical argument that the states had existed before the Union - as a “creation” of the states - came into being’⁴⁰³.

Friedrich notes that this “States’ rights” reading of the Constitution was ‘... one possible view of how to interpret its provisions’⁴⁰⁴. The first test of the conception came during the crisis of 1798 when war with France appeared imminent, and the Federalist majority in Congress passed the Alien and Sedition Acts in an attempt to silence internal opposition. In turn, the Republicans responded with a series of resolutions in which they set out their position, the most important of which were the Virginia Resolution (drafted by Madison) and the Kentucky Resolution (drafted by Jefferson). The latter even went so far as to declare the Sedition Act unconstitutional, concluding that ‘... it does abridge the freedom of the press, is not law, but is altogether void and of no effect’⁴⁰⁵. Heideking identifies the crucial point in this logic, underlying what might otherwise perhaps be considered a ‘normal’ democratic protest against the excessive appropriation of powers by an incumbent government:

‘... it must also be seen as the presentation of a constitutional theory directly opposite to the Federalist understanding of

⁴⁰² Cited in Heideking, *op. cit.*, p.9.

⁴⁰³ Heideking, *op. cit.*, p.9.

⁴⁰⁴ Friedrich, Carl *Trends of Federalism in Theory and Practice* (Pall Mall, 1968), p.20.

⁴⁰⁵ Heideking, *op. cit.*, p.10.

government. The most important point was the assertion that individual states, not the Supreme Court of the United States, had the power to decide about the constitutionality of laws made by Congress⁴⁰⁶.

This was clearly a radical and unprecedented departure. Perhaps the most surprising aspect in this turn of events is that we see the hand of Madison, foremost architect of the Constitution, arguing for a seemingly extra-legal method of determining the constitutionality of governmental acts⁴⁰⁷. Plano and Greenberg note that the ‘theory of interposition’ set forth by him in the Virginia Resolution held that

‘... a state may place itself between its citizens and the national government so as to prevent the enforcement of national law upon its citizens. According to this doctrine, each state may be the judge of the legality or constitutionality of national action’⁴⁰⁸.

When the expected war with France did not materialise and Jefferson was elected President in 1801, the mood of crisis subsided and calm was restored for a number of years. However, the clash between the States’ rights and Constitutional supremacy perspectives had not been resolved - merely postponed. By 1830, matters were once

⁴⁰⁶ *Ibid.*, p.10.

⁴⁰⁷ It appears particularly ironic that Madison emerges as a defender of the prerogatives of the States, in view of his former (though ultimately unsuccessful) pressing in the Convention for a central government power of veto over all State legislation.

Wood notes that, in view of the apparent contradiction, many scholars have been led to ask ‘... Is there a “James Madison problem”?’. He himself concludes not, suggesting that Madison’s views can be reconciled by understanding his ambitions at Philadelphia as having lain between the extremes of Jeffersonian decentralisation and a Hamiltonian fiscal-military State. Madison hoped, believes Wood, to establish a central government ‘... that might transcend parties and become a kind of superjudge and arbiter’, whilst retaining a primary place and role for the States. His proposed ‘council of revision’ for reviewing State legislation was modelled on the British Crown’s Privy Council with its power of disallowance over colonial legislation, perceived to have been a moderating and steadying influence. Wood says that ‘... Madison very much desired to transcend the states and build a nation in 1787, but he had no intention of creating for this nation a modern war-making state with an energetic and powerful executive. Instead he wanted a government that would act as a disinterested judge, a dispassionate umpire, adjudicating among the various interests in the society’.

Understood in this light, the contrast between Madison’s early and later views does not, indeed, seem quite so sharp.

Kramnick, Isaac ‘Editor’s Introduction’ in Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), p.35. Originally published in 1788.

Wood, Gordon *Revolutionary Characters: What Made the Founders Different* (Penguin, 2007), pp.158-72.

more coming to a head, this time over the issue of trade tariffs, and the doctrines of interposition and nullification were about to become ‘... dangerous weapons in the hands of politicians who were less committed to the American Union than Jefferson and Madison’⁴⁰⁹. As the issue of slavery in particular became ever more pressing for both sides - an economic lifeline for the South and an abomination to the North - the country slid inexorably towards Civil War.

This gradual polarisation over many decades of two camps on the nature of the Union established by the US Constitution is seen to have led, ultimately, to a perhaps inevitable destination: the invocation of two radically opposed stand-points as to the very foundations upon which the Union stood. We consider here in some detail the elaborate position developed by the States’ rights camp in this regard, and come to see the respect in which it did indeed have a valid basis, in circumstances where the issue of ultimate authority in the new order had been finessed in the negotiations at Philadelphia. That adopted by the Constitutional supremacy camp, by contrast, though having made an effective appeal to the then emerging sense of nationhood, in fact had a less secure historical grounding and legitimacy.

Merriam tells us John Calhoun’s political theory was ‘... the finally accepted statement of the states-rights doctrine’⁴¹⁰. The following extract from his Fort Hill address (*‘On the Relation Which the States and General Government Bear to Each Other’*), given when the South Carolinian was Vice-President in 1831, puts starkly the philosophical position that he developed and captures clearly the linkages between the ideas of compact theory, interposition and nullification:

⁴⁰⁸ Plano, Jack and Greenberg, Milton *The American Political Dictionary* (Western Michigan University Press, 1962), p.34.

⁴⁰⁹ Heideking, *op. cit.*, p.11.

⁴¹⁰ Merriam, *op. cit.*, p.267.

‘... The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described; and that the several States, or parties, have a right to judge of its infractions; and in the case of deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, “*to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.*” This right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may, - State-right, veto, nullification, or by any other name, - I conceive to be the fundamental principle of our system’⁴¹¹.

One cannot help wondering whether Madison’s propounding of the idea of interposition, which had had as its rationale the objective of enforcing respect for the original constitutional settlement, in the end created more problems than it solved. For clearly it, together with the theory of compact upon which it was based⁴¹², engendered a rigid and uncompromising attitude among the less scrupulous, and lent legitimacy to the idea that the States possessed a right to secede; all of which in turn catalysed the very bloody Civil War⁴¹³. One might speculate that had he had the benefit of hindsight, perhaps Madison would not have chosen to go down this same path,

⁴¹¹ Cited in Karmis and Norman, *op. cit.*, p.136.

⁴¹² Madison had stated in the Virginia Resolution that the powers of the Federal Government resulted from a ‘... compact, to which the states are parties’, and were ‘... no farther valid than they are authorized by the grants enumerated in that compact’.

Elliot, Jonathan *Debates of the State Conventions, on the Federal Constitution*, Vol. IV (Washington, 1836), p.554.

⁴¹³ Goldsworthy illuminates Madison’s precise line in the 1830s: ‘... He explained his earlier position as being that the states could proclaim their opinion that national laws were unconstitutional, and call for their repeal, but not assume the judicial function of invalidating them, or actively resist their execution. However, he had more difficulty dissociating Jefferson from the ideas of the nullifiers. Jefferson has used the word “nullification”, apparently referring to the right of individual states to “take measures” to ensure that unconstitutional federal laws “shall [not] be exercised within their respective territories”. Moreover, he subsequently endorsed the right of a state to secede from the union: “to sever ourselves from that union we so much value rather than give up the rights of self-government which we have reserved”’.

Goldsworthy, Jeffrey ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Walker, Neil (Ed.) *Sovereignty in Transition* (Hart, 2003), pp.432-5. Plano and Greenberg, *op. cit.*, p.25.

focusing his energy instead on pressing for strengthened means of ensuring judicial independence, in order to provide the fair and unbiased interpretation of the Constitution in the Supreme Court that he had initially envisioned in *The Federalist Papers*⁴¹⁴. However, arguably this route was blocked⁴¹⁵.

In Madison's defence, it must also be remembered that at that time the nature of the overall entity remained open. Indeed, the compact notion of an agreement between several distinct political communities appears on close inspection to have originally been the predominant conception in 1787, and to have remained so afterwards. This central point is often overlooked today. McLaughlin explains the important rationale underlying this thinking. The compact theory of government, he notes of the period, had developed from extension of the then dominant social contract theory to the realm

⁴¹⁴ Concerning the general and local governments, Madison had written in *Federalist No. 39*, '... It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. ... (However,) ... The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated'. Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), No. 39, pp.258-9. Originally published in 1788.

⁴¹⁵ The inadequacy of the judicial arrangements in the Constitution forms the principal complaint in Calhoun's Fort Hill address, where he argues that the text fails to protect properly the rights of minorities, as originally intended. He points to the 'high controlling power' of appointment as the true source of power that subverts this aim. In the case of the Supreme Court, this lies with the President and Senate jointly; thus, '... The judges are, in fact, as truly the judicial representatives of this united majority ... (of the States and of the people) ... , as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the Judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they are controlled in various ways'. Following Jefferson, Calhoun advocates, in the case of competing claims between the State and federal levels, the calling of a Convention of the States to '... ascribe the doubtful power', along the lines of that proposed in the Constitution as one track of the mechanism for constitutional amendment. In this context, Merriam sees Calhoun entering on a vigorous polemic against the 'tyranny of the majority', and expands on the philosophy he developed. The case in point was '... that of the protective tariff, which he considered was levied for the benefit of the North at the expense of the South'. He thus advocated the central idea of a 'concurrent majority', which granted to the various separate interests a negative or veto power over the actions of the general government: '... A state may reject any measure of the general government regarded as inconsistent with the terms of the Constitution; may, in other words, nullify the proposed action of the federal government. If three-fourths of the states support the action of the government, the nullifying state must either yield or withdraw from the Union'. Cited in Karmis and Norman, *op. cit.*, pp.142-4. Merriam, *op. cit.*, pp.267-77.

of international relations: ‘... If government with power could arise from agreement among individuals, so could it spring from agreement between bodies of individuals’⁴¹⁶. Hence, the most common early view of the US Constitution seems to have been as representing a compact among States.

‘... Why this conception of the origin of government in contract was all powerful in America at that time is easy of explanation’, McLaughlin argues. Recalling the influence that Locke and other social contract theorists, such as Milton and Sydney⁴¹⁷, then exerted over the American mind (see footnote 224 on page 119), he says:

‘... It is sufficient to say that the colonists were the political offspring of the seventeenth century; that to them the Revolution of 1688 meant more by example than it did, perchance, even to the people of England; and that the arguments and facts leading up to the separation from the mother country tended to emphasize the doctrine of natural rights and the theory that society and government had their beginnings in agreement’⁴¹⁸.

Reference to the underlying constitutive basis of the Constitution supported the conception of the Union as a compact. For the States had been the sovereign bodies prior to Philadelphia and the document was ratified by special State Conventions elected for the purpose. So there was apparently no change in the move from the

⁴¹⁶ McLaughlin, Andrew ‘James Wilson in the Philadelphia Convention’ in *Political Science Quarterly*, Vol. 12, No. 1, March 1897, pp.18-9.

⁴¹⁷ Merriam, *op. cit.*, p.89.

⁴¹⁸ McLaughlin, *op. cit.*, pp.18-9.

Articles to the new Constitution⁴¹⁹. Both the Tenth Amendment (see the quotation on page 198) and Article VII, which referred to ratification ‘... between the States so ratifying’, reinforced this interpretation⁴²⁰.

Thus, when seeking to locate the originative authority for, and basis of legitimacy of, the Constitution, it was in sum highly plausible to suggest that the text had been established by several peoples, rather than one people. When the Preamble to the document opened with the words ‘We the People ...’, this appeared to refer to a body in its composite character, made up of distinct parts, rather than a single undifferentiated whole⁴²¹. Calhoun provides a full - and convincing - exposition of this view. His starting position is that the States initially had acted jointly in forming the new Constitution, as the several parties to a compact:

‘... the States, when they formed and ratified the constitution, were distinct, independent, and sovereign communities ... That the people of the several States, acting in their separate, independent, and sovereign character, adopted their separate State constitutions,

⁴¹⁹ Madison had written, in *Federalist No. 39*: ‘... Each State, in ratifying the Constitution, is to be considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will ... be a *federal*, and not a *national* constitution’; and he had clarified that ratification would be ‘... an act of the people, as forming so many independent States, not as forming one aggregate nation’.

He had deployed the same argument in the Virginia ratifying debate, to answer Patrick Henry’s charge that the Constitution would inaugurate a ‘consolidated National Government’ rather than a ‘compact’ among States. Rives records that ‘... To the argument ... (of) ... Mr. Henry ... that the scheme proposed was a consolidated government of the whole people of America as one integral mass, Mr. Madison gave the following lucid and irrefragable answer: “Who are parties to it? The people, - not the people as composing one great body, but the people as composing thirteen sovereignties”’.

Clearly, then, the basis upon which the delegates of the several States had been led by the framers to vote for the text was as a compact among multiple political communities.

Kramnick, *op. cit.*, p.32.

Madison, Hamilton and Jay, *op. cit.*, No. 39, pp.257-9.

Rives, William *History of the Life and Times of James Madison*, Vol. II (Little Brown, 1870), p.580.

⁴²⁰ Supporting further these arguments, Calhoun made a compelling case that in the Tenth Amendment’s use of the word ‘delegated’, the attribution of competences to the federal government in the American system was done on the basis of ‘trust powers’, loaned from the source of sovereignty, the States. He wrote that the powers in the constitution were ‘... in fact, delegated powers, - powers granted in trust, - and not absolutely transferred’.

Crallé, *op. cit.*, pp.130, 143.

⁴²¹ The Preamble reads: ‘... We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America’.

is a fact uncontested and incontestable; but it is not more certain than that, acting in the same character, they ratified and adopted the constitution of the United States; with this difference only, that in making and adopting the one, they acted without concert or agreement; but, in the other, with concert in making, and mutual agreement in adopting it'⁴²².

The reason for confusion, he believes, is that '... the term "people," has, in the English language, no plural, and is necessarily used in the singular number, even when applied to many communities or states confederated in a common union, - as is the case with the United States'⁴²³. Prior to ratification, the term 'United States' had always had a plural connotation, he argues, and those seeking surreptitiously to establish a (false) national basis for the Constitution relied on the omission of a full list of States from the Preamble, which would have made clear the still multi-State character of the Union. This happened, he says, for no other reason than it was uncertain in the Convention which States would in the end make it through to completion of the ratification process⁴²⁴. Inclusion of the list would have instead made the Preamble read '... "We, the people of New Hampshire, Massachusetts &c."' ⁴²⁵,

⁴²² Crallé, *op. cit.*, p.119.

⁴²³ The *Oxford English Dictionary* provides some support for Calhoun's view here. First, it records that in the sense of 'nations' (plural), the singular form 'people' was sometimes used unchanged, giving as an example a quotation from Thomas Jefferson: '... It will prove that the agents of the two people [the US and France] are either great bunglers or great rascals'. However, there are also listed several examples where the plural form 'peoples' was used, both in the mid-nineteenth century and prior. Secondly, it notes that the plural form was avoided in sixteenth century versions of the Bible and by many seventeenth and eighteenth century writers, a later draft revision adding that it was '... thought to require defence or explanation even in the 19th cent. (cf. quots. 1842 and 1845)'. Here Calhoun may have had grounds for his point from a stylistic perspective. The 1845 reference, a quotation from G.S. Faber, reads: '... If, therefore, the delicacy of our ears be offended by the uncouth sound of *peoples*: let us at least ... substitute the more euphonic word *nations*'. The rationale that 'peoples' was displeasing to the ear in the mid-nineteenth century appears to make sense and could go some way towards explaining why Calhoun wrote the words that he did.

Crallé, *op. cit.*, p.133.

Oxford English Dictionary, draft revision June 2008,

URL=<http://dictionary.oed.com>.

Simpson, J. and Weiner, E. (Eds.) *The Oxford English Dictionary* (Oxford University Press, 1989), p.504.

⁴²⁴ This reading is supported by Goldsworthy.

See Goldsworthy, Jeffrey 'The Debate About Sovereignty in the United States: A Historical and Comparative Perspective' in Walker, *op. cit.*, p.432.

⁴²⁵ Crallé, *op. cit.*, p.132.

thus making plain that the new Union had been founded by the several peoples of the thirteen States.

Reference to Madison's notes of the Convention proceedings appears to confirm this view⁴²⁶. The draft text returned by the Committee of Detail on Monday 6 August 1787 did, indeed, begin with the States individually listed in the Preamble. This was adopted the following day unopposed. The text subsequently seems to have been amended by the Committee on its own initiative - probably for the reasons Calhoun identifies - and this was later accepted without demur, the floor debate passing upon final review straight on to Article I.2.

Calhoun thus makes a powerful case that it is right to understand the term 'people' as a composite (i.e. effectively 'peoples'); and hence that the basis of the Constitution was as a compact between several sovereign parts:

'... Nothing more is necessary, in order to show by whom ... (the Constitution) ... was ordained and established, than to ascertain who are meant by, - "We, the people of the United States;" for, by their authority, it was done. ... Who they were, admits of no doubt. The process preparatory to ratification, and the acts by which it was done, prove, beyond the possibility of a doubt, that it was ratified by the several States, through conventions of delegates, chosen in each State by the people thereof; and acting, each in the name and by the authority of its State: and, as all the States ratified it, - "We, the people of the United States," - mean, - We, the people of the several States of the Union'⁴²⁷.

Merriam sees Madison attempting to '... combat the theories of the extreme states-rights party', noting that he employed the doctrine of contract - which was '... capable of different application' - to suggest that unilateral secession was not (normally at least) permissible:

‘... It was conceded that the Union was formed by an agreement to which states, and not individuals, were the parties, but the binding force of the contract was emphasized in the very strongest way. ... “It is,” said Madison, “the nature and essence of a compact that it is equally obligatory on the parties to it, and of course that no one of them can be liberated therefrom without the consent of the others, or such a violation or abuse of it by the others as will amount to a dissolution of the compact”’⁴²⁸.

Calhoun, however, as Merriam records, entirely rejected the social contract and *Naturrecht* basis upon which this logic stood, which gave the States ‘... only ... a revolutionary right of resistance or secession’. Anticipating the later direction of political science, he repudiated the pre-governmental state of nature idea, in favour of an ‘evolutionary’ or ‘organic’ perspective of the State. Government, he insisted, was

‘... not artificial and unnatural, but perfectly natural in the sense that it is necessary to the development and perfection of human powers. Government is not a matter of choice, depending for its origin and continuance on the caprice of the individual; on the contrary, it is a primary necessity of man, and, “like breathing, it is not permitted to depend on our volition”’⁴²⁹.

He combined this new thinking with a strong and clear conception of sovereignty located indivisibly in the ‘constituent power’ standing behind both the federal and State governments, from which powers had been originally delegated and to which they could in consequence be recalled. The practical conclusion to be drawn from this was that States could nullify actions they deemed unconstitutional; or ‘... at any time rightfully assert their sovereign prerogative and withdraw from the Union’⁴³⁰.

The Constitutional supremacy camp attempted to counter the arguments of the States’ rights theorists by positing an entirely different conception of the foundations of the

⁴²⁶ Madison, James *Notes of Debates in the Federal Convention of 1787* (Norton, 1987), pp.385, 396, 616, 633. Originally published in c.1840.

⁴²⁷ Crallé, *op. cit.*, p.128.

⁴²⁸ Merriam, *op. cit.*, pp.263-4.

⁴²⁹ *Ibid.*, pp.267-9.

Union. Bennett sees this line of reasoning, for example, being advanced in the Senate by the leading exponent of the ‘nationalist’ doctrine, Daniel Webster, during the nullification crisis of 1832 - 3⁴³¹. The latter, he says, ‘... thought it highly important that the Constitution did not say that it was established by the people of the several states, and he jumped to the conclusion that it “pronounced” that it was established by the people of the United States in the aggregate’⁴³². Merriam enlarges that, in this perspective, Webster deployed the old theory of a binding social contract, but in a new way. He attempted

‘... to show from the language of the Constitution itself, without much discussion of philosophic or historic considerations, that the Union was formed by a contract between individuals which resulted in the establishment of a supreme law and government, and that the states as such were not concerned in this agreement. “The people of the United States” he understood to mean the people of the whole Union, and not of the several states. The Union is not merely a compact between states to form a new Confederacy, but an agreement between individuals to form a national government. “It is established,” said he, “by the people of the United States. It does not say by the people of the several states. It is as all the people of the United States that they established the Constitution”’⁴³³.

However, as Bennett goes on to point out, this argument was effectively demolished by Calhoun’s forensic logic: ‘... The assumption that the phrase “We the people of the United States” necessarily meant the people of the country taken collectively, without regard to state boundaries, could, as Calhoun showed, easily be countered if

⁴³⁰ *Ibid.*, pp.281, 303.

⁴³¹ South Carolina’s nullification of the tariff laws of 1828 and 1832 led to the passage of the Force Bill, in which Congress sanctioned measures to have the law enacted by force if necessary. The crisis was eventually defused by Henry Clay’s brokering of a compromise tariff law in 1833 (known as “Clay’s Compromise”).

⁴³² Bennett, *op. cit.*, p.166.

⁴³³ Merriam, *op. cit.*, pp.284-5.

one only referred to the early drafts of the Preamble. In these drafts the people of each state had been mentioned, all of the states being enumerated by name⁴³⁴.

So the logic of the States' rights camp does, indeed, seem persuasive; and the 's' omitted after the word 'people' begins to look like one of the most important missing letters in history. Certainly, the centrality of the old federal idea to voters intent on preserving their liberty in the public debates on the Constitution of 1787 and 1788, had meant that at the start there had been no question in the popular mind of the States being wholly denuded of their sovereignty and Statehood; and the prevailing practical reality of politics on the ground had been such that the States had initially formed

⁴³⁴ A parallel path, for the Constitutional supremacy camp, to denying that the Constitution had been founded on a compact between States, was to deny that the States ever had been sovereign prior to 1787. A first focus for this line of thinking was the reference to 'these United Colonies' in the Declaration of Independence. Bennett notes that on this view the Colonies were in 1776, as James Wilson had argued in the Convention, '... "independent, not *Individually* but *Unitedly*"; they "were confederated as they were independent, states"'. This was, for example, the reasoning deployed by Supreme Court Judge Joseph Story in his *Commentaries on the Constitution* (1833). Explicitly drawing on Wilson, Story argued: '... the declaration of the independence of all the colonies was the united act of all. ... It was emphatically the act of the whole *people* of the united colonies. ... It was an act of original, inherent sovereignty by the people themselves'. However, a full reading of the document makes clear the weak foundations of this line of thinking. As McDonald notes, '... The plural language is used throughout. ... what the delegates represent are united States - that being not a name, but "united" being merely an adjective describing the stance of the states in opposition to Britain' (see the extract characterising the States as 'Free and Independent' entities on page 147). A second, more credible, variant on this position was taken by Abraham Lincoln in his First Inaugural Address as President in March 1861. Lincoln laid great stress upon the word 'perpetual' that had appeared in the title of the Articles of Confederation (see footnote 291 on page 145). The argument ran that a permanent bond between the States had been established in 1777 which was from that time forward irrevocable; and hence that the States had then forfeited sovereignty in its ultimate sense. Finally, it was plausible to argue, as Hamilton had done in the public debate of 1787 - 88, that in view of the Continental Congress' 'absolute and undefined authority' at its high-point in the war against Britain, reflecting the 'full power of sovereignty' of an independent State, the States never had been completely sovereign bodies initially and that, in fact, a union had pre-existed the original confederal agreement. Sawyer notes, however, that the position that the central authority had succeeded to the place of the British authority was '... naturally enough a minority view, pressed rather more frequently in the years after 1788 than at the Conventions and political campaigns of 1787-88'.

Bennett, *op. cit.*, pp.79, 164-7.

Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), p.216.

McDonald, Forrest *States' Rights and the Union: Imperium in Imperio, 1776 - 1876* (University Press of Kansas, 2000), p.10.

Sawyer, Geoffrey *Modern Federalism* (Watts, 1969), pp.4-6.

Story cited in Elliot, *op. cit.*, Vol. I, pp.92-6.

several distinct political entities, not one⁴³⁵. Whilst a gradual recognition of the bonds of shared interest (not least economic interest), of sameness rather than difference, had been stirring in the late eighteenth century, any national feeling had been still embryonic and confined largely to politicians, businessmen and former military men who had collaborated across colonial boundaries in the revolutionary war against Britain. As Goldsworthy comments, ‘... National identity only developed gradually, during the first half of the nineteenth century’⁴³⁶.

By admitting the idea of a single people in the key but seemingly innocuous opening phrase of the Constitution, whilst leaving the appearance of a compact among many peoples in place, the location of ultimate authority - and hence of sovereignty - had thus been blurred at Philadelphia. Merriam says that on ratification, following the revolutionary Lockean understanding, ‘... The real sovereign was thought to be the “people,” but whether this meant the people of the United States as a whole or the people of the several states was left undetermined. ... This was a question left for coming generations’⁴³⁷. In particular, as events would turn out, it would be the second and third subsequent generations that would be compelled to confront this ambiguity.

⁴³⁵ Wood observes that the States had been, at that stage of political development, jealous guardians of their individuality, concluding: ‘... The “United States of America” were plural and possessed a literal meaning that is hard to appreciate today’.

Wood, *op. cit.*, p.146.

⁴³⁶ Goldsworthy, Jeffrey ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Walker, *op. cit.*, p.430.

⁴³⁷ Merriam, *op. cit.*, pp.257, 302-3.

In order to complete the political system and clarify its nature, however, they would have to pay a very heavy price in blood⁴³⁸.

III. The Effect of the Civil War: Divided Sovereignty Shown a Fallacy

We now turn to consider the precise impact of the resort to force in the Civil War upon the development of American federalism. We start from the premise that any possible legitimacy for the States' rights idea and compact theory was comprehensively closed off at this juncture, with the secessionist South beaten back into the Union, and America shown to have been forged (at the canon's mouth) into one nation and one people. As Katz observes, the constitutional bargain of 1787 was thus redefined and completed in 1865:

‘... The Civil War itself changed American federalism forever. No longer could the Constitution be regarded as a bargain among sovereign states; it was the creation of the entire American people acting in their corporate and sovereign capacity’⁴³⁹.

Merriam paints a clear picture of the entire transition that took place leading up to this conclusion, in terms of evolving political theory, which we follow in outline here. He begins by recalling the consensus interpretation of the nature of the polity initially

⁴³⁸ Forsyth supports the view that the situation concerning ultimate authority had been muddled at Philadelphia. Referring to the rationale for using the words ‘We, the People ...’, he says: ‘... It was because the new constitution was to be ratified, not by the state legislatures, but by popular conventions, that the preamble took its particular form. This form was ambiguous because, while the final article of the constitution indicated clearly that the ratifying powers were the people of each state - that is to say the ‘peoples’ of the United States - the preamble suggested that it had been made by one ‘people’, that is to say, by the single undifferentiated collectivity that Wilson had championed so fervently in the Convention.

In fact neither the preamble, nor Madison’s successful endeavour ... (in the idea of ratification by extraordinary State Conventions) ... to provide the constitution with a deeper foundation than that of a normal treaty between governments, prevented it from being considered from the start as a species of contract or compact. Ratification was unequivocally a matter for each state individually; none could be bound without their assent. Massachusetts in its formal act of ratification expressly called the constitution a compact, and in the debates in the various conventions it was also referred to as such’. Forsyth, *op. cit.*, p.65.

instituted in 1789. The form of government first established under the Constitution, he says,

‘... must be regarded neither as a pure confederacy nor yet as a “consolidated republic”; but should really be placed in a class by itself. It is a new type of government peculiar to American conditions - a form at once national and federal, happily combining the characteristics of both’⁴⁴⁰.

He continues:

‘... In harmony with this idea of the mixed character of the Union, was the theory that sovereignty is capable of division and actually is divided in the United States’⁴⁴¹.

He clarifies for us here that the mainstream opinion in the early post-Philadelphia period was that it was the original sovereignty of the States that was now in some way or other shared between the States and the Union. In general, he says,

‘... it was thought that a compromise was being made between states and Union, and that a division of sovereignty was involved in this’⁴⁴².

Illuminating how this idea dovetailed with the notion of the Constitution as a compact, identified in the preceding section, he sees the then prevailing ‘compromise theory’ of the Constitution as constructed in Madisonian terms of ‘... a contract between states by which the sovereignty of the contracting parties is diminished’⁴⁴³. It was on this basis, he observes, that Madison himself contended that

⁴³⁹ Katz, Ellis ‘The Development of American Federalism, 1763 - 1865’ in Bosco, Andrea (Ed.) *The Federal Idea, Vol. 1: the History of Federalism from the Enlightenment to 1945* (Lothian Foundation, 1991), pp.47-8.

⁴⁴⁰ Merriam, *op. cit.*, p.255

⁴⁴¹ *Ibid.*, p.255.

⁴⁴² *Ibid.*, pp.257-8.

⁴⁴³ *Ibid.*, p.286.

‘... It is difficult to argue intelligibly concerning the compound system of government in the United States without admitting the divisibility of sovereignty’⁴⁴⁴.

That such thinking was at the start dominant is revealed by a reply of Senator Rives of Virginia, himself a ‘states-rights man of the old school’, to Calhoun’s argument for unqualified (and indivisible) State sovereignty in 1833:

‘... Sir, this is a novelty unknown to the founders of the Constitution, and has sprung up in a hotbed of local politics. At the period of the adoption of the Constitution it was distinctly made known and understood that to the extent to which sovereignty was vested in the Union, that of the states was relinquished and diminished’⁴⁴⁵.

Merriam goes on to explain, however, that in the contest over national supremacy in the Civil War the idea of divided sovereignty was ‘... laid aside, and the unity and indivisibility of the supreme power strongly affirmed’⁴⁴⁶. The earlier Madisonian compromise view of the Constitution was at this point wholly jettisoned. Whereas Calhoun and the ‘particularist’ school interpreted the Union in terms of ‘... a treaty relation between sovereign states’, Webster and the ‘nationalist’ school came to regard the Constitution as ‘... a *law*, resting on a social contract between individuals, and in which the states as such had no part’⁴⁴⁷:

‘... As at an earlier time Calhoun rejected the compromise doctrine, so now the nationalistic school abandoned the idea, declaring that the sovereignty is one and indivisible, and at the same time that it belonged to the nation’.

⁴⁴⁴ Cited in Merriam, *op. cit.*, p.259.

⁴⁴⁵ Cited in Merriam, *op. cit.*, p.261.

⁴⁴⁶ Merriam, *op. cit.*, p.298.

⁴⁴⁷ *Ibid.*, p.286.

When the unionist side eventually won out, Merriam concludes,

‘... in respect to the ultimate political sovereignty dispute practically came to an end. The events of the Civil firmly established the fact that the one and indivisible sovereignty belongs to the nation, or the Union as a whole’⁴⁴⁸.

In this light, therefore, we come to appreciate the validity of Katz’ perspective in attributing sovereignty, at this juncture, to the ‘entire American people’ in their corporate capacity. We left the preceding section having observed that the apparent vesting of ultimate authority in ‘the People’ had been the source of the obfuscation at Philadelphia: for whether one people (i.e. one sovereign body) or many peoples (i.e. several sovereign bodies) was no longer plain after 1787. Yet, here we see that the subsequent trajectory of American politics in the nineteenth century appears to demonstrate conclusively the import of such a concept - and hence the necessity of maintaining both a clear conception of sovereignty and certainty over its location (i.e. who possesses it) in well-ordered and stable federal polities which avoid recourse to violence. The abandonment of the earlier ‘compromise theory’ of divided sovereignty, and the descent into war to resolve disputed matters, would seem evidence enough of this fact.

It is the ‘political community’ - the body of the people clearly defined, the ‘body politic’ - that is seen to constitute the repository of this indivisible final authority. The

⁴⁴⁸ Merriam completes the picture by noting that the political theory of the nationalist school was ‘... not fully stated until the events of the Civil War had shown the strength of the Union sentiment’. Authors such as de Maistre and Lieber, he says, ‘... emphasized more strongly the unity and indivisibility of the sovereignty, and consequently the wholly subordinate position of the states’. In rejecting the contract basis of earlier nationalist theory, the new national school unhesitatingly attributed sovereignty to ‘... the United States as a whole’. The school, he notes, received its fullest and most scientific interpretation in the work of J.W. Burgess: ‘... “Really the state cannot be conceived,” says Burgess, “... without sovereignty, *i.e.* without unlimited power over its subjects; that is its very essence.” There is no other power, no association or organization which can be conceived as limiting the state in its control over its subjects, for the authority which could exercise such power would itself be sovereign’. *Ibid.*, pp.289-99.

idea of a ‘threshold’ of sovereignty transfer is now seen to emerge as a necessary corollary of such a perspective on the nature of sovereignty. This represents the point where either (a) many political communities fuse into one political community and the locus of sovereignty and Statehood shifts upwards; or (b) one political community fragments into several parts and the locus of sovereignty and Statehood shifts downwards. This I term the ‘rubicon’ of sovereignty transfer. It reflects a point conception of sovereignty, which ‘shifts’ at an instant in time from one level to another, higher or lower, from the parts to the whole, or vice-versa. In view of the preceding analysis, it seems that it is precisely such a transformation we see happen by force of arms in America in 1865 (or, at least, the prior ambiguous situation being clarified in this way).

Such an understanding of sovereignty, however, strikes at the heart of the prevailing understanding of modern federalism - and, indeed, challenges us to reappraise fundamentally the nature of the concept. For as Vile notes, in *The Structure of American Federalism* (1961), ‘... the idea of divided sovereignty ... has ... characterized American thought from the beginning of the constitutional period up to the present day’⁴⁴⁹; and since the American system of government and the definition of federalism are intimately linked, the latter must therefore also be thought to incorporate the idea of divided sovereignty - as we find is, in fact, still today the case (see the quotation from Diamond on page 175, and the definitions offered by Heywood on page 60 and by several other authors at footnote 135 on page 63). Given that this does, indeed, continue to represent the mainstream of current thinking on the subject, it has been somewhat unexpected on the journey of this inquiry to find such a

⁴⁴⁹ Vile, Maurice *The Structure of American Federalism* (Oxford University Press, 1961), p.25.

high level of support for the idea that sovereignty is, by its very nature, indivisible - and therefore, by implication, that we need to rethink the definition of federalism.

Speaking at a seminar at the University of Kent, Vile was sharply dismissive of the idea that sovereignty could be divided, noting that Kelsen, Bodin and others have shown that there must be a single finality, a *Grundnorm*⁴⁵⁰. Yet here is a scholar who has devoted a good part of his academic life to the study of the American system of government. In his writings, the same circumspect sentiments are found:

‘... The idea of sovereignty presents particular difficulties in a federal state, both from the point of view of the political scientist and from the point of view of the inhabitants. It is an idea shot through with ambiguities and inconsistencies such that it has been suggested that the word is no longer of any further use at all to the political analyst. A particular difficulty in the use of this term is the assertion made by Austin that sovereignty is indivisible, an assertion which it is difficult to refute if one defines sovereignty to mean the supreme legal authority. Thus the argument used by W.J. Rees to fit the idea of sovereignty to the federal state does not seem persuasive. He argues that in a state there can exist ‘two supreme legal authorities, one having supreme authority in one set of decisions, on one level of generality, and the other supreme authority in another, on a different level of generality’. It is difficult to know what ‘supreme’ means here when some organ would be necessary to decide disputes between the two authorities about the level of generality relevant for particular decisions. We may suggest, therefore, that it is better to drop the word altogether as a means of analysing political systems, or we may agree that if we are to use the word consistently we must admit the indivisibility of sovereignty’⁴⁵¹.

Yet he admits quite frankly another possibility:

‘... Alternatively it might be argued that the analysis of the idea of sovereignty, an idea which is so recurrent in political writing that there seems to be a need for some such concept, has still not yet

⁴⁵⁰ Presentation at the James Madison Trust Conference, held at the University of Kent, 23 June 2006.

⁴⁵¹ Vile, *op. cit.*, p.24.

made the adjustment necessary to meet the development of the federal form of state'⁴⁵².

So we are left, from reading Vile, with the impression that the relationship between sovereignty and federalism remains an unresolved question; but his own inclination is to understand the former concept in indivisible terms - failing to see how it could be otherwise.

Perhaps the question should have been settled definitively in 1865. The fact is, however, that it wasn't; and the old idea of divided sovereignty (the original conception of the nature of the Union) continued in use, being seen as helpful in conceiving the day-to-day practical reality of a constitutional division of powers. As Vile remarks, the Civil War

‘... certainly did not banish the concept of divided sovereignty from practical politics. ... The Supreme Court ... almost immediately reverted to the ideas of sovereignty which had been current after 1789, and before the great upheaval ... In fact, rather than taking the view that sovereignty was undivided, the Court sedulously set about further developing the views of the pre-Civil War Taney Court into a doctrine of dual federalism’⁴⁵³.

Yet sovereignty refers not to governmental powers, but the *source* of those powers. Here we arrive at the idea that the heart of the problem of conceptual confusion we experience today has its roots over many centuries in a long-standing conflation of, and failure to distinguish between, sovereignty on the one hand, and the powers flowing from sovereignty on the other. Whilst the latter are divisible, it seems clear to us today, with the benefit of hindsight, the former is not.

⁴⁵² *Ibid.*, p.24.

⁴⁵³ *Ibid.*, p.27.

The perspective of the core meaning of sovereignty as an ultimate concept - the indivisible source of political authority underlying any actual distribution of governing powers - was seen earlier in the thesis in the thought of Malcolm, James, Forsyth and Althusius. Given the rapidly accumulating body of literature supportive of such a line of thinking, now also seen to include such writers as Kelsen, de Maistre, Lieber, Burgess, Austin and Vile, rather than simply reject or ignore it, perhaps we should be prepared to consider that it is our received understanding of federalism that is mistaken. A promising avenue for advancing our conceptions would seem to be the suggestion that federalism be understood not as a division of sovereignty - since this is not possible - but as a division of *the powers flowing from* sovereignty, with sovereignty itself remaining indivisibly in the possession of the people (either one or many).

The analysis that Calhoun makes is highly persuasive and appears to support this whole train of thought. We will also here bring into the discussion James Wilson's advocacy of the divided sovereignty view, and come to see how Calhoun deconstructs the idea. In so doing, we observe that he actually hits the nail on the head in bringing out for the first time a clear distinction between sovereignty and the powers flowing from sovereignty. Thus, it becomes apparent that the elements needed to construct a rational concept of federalism today have in fact been present in the literature for over a hundred and fifty years.

Vile considers Calhoun a brilliant mind, calling him a

‘... thinker with a truly systematic political philosophy, a man who perhaps more than any other can suggest insights into the working of American political institutions’⁴⁵⁴.

Forsyth likewise holds Calhoun in high regard, saying that of all the writers he considers in his work, Calhoun seems

‘... the most thorough, systematic and accurate expositor of what was originally established in America in 1789’.

He continues by clarifying that such an evaluation of the merits of the man as political theorist should be distinguished from the rightness of the end he was promoting:

‘... This does not mean of course that his cause was ‘right’, or that the South ‘should have won’ ... But it does mean that Calhoun provides us with an excellent analysis of the logic of making a union of states and of erecting a federal government - one that has a value that lasts well beyond the particular circumstance in which it was written’⁴⁵⁵.

As was noted in the previous section, in his *Discourse* Calhoun draws upon a ruthlessly logical succession of argument to argue that it was the States who were the contracting parties to the new Union; that the latter represented a compact among sovereign States; and, therefore, that the constitutive basis of the post-1789 American order was no different to what had gone before under the Articles. The US Constitution, he says,

‘... rested, without material change, on the same basis, - as under the confederacy and the revolutionary government’⁴⁵⁶.

Whilst this was one view, as has been seen, another was entirely possible. The whole debate came to turn on ‘what happened at Philadelphia’. Vile brings out the key

⁴⁵⁴ *Ibid.*, p.23.

⁴⁵⁵ Forsyth, *op. cit.*, p.132.

⁴⁵⁶ Crallé, *op. cit.*, pp.116-7.

aspect of the transition that took place here, in terms of ambiguity over the nature and location of sovereignty introduced in order to achieve agreement on a text. He suggests that this was possibly an intentional ploy on the part of the framers - and thus the idea of divided sovereignty that emerged was a sophism:

‘... The Constitution of 1789 represented a compromise between those who wished for a strong, almost unitary central government, and those who recognized the need for some central authority but wished to keep it as weak as possible, fearful of the consequences of such centralization. In such a compromise the location of sovereignty could only be glossed over, deliberately confused, if necessary, in order to ensure the acceptance of the compromise by both parties. Thus emerged the idea of a sovereignty divided between Federal and State governments’⁴⁵⁷.

The issue of sovereignty, indeed, was the principal stumbling block which it required quite some ingenuity to find a way around in the negotiations of the Convention. For the old problem of *imperium in imperio*, the very argument that the colonists had turned to use against Britain only a decade before - the then perceived impossibility of having two legislatures operating within the same territory - once again reared its head, when two levels of government were envisaged: ‘... There could be but one supreme legislative power in every state, the Antifederalists said over and over’⁴⁵⁸. It was James Wilson who broke the deadlock by confronting effectively the Anti-federalist conception of sovereignty. As Berger points out,

‘... It was Wilson who triumphed over “indivisibility” ... by a bold takeover: conceding that ultimate authority must be centered somewhere, he proceeded from the widely accepted axiom that power resided in the people; they could distribute it to their several agents as they thought best’⁴⁵⁹.

⁴⁵⁷ Vile, *op. cit.*, p.25.

⁴⁵⁸ Wood, Gordon *The Creation of the American Republic 1776 - 1787* (University of North Carolina Press, 1969), p.527.

⁴⁵⁹ Cited in Bolick, Clint *European Federalism: Lessons from America* (Institute of Economic Affairs, 1994), pp.21-2.

To gain the full picture of Wilson's approach, we turn once again to the authoritative voice of Wood, who points to the speech he made at the Pennsylvania State Ratifying Convention as crystallising the essence of Federalist thinking concerning the new idea of 'popular sovereignty', now replacing State sovereignty as the dominant philosophy:

'... The supreme power, Wilson emphasized, did not rest with the state governments. "It *resides* in the PEOPLE, as the fountain of government." "They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare." The sovereignty always stayed with the people-at-large; "they can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." Unless the people were considered as vitally sovereign, declared Wilson with some exasperation, "we shall never be able to understand the principle on which this system was constructed." ... "The power both of the general government, and the State governments, under this system, are acknowledged to be so many emanations of power from the people." The state legislatures could therefore never lose their sovereignty under the new Constitution, as the Antifederalists claimed, because they never possessed it'⁴⁶⁰.

This is elegant rhetoric on Wilson's part; and no doubt the ambiguity his popular sovereignty concept fostered helped an agreement emerge in the short-term⁴⁶¹. However, it left unanswered the crucial question, with tragic longer-term consequences: Which people? The people of the US as a whole, or the people(s) of the several States? Certainly, it seems a valid claim that 'the people' are the holders of sovereignty; but, as is now clear, this must always be well-defined as one distinct body. Wilson, instead, seems to have been using the notion as a way to avoid having to choose between many peoples and one people. For despite his earlier apparent insistence that such as thing as a single 'American people' did exist (noted above at

⁴⁶⁰ Wood, *op. cit.*, pp.530-1.

footnote 434 on page 210), his later argument at the Pennsylvania Ratifying Convention reveals his actual thinking to have been somewhat more nuanced. We gain a clearer picture of his construction here by turning to his actual words on 4 December 1787, and to one passage in particular:

‘... I consider the people of the United States as forming one great community, and I consider the people of the different States, as forming communities again on a lesser scale. From this great division of the people into distinct communities, it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.

Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed’,⁴⁶²

So it now becomes plain exactly what Wilson is suggesting: one body of humanity conceived in two different ways. Not one people; and not many peoples; but *both* one people and many peoples.

In this way, the question of sovereignty was thus clearly fudged at Philadelphia. Wilson’s position was one of fence-sitting with respect to the location of final authority. This obfuscation would serve to make the theories of compact, interposition and nullification advanced by the States’ rights camp seem genuinely plausible, and thus lend legitimacy to later attempts at secession. It would have further relevance to the propriety or otherwise of the assumption by the federal government of unenumerated powers, in the context of the North’s desire to see slavery abolished in the South, that was the proximate cause of the Civil War. Who was sovereign to decide this matter? The centre, or the parts? In Calhoun’s view - arguably rightly - the

⁴⁶¹ We can see from this discussion that the notion of ‘divided sovereignty’ originally stemmed from the idea that since the people were thought to be sovereign, they could divide sovereignty between levels of government according to a constitution as they saw fit. As Wood notes above, the powers attributed to each tier were understood to be ‘... so many emanations of power from the people’.

⁴⁶² Cited in Elliot, *op. cit.*, Vol. II, p.426.

number of political communities was the key: either one or many. The underlying constitutive basis was seen to be the critical determinant of ultimate political authority (and thus true sovereignty) which alone could provide the answer to this central question in a grey constitutional area. The problem for Americans in the mid-nineteenth century was that, some seventy years prior, the waters had been muddied in this regard.

Here we come upon the crucial element that shows the notion of divided sovereignty to be false: *the inability of written constitutions to cover every conceivable aspect of political life in advance*. The American experience in the decades prior to the Civil War provides firm evidence on this point. In his first inaugural address as President, Lincoln made direct reference to the two troublesome questions of the return of fugitive slaves and the expansion of slavery into new States, noting the Constitution's silence on these matters:

‘... no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the territories? The Constitution does not expressly say. *Must* Congress protect slavery in the territories? The Constitution does not expressly say’⁴⁶³.

We thus come to see the imperative of having a third party judge to rule on grey areas and boundary disputes, where powers are divided among two levels of government under federalism. In the absence of any higher authority in the international sphere, it seems, it is necessary for a federal polity to have internal to itself its own means of

⁴⁶³ Lincoln, Abraham, First Inaugural Address in Washington, 4 March 1861.

dispute resolution, and hence a clearly identified and accepted final arbiter. Such authority can only be located in one place.

Thus, as Calhoun argued persuasively in respect of the American case, disputes about the nature of the common government and implicitly about the scope of its right to legislate, command obedience to its edicts and in the end stand in the way of secession (in the absence of express mention of withdrawal in the Constitution), were ultimately

‘... reduced to a single question; whether the act of ratification, of itself, or the constitution, by some one, or all of its provisions, did, or did not, divest the several States of their character of separate, independent, and sovereign communities, and merge them all in one great community or nation, called the American people? ... if they have ... it is equally clear, that the sovereignty would reside in the whole, - or what is called the American people; and that allegiance and obedience would be due to them’⁴⁶⁴.

The notion of sovereignty transfer (and implicitly an indivisible conception of sovereignty) is clearly apparent here; and Calhoun seems justified in making the case that sovereignty had never left the States’ possession - or at least not openly so.

In arguing in favour of the indivisibility of sovereignty, however, he does not argue that all governmental powers must be exercised indivisibly. Instead, he makes clear that the powers flowing from sovereignty can be divided up and delegated, to be exercised by third parties. This seems an entirely logical proposition. He takes issue, by contrast, with the idea that sovereignty itself can be divided, asking how

‘... the people of the several States can be partly sovereign, and partly, *not* sovereign, - sovereign as to the reserved, - and not sovereign, as to the delegated powers? There is no difficulty in understanding how powers appertaining to sovereignty, may be divided; and *the exercise* of one portion delegated to one set of

⁴⁶⁴ Crallé, *op. cit.*, p.121-2.

agents, and another portion to another: or how sovereignty may be vested in one man, or in a few, or in many. But how sovereignty itself - the supreme power - can be divided, - how the people of the several States can be partly sovereign, and partly *not* sovereign - partly supreme, and partly *not* supreme, it is impossible to conceive. Sovereignty is an entire thing; - to divide, is, - to destroy it,⁴⁶⁵.

This is, we come to appreciate, a powerfully-stated case. If we are to take forward its implications today, we are, it seems, left with no other choice but to challenge head-on the still widely-held - indeed, dominant - orthodoxy that sovereignty is of nature divisible and that the young America showed the world how such a division could be achieved. As McDonald puts the conventional wisdom: ‘... Dividing sovereignty was generally regarded as impossible, until Americans devised a way of doing it’⁴⁶⁶. The American case, I argue, *did not* show how dividing sovereignty was possible. Rather, it exposed the notion for what it was: a contradiction in terms, leading only to instability, a logical fallacy.

This line of reasoning means that when talking of sovereignty in terms of powers allocated and of sovereignty in its ultimate sense (both authority meanings), it is the latter that we should more properly call by the name ‘sovereignty’. For the concept by definition concerns *final* authority (see the definition given in Chapter 3 on page 81). The former is more appropriately termed ‘delegated powers or competences flowing from sovereignty’. Thus, a suggestion for modifying our current usage of terms is as illustrated in Figure 17:

⁴⁶⁵ *Ibid.*, p.146.

⁴⁶⁶ McDonald, *op. cit.*, p.viii.

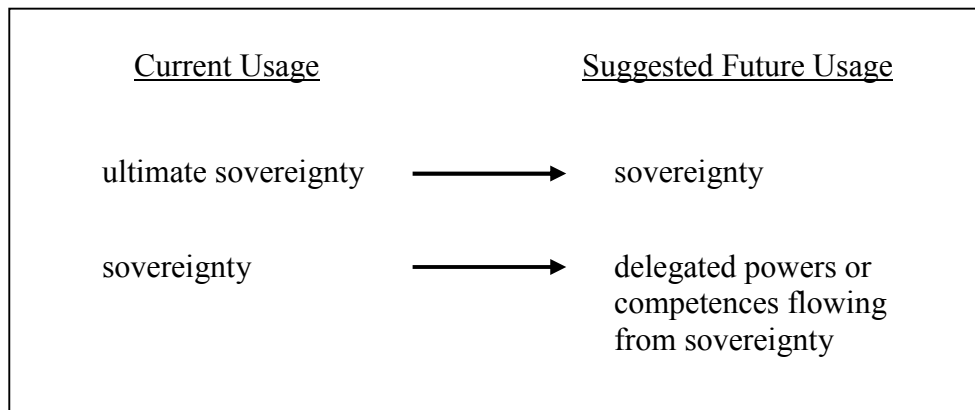


Figure 17 - Restoring the True Meaning of Sovereignty

This, then, is arguably the perspective upon which our concept of federalism should be based: sovereignty undivided, residing in either the parts or the whole of a compound polity (in either the several peoples of the component units or the single people of the wider union); and the powers flowing from sovereignty divided among the two levels of government. In our present conflation of the latter with sovereignty, the former - the true meaning of the concept - tends to go either ignored or wholly unobserved. This seems a serious oversight in the literature of political science which needs correcting.

IV. From Modern Federalism to Modern Federation

With the sovereignty issue at last clarified in the outcome of the Civil War, the concepts and terminology of federalism were now free to make progress towards a finalised state and to bed down in a settled framework. The American compound polity was seen to have become a single State - a modern federation or federal State - and thus to have shifted definitively to the right within the zone of modern federalism, to come to represent one specific manifestation of this form, as in Figure 18 below. The possible existence of the other manifestation, the multi-State federal form, the federal union of States, at this juncture receded from view. This had been, however, as

the States' rights view had made clear, an equally plausible arrangement throughout the initial phase of the Union's life.

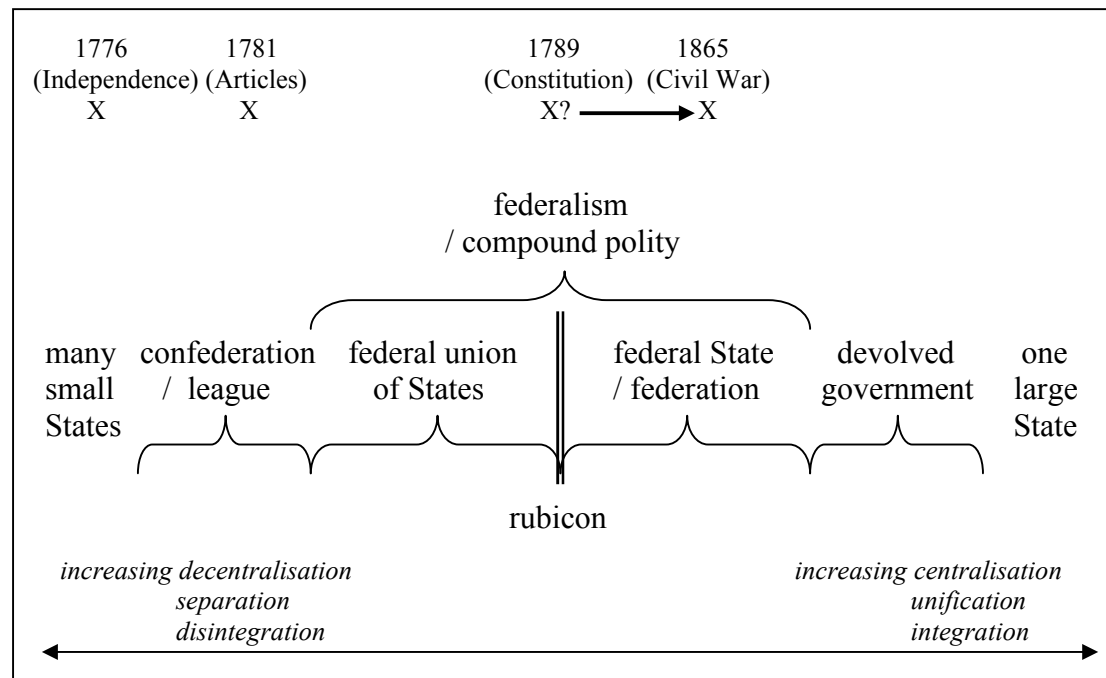


Figure 18 - The Impact of the American Civil War: from Modern Federalism to Modern Federation

Forsyth argues that the US prior to the Civil War had been a federal union of States rather than a federal State, only making the final transition across the rubicon upon the War's conclusion⁴⁶⁷. He says:

‘... until the Civil War had finally decided the issue of the locus of sovereignty in the United States, between the centre and the parts, it was not unequivocally clear that the country formed one federal state, rather than a federal union ... of states’⁴⁶⁸.

I agree with Forsyth that the US did not immediately in 1789 become a State, but prefer to maintain that, owing to uncertainty over the location of sovereignty (as

⁴⁶⁷ Among non-specialists, it should be noted, the general tendency is to assume that America became a federation or federal State directly in 1789.

⁴⁶⁸ Forsyth, *op. cit.*, p.4.

principally reflected in the absence in the Constitution of an explicit granting or prohibition to the States of a right of withdrawal), it remained in this period a beast of ambiguous nature.

It was the Civil War that had the crucial practical effect of ruling out unilateral secession, which finally determined that the polity was one State with territorial integrity. America was now, in the words of US Supreme Court Justice Salmon Chase's 1869 decision *Texas vs. White*, an 'indestructible Union'⁴⁶⁹. Bowles echoes this point, saying of the situation that had prevailed under the earlier post-1789 structure:

'... Some States regarded their membership of the new political order as revocable; not until the victory of Union forces in the Civil War was that view refuted'⁴⁷⁰.

It is interesting to note that the principle of indissolubility (and prohibition on secession) today operates in America through judicial doctrine alone. To this point in time, there has been no formal constitutional amendment to make clear this point.

The conceptual clarification provided by this change had the knock-on effect of sharpening the steadily emerging distinction between the terms confederation and federation. This happened through a solidification of the colloquial opposition of the words 'confederal' and 'federal' that had become normal usage during the course of the war. As was noted earlier in the chapter, right up to 1861 the phrase 'confederated States' had been the standard term to refer to the US (see the quotation on page 193); no longer was this the case after 1865.

The eleven Southern States that had attempted secession in 1861 had formed the ‘Confederate States of America’⁴⁷¹, known as the ‘Confederacy’, and their forces had been called the ‘confederate’ forces, in contrast with the ‘federal’ forces of the Union. This distinction had brought a novel slant to the word confederation. From this point forward, the term would have a States’ rights and hence multi-State allusion, in contrast to federation which would imply a single State, a federal State. Thus were the seeds of a tentative dichotomy in American English sown. However, this distinction has always remained rather fuzzy and uncertain in North America, not least in view of Canada persisting with the title ‘Canadian Confederation’ (styled as such from 1867), whilst clearly being a federal State⁴⁷².

A more sharply defined and hence clearer, if more rigid, terminological distinction would emerge in Europe, by contrast, through the German experience of regional integration, which coincidentally occurred at close to this juncture as the Princely

⁴⁶⁹ The decision reads: ‘... The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. ... the ordinance of secession ... (of the State of Texas) ... and all the acts of her legislature intended to give effect to that ordinance, were absolutely null’. Supreme Court of the United States, Judgement of 12 April 1869 in *Texas vs. White*, United States Reports, Vol. 74, p.700.

⁴⁷⁰ Bowles, *op. cit.*, p.12.

⁴⁷¹ It is revealing that the Constitution of the Southern Confederacy was almost an exact duplicate of the US Constitution. This serves to highlight the fact that it had been the interpretation put on the latter, rather than its form, that had generated the controversy. For it had contained sufficient ambiguity to accommodate a more decentralised (States’ rights) interpretation, as well as a more centralised view. The former avenue was, indeed, in the early life of the Union the predominant reality, with most Presidents of either Southern extraction or sympathy. This perspective, however, appeared to Southerners to be becoming steadily closed off, in view of growing Northern ascendancy both in terms of industrial and commercial power, and population, together with the associated implications for political dominance within the federal legislature.

⁴⁷² As Karmis and Norman note, the dichotomy among specialists became established in the late nineteenth century. By 1893, Woodrow Wilson, then a Professor of Law at Princeton, was able to distinguish between a federal State, in which there was a ‘central sovereignty’, and confederations, which were ‘associations of sovereigns’. Bennett says the former term was in fairly common usage at that time. Nevertheless, the old vocabulary lingered on as popular currency well into the twentieth century. *Webster’s* 1913 edition, for example, continued to give ‘confederation’ and ‘league’ as meanings under the heading ‘federation’.

Bennett, *op. cit.*, p.190.

Karmis and Norman, *op. cit.*, p.103.

Porter, Noah (Ed.) *Webster’s Revised Unabridged Dictionary* (Merriam, 1913), p.549.

Wilson, Woodrow ‘Political Sovereignty’ in *An Old Master and Other Political Essays* (Scribner’s, 1893), pp.91-3.

States of the Bund made the transition from a league to a federation in the Empire (or *Reich*) founded in 1871. Here, legal scholars began a debate by challenging the definition that had been offered by Waitz of a *Bundesstaat*, which had attempted to formalise the American model⁴⁷³. Although the exchanges in the end proved largely inconclusive, what lingers to this day remains Waitz' original distinction between the terms *Staatenbund* and *Bundesstaat*, the confederation of States and the federal State⁴⁷⁴. We will look further at this discussion in the next chapter.

Forsyth concludes his analysis of the American experience with a helpful summary view. He brings out how conflict over the uncertain location of sovereignty within the overall architecture had been at first avoided, through a willingness on the part of both camps to compromise and not to press the matter. However, it could not be put off for ever and, as has been seen, slavery (and implicitly fundamental human rights) proved the defining issue which brought the question of supremacy in a grey constitutional area to a head. One or other side would now have to back down, as the long effort to straddle two irreconcilable positions had run out of road. America was either one sovereign State, or it was several:

‘... In the end the antagonisms became so embittered that compromise was no longer possible and the Hobbesian question of *who ultimately had the right to decide within the union* - that is, the question of sovereignty between the centre and the parts - came to the surface and could only be settled by force. As the Southerner Stephens wrote after the war was over: “Slavery ... was unquestionably the occasion of the war, the main exciting proximate cause on both sides, on the one as well as the other, but it was not the real cause, the *Causa causans* of it. That was the assumption on the part of the Federal authorities, that the people of the several States were ... citizens of the United States, and owed allegiance to the Federal Government, as the absolute Sovereign power over the whole country, consolidated into one Nation. The war ... grew out of different and directly opposed views as to the

⁴⁷³ Emerson, Rupert *State and Sovereignty in Modern Germany* (Yale University Press, 1928), p.96.

⁴⁷⁴ *Ibid.*, pp.94-5.

nature of the Government of the United States, and where, under our system, ultimate Sovereign power or Paramount authority properly resides”⁴⁷⁵.

If this perspective is correct, identifying a rubicon of sovereignty transfer within the broad genus of the federal or compound polity would clearly seem an indispensable feature, when seeking to make sense of processes of regional integration and disintegration. Without such a boundary, the two distinct conceptual species - the multi-State and single State federal forms, more decentralised and more centralised, in which sovereignty resides in either the component parts or the whole respectively - blur into one, whilst very important differences appear to exist between them.

Conclusions

In this third and last chapter on the American debate, we have explored the impact of the Civil War upon the development of modern federalism. First, we observed how initial ambiguity over the exact nature of the novel compound polity established meant that the concepts and terminology of federalism were unable to advance immediately after Philadelphia. Secondly, we noted that this uncertainty led to the adoption of two conflicting positions as to the fundamental character and appropriate operation of the entity. Thirdly, we saw that resort to the use of force in the Civil War showed the idea of divided sovereignty, thought inherent to the compound form, to be a false construction. Fourthly, we identified how this pivotal event finally unblocked the path to conceptual and terminological progress, and clarified the nature of the beast as a single sovereign State and thus a modern federation.

⁴⁷⁵ Forsyth, *op. cit.*, pp.69-70.

Emerging from the analysis was seen to be an amended conception of federalism, as referring to a division of the powers flowing from sovereignty. Through the restoration of an indivisible notion of sovereignty in this change, two federal forms are now specified rather than just one: the federal union of States and the federal State. Implicit in this elaboration is illumination of the existence of a rubicon of sovereignty transfer between many States and one State along a pathway of regional integration, which is at some point definitively crossed - whether this occurs by accident or design.

Although the American case was the pioneering instance of modern federalism, it can now be appreciated in the light of the above analysis that the approach the Americans adopted to the development of the concept was largely pragmatic. More theoretical in nature was the treatment accorded it by German scholars in their subsequent regional integration process. It is to examination of this example that we turn next, in Chapter 8.

Chapter 8

The Impact of the German Debate

The German experience of integration that occurred in the late nineteenth century appears not to have impacted upon the development of federalism to the same extent as the American instance beginning a century before. Indeed, Elazar is rather dismissive of the literature that emerged in this period:

‘... German schools of federal theory that arose in the latter half of the nineteenth century in response to the efforts of the Germanic states to federate offered the most abstractly theoretical inquiry, fully in the German intellectual tradition. The intellectual impetus to discuss federalism came from Alexis de Tocqueville’s work on the American federal system, but rather than attempt to analyze the political behavior of federal nations and states insightfully as did Tocqueville, the Germans turned to doctrinaire and metaphysical analyses of problems of nationalism, sovereignty, and popular consent. Their works have lost much of their appeal in the twentieth century. Only Otto Gierke has attracted and maintained an international reputation’⁴⁷⁶.

We will see, during the course of this chapter, however, that it is probably a mistake to treat this body of scholarship quite so harshly; for there is, in fact, much of value to be gained from the intellectual rigour that these authors consistently attempted to apply to the concepts they analysed - even if the destination of their own lines of enquiry at the time eventually proved somewhat unclear.

Writing in *State and Sovereignty in Modern Germany (1928)*, Emerson sees this body of literature as already largely neglected only thirty or so years after the close of the

⁴⁷⁶ Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987), p.147.

debate. This stands in contrast, he says, to the ‘classic period’ of German thought at the beginning of the nineteenth century (authors such as Kant, Fichte, Schelling and Hegel). Echoing Elazar’s criticism of pedantry, he sees their works as ‘... on the whole ... curiously unrelated in form, temper, and substance to that of their foreign contemporaries’⁴⁷⁷, and goes on to explain the reasons for the heavy legalism of this discourse:

‘... In Germany the sphere of the jurist is far wider and his importance considerably greater than in any of the Anglo-Saxon countries. The jurist in high place must be at once philosopher and political theorist, as well as student of law and laws. Traditionally the relation between law and political thought in Germany is very intimate, the reason being perhaps that dangerous political doctrines were less suspect in the guise of jurisprudence than under their own proper name. Althusius, Pufendorf, Stahl, Ihering, Stammler, Kohler, were all jurists, and even the philosophers such as Kant and Hegel tended to embody their political philosophy in the form of treatises on law or right’⁴⁷⁸.

If this intellectual tradition is one reason for the apparent disconnect between the German and other federal discourses at this time, another may be found in the continuing centrality of monarchy in the German context. Clearly, against this backdrop, the question of the nature and location of sovereignty took on a much greater level of salience. Emerson highlights the contentious issue of whether, by the time the *Reich* was widely thought of as having State-like qualities in its own right, it was at all conceivable ‘... that the royal domains of, say, the kings of Prussia, Bavaria, and Saxony should lapse from the dignity of Statehood into the ignominy of being mere administrative districts?’⁴⁷⁹. No doubt it was this element that led to the battle for ideas reaching the pitch and intensity that it did. After 1871, says Emerson, the ‘full measure of juristic ingenuity’ was no longer directed towards the thorny

⁴⁷⁷ Emerson, Rupert *State and Sovereignty in Modern Germany* (Yale University Press, 1928), p.viii.

⁴⁷⁸ *Ibid.*, p.viii.

conceptual problem of how the Bodinian idea of indivisible sovereignty might be constrained in a framework of limited government, but instead now switched focus to

‘... the vital issue ... of the relation between the concept of sovereignty and the new fact of federalism with its apparent subordination of a group of sovereign States to a new State of their own creation. Where in such a situation was sovereignty to be found?’⁴⁸⁰

This chapter is divided into two sections. The first section investigates the elements of the new debate on federalism. The second section considers the debate’s lasting impact in terms of how it altered the framework of concepts and terminology.

I. The Theoretical Battle Joined: Indivisible Sovereignty Restored

We enter the debate by following Forsyth, who provides us with the appropriate theoretical and historical context. He emphasises, in particular, the way in which each contribution to the unfolding discussion responded to the previous one, giving a sequential progression of argument:

‘... Whereas in the first half of the nineteenth century the most significant discussion of federal union took place in America, in the second half of the century it took place in Europe. The European debate was conducted chiefly, though not exclusively, by German writers, and was concentrated in the years between 1870 and 1900, What is remarkable about this period is not only the quantity and quality of scholarly analyses devoted to the problem of federalism, but the sense of progressive development that these analyses convey. Each writer was engaged in refining or refuting the doctrines of his predecessor, and in taking the argument yet one

⁴⁷⁹ *Ibid.*, p.101.

⁴⁸⁰ As Emerson points out, the theoretical debate on German integration was far from conducted in isolation from ‘real world’ pressures, given the heavy implications of its conclusions for the perceived understanding of the nature of the *Reich*. Practical politics frequently intruded and impinged upon the evolution of theory: ‘... it was impossible that this controversy could be held on purely juristic grounds since the political issues invariably injected themselves and weighted down the balance in one way or another’.

Ibid., pp.92, 101.

stage further. It is this that makes it legitimate to speak of a “debate”.

Like its counterpart in America the European debate was not a mere exercise in academic logic but provoked by concrete political developments. The successive changes that took place in the Swiss federal constitution in 1848 and 1874 provided one stimulus, but undoubtedly the decisive catalyst was the political remoulding of Germany between 1866 and 1871, as a result of the termination of the German Bund, the establishment of the North German Bund, and finally the transformation of the North German Bund into the German Empire. Most of the expositions of federalism made by German writers during the period in question were intimately linked with interpretations of the curious and complex German constitution of 1871⁴⁸¹.

The majority of authors considered in the last three chapters were writing before the American Civil War had decided the issue of sovereignty between the centre and the parts, and their focus was on illuminating the then still uncertain nature of the post-1789 structure. In this sense, we must be clear that the American debate took place before a defining moment in history. As Forsyth observes, none of these authors spoke of the United States as a ‘federal State’. The German writers, by contrast, ‘... stood the other side of the “great divide”’⁴⁸². He brings out the important implications of this paradigmatic shift:

‘... For European writers the primary question became one not of defining a federal *union* of which states were members, but rather of defining a fully fledged *state* of which something less than states were members. To describe this latter body, which they saw existing in Germany, Switzerland, and the United States, they used the term “federal state” or *Bundesstaat*, while they used the term “confederation of states” or *Staatenbund* to describe the kind of body a federal state was not, and had developed beyond, namely a multiplicity of states united’⁴⁸³.

We can now appreciate that it was primarily through the German political discourse, and the term *Bundesstaat* in particular, that the term ‘federal State’ entered the

⁴⁸¹ Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), p.133.

terminology of political science⁴⁸⁴. Furthermore, the distinction which had been (and remained) loose and ill-defined in America between a federation and a confederation took on sharper definition in Europe, as the latter term became equated with the word *Staatenbund*. It was in this way, it seems, that it most firmly acquired its explicitly multi-State allusion. For example, the title of Le Fur's work of 1896 towards the end of the German debate, *Etat Fédéral et Confédération d'Etats (Federal State and Confederation of States)*, was, as Forsyth notes, a direct translation of the German terms *Bundesstaat* and *Staatenbund*⁴⁸⁵.

Thus, the categories used in the German debate, in contrast to those employed by earlier American writers, were based on '... the radical antithesis between one state and many states'⁴⁸⁶. In this manner, the two discussions of federalism, starting from different historical perspectives, approached the differing theoretical questions of their age with a different vocabulary.

The terms *Bundesstaat* and *Staatenbund* did not originate in this period. They seem to have entered into general usage in German at the beginning of the nineteenth century, after the Napoleon-inspired Confederation of the Rhine, or *Rheinbund*, had absorbed the bulk of the old Holy Roman Empire. The two terms

'... appear to have been first directly contrasted with one another in 1807. The debate that began in the 1870s was thus not concerned to

⁴⁸² *Ibid.*, p.134.

⁴⁸³ *Ibid.*, p.134.

⁴⁸⁴ It seems that it was from Germany that the term arrived in America. Bennett suggests that this was, for example, the influence leading Woodrow Wilson to use it when writing in 1893 (see footnote 472 on page 230). In this connection, Merriam illuminates how the 'scientific method' of the German school had profoundly influenced the founding of American political science in the late nineteenth century (scholars such as Burgess, Willoughby, Wilson and Woolsey), in particular via the work of the immigrant Lieber, who came to the United States in 1827.

Bennett, Walter *American Theories of Federalism* (University of Alabama Press, 1964), p.190.

Merriam, Charles *A History of American Political Theories* (Transaction, 2008), pp.305-6. Originally published in 1903.

⁴⁸⁵ Forsyth, *op. cit.*, p.135.

⁴⁸⁶ *Ibid.*, p.134.

introduce the terms *Bundesstaat* and *Staatenbund* but rather to give them a precise and coherent meaning⁴⁸⁷.

The argument starts one year after the founding of the German Empire in 1872, with von Seydel's publication of *The Concept of the Federal State* (*Der Bundesstaatsbegriff*). This was largely a critique of the article that had been published by the historian Waitz two decades prior in 1853, *The Essence of the Federal State* (*Das Wesen des Bundesstaates*); and so it is Waitz we consider first.

In 1835, de Tocqueville had written that the post-1789 America comprised two distinct and separate levels of government, each operating within its sphere. It will be recalled from the previous chapter that he had followed *The Federalist Papers* in conceptualising the new polity as a compound of federal and national elements, and had pointed to the need for a new name for the species. Forsyth suggests that Waitz could be said to have directly attempted to supply this lack, with his concept of the *Bundesstaat*.

Whilst Waitz defines the *Staatenbund* as an association of States by means of a treaty or international agreement, hence implying the maintenance of sovereignty wholly with the component units, untransgressed⁴⁸⁸, he defines the *Bundesstaat* in a very contrasting light by applying the notion of divided sovereignty. In this way, says Forsyth, he '... systematized Tocqueville'⁴⁸⁹; for it was the latter who had first formalised this radical idea flowing from the Philadelphia construct of 'sovereignty of the people'. Emerson observes that '... Untroubled by the strict canons of classic political jurisprudence, de Tocqueville, like the authors of the *Federalist*, was easily

⁴⁸⁷ *Ibid.*, p.135.

⁴⁸⁸ Emerson comments that, later, the definition of this term '... was usually amplified by the explicit declaration that sovereignty in the *Staatenbund* remained in the undisturbed possession of the several States, but this addition would probably have been acceptable to Waitz'. Emerson, *op. cit.*, p.95.

able to resolve the difficulties of federalism by means of the conception of divided sovereignty⁴⁹⁰.

In the *Bundesstaat*, Waitz writes, the two levels of government are equally sovereign States. A part of the

‘... general tasks of State-life is to be fulfilled jointly by the whole nation, another part separately by the individual stocks or divisions of the nation. ... The distinctive feature is that each part must itself really be a State’⁴⁹¹.

So for Waitz the ‘essence of the federal State’ lay, as Emerson perceives it,

‘... in the fact that sovereignty belonged exclusively to neither center nor parts, but inhered in both within their respective and separate spheres’⁴⁹².

Merriam enlarges on this thinking as follows. Waitz, he says, asserted that

‘... The central government and each member of the association has its own organization; each has its own particular sphere of operations. Within the limits of its own sphere, one is as independent in the exercise of its power as is the other. “Now this independence,” urged Waitz, “may not inappropriately be called by a name customary in Political Science, sovereignty”’⁴⁹³.

⁴⁸⁹ Forsyth, *op. cit.*, p.136.

⁴⁹⁰ Forsyth considers that it was de Tocqueville who raised the idea of divided sovereignty ‘... to the level of a principle’. In *Democracy in America*, he had written: ‘... The principle upon which all confederations rest is that of a divided sovereignty’.

Merriam notes that Waitz had commented ‘... Most of all Tocqueville’s clear sighted exposition of the North American constitution instructed me’. Merriam explains that the theory of divided sovereignty was, however, ‘... not Tocqueville’s own, but the formulation of ideas already long in existence. It was, in fact, the familiar compromise theory of the American federal State that was applied by Waitz and his followers to the German problem’.

Emerson, *op. cit.*, p.94.

Ibid., p.113.

Merriam, Charles *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press, 1900), p.188.

Tocqueville (de), Alexis *Democracy in America*, Vol. I (Schocken, 1961), p.186. Originally published in 1835.

⁴⁹¹ Cited in Emerson, *op. cit.*, p.95.

⁴⁹² Emerson, *op. cit.*, p.95.

⁴⁹³ Merriam, *op. cit.*, pp.186-7.

In this light, now, and drawing upon insight gained from the American experience in Chapters 5 - 7, we can compare Waitz' mental framework of basic political forms against that developed in America after 1789. The *Staatenbund*, clearly dependent on the idea of State sovereignty undisturbed, is seen to map precisely onto the form of a league. The *Bundesstaat*, by contrast emphasising the concept of divided sovereignty, reflects exactly the species of the compound polity, being a composition of two co-ordinate levels of government (thus occupying the whole of the central space between a league among sovereign States and a system of devolved government within a unitary State). This is illustrated in Figure 19 below. The diagram is an exact mirror image of Figure 16 on page 182. It will be recalled that, as the meaning of federalism was reinvented in America, the word moved over time from representing the looser of these two forms to the more integrated.

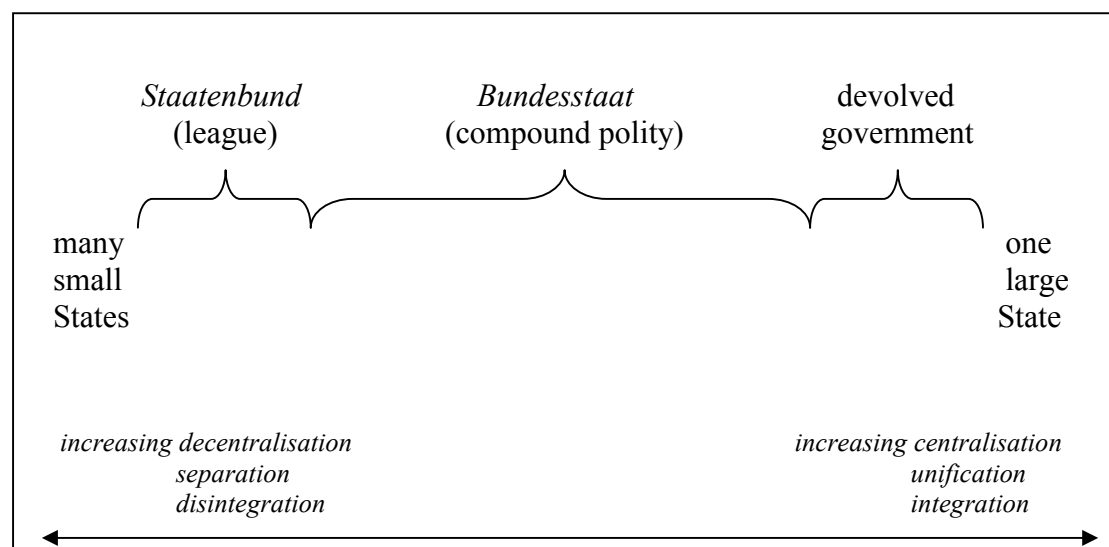


Figure 19 - Waitz' Framework of Basic Political Forms

What is particularly interesting here, in 1853 then still nearly a decade prior to the American Civil War, is Waitz' early identification of the US as a State (*Staat*) - well before Americans themselves took to using the term and certainly in advance of the

issue being definitively settled. Arguably, this first assigning of the term *Bundesstaat* was a little premature, counting eggs before they had hatched so-to-speak. Fortunately for Waitz, however, in time hatch they would, and the concept gained wide acceptance since, through the idea of divided sovereignty, it appeared to reflect well the actual practice of constitutional government on two levels observed in America.

As Emerson brings out, however, as soon as the model was applied directly to Germany after the birth of the *Reich*⁴⁹⁴, a more critical eye came to be cast over the underlying operating concept. At this point, the *Bundesstaat* swiftly came under sustained attack, with the vast bulk of its former supporters now deserting the notion of divided sovereignty:

‘... As, in its American form, this theory of divided sovereignty or, rather, of sovereignty limited to a certain sphere of activity, had been sharply assailed by Calhoun of South Carolina, so likewise in Germany it was subjected to the “particularist” attack of Max von Seydel of Bavaria. In the nineteen years before its demolition, however, it had gained the support of virtually all important thinkers, among its adherents, for the moment at least, being von Gerber, Ahrens, von Mohl and Heinrich von Treitschke. Of these and of the new writers who came into prominence in the last thirty years of the century, only one, von Mohl, was not converted by 1880 to the proposition that sovereignty was one and indivisible, and that there could not be two sovereignties over the same area or group of men’⁴⁹⁵.

Von Seydel rested his assault on the idea that

‘... sovereignty was the natural and traditional attribute of the State; that, by definition, it was supreme and absolute power, and that, in consequence, it was inconceivable that two States should exercise sovereignty over the same territory - a thesis, the logical

⁴⁹⁴ The *Reich* had been founded after victory in the Franco-Prussian War of 1870 - 71, and the decision to transform the Prussian-led North German Bund into a unified German Empire under Wilhelm I. The latter was proclaimed Emperor in the Hall of Mirrors at the Palace of Versailles on 18 January 1871.

⁴⁹⁵ Emerson, *op. cit.*, p.96.

coherence of which, accepting its premises, made it indisputable⁴⁹⁶.

If Waitz systematised Tocqueville, therefore, in direct parallel von Seydel can be said to have systematised Calhoun⁴⁹⁷. The influence is unmistakable. Emerson sees him citing Calhoun approvingly as ‘... laying down universally recognized principles’⁴⁹⁸; for example, directly referring to his dictum that to divide sovereignty is to destroy it (see the quotation on page 226). For von Seydel, then, as Forsyth remarks, Waitz’ *Bundesstaat* appeared

‘... a contradiction in terms. In so far as it was composed of more than one sovereign power it could not be called a state. Seydel’s conclusion was a radical one: all bodies that had hitherto been classified as ‘federal states’ were in reality either simple states, or confederations of states. No third term was possible’⁴⁹⁹.

The *Bundesstaat* now came to be seen as ‘... juristically untenable and worthless ... logically inconceivable’⁵⁰⁰, says Emerson. Whilst most of von Seydel’s contemporaries followed him as far as rejecting Waitz’ construction of the *Bundesstaat*, hardly any followed him, however, to the conclusion he drew that Switzerland, the US and the new German Empire were all then confederations of States, rather than States in their own right. Here, he argued that the component States had never formally divested themselves of sovereignty, and, therefore, that they still were in possession of it. This excessively legalistic application of Calhounian logic - ignoring the fact that *politically* in each case a transition had by then occurred - lost von Seydel his base of support.

⁴⁹⁶ *Ibid.*, p.97.

⁴⁹⁷ Forsyth, *op. cit.*, p.136.

Merriam, *op. cit.*, p.202.

⁴⁹⁸ Emerson, *op. cit.*, p.97.

⁴⁹⁹ Forsyth, *op. cit.*, p.137.

⁵⁰⁰ Emerson, *op. cit.*, p.97.

In spite of the rejection of von Seydel's more extreme end-point, what is striking in the German debate is the impact that Calhounian philosophy made upon the German mind via von Seydel. Of most significance is that, as Emerson notes, from the time of *The Concept of the Federal State* onwards,

‘... it was accepted as virtually axiomatic that sovereignty was one and indivisible and at least potentially absolute, suffering no restrictions to be imposed upon it from without’⁵⁰¹.

It would be this thinking, not the divided sovereignty then - as now - prevailing in America, that would mark the German discourse henceforth.

Support for the other possible destination following such logic - that the German Empire was a sovereign State and the Princely States no longer held the attribute of Statehood - was advanced by Jellinek. The powers of the *Reich* and the status of its Emperor were, after all, simply too developed and important to deny that the former had acquired at least some sovereign rights of its own. However, this interpretation of the Constitution proved equally unpalatable to many, threatening as it was to the on-going sovereignty of the Principalities.

For a number of years the debate rumbled on, before petering out after Le Fur's contribution just prior to the century's end, leaving the matter not unequivocally settled. Indeed, conceptually the final outcome was rather a muddled position. This was broadly accepting of the premise of the indivisibility of sovereignty, with the *Reich* clearly thought to have become a State in its own right. Nevertheless, it was

⁵⁰¹ *Ibid.*, p.99.

still generally held that the Princely States had not been entirely denuded of the characteristic of Statehood⁵⁰².

II. The German Legacy: the ‘*Sui Generis*’ Gap

We turn now to consider the lasting effect that the German deconstruction of American divided sovereignty had upon the concepts and terminology of federalism more broadly. Like the debate itself, the result is not entirely clear. Nevertheless, some diagrams may help to shed light upon the possible impact.

In denying the possibility of the existence of intermediate forms, von Seydel appeared to be returning to the earlier tripartite schema of Pufendorf (see Figure 13 on page 168). Emerson makes the intellectual link: ‘... As Preuss pointed out, the German parent of Seydel’s doctrines was Pufendorf’⁵⁰³. He goes on:

‘... Always Seydel came back to his central proposition that “either the whole is a State, in which case the parts are not; or the parts are States, in which case the whole cannot be a State”’⁵⁰⁴.

The echoes with Pufendorf’s view of the world are clearly strong here. On this view, it seems appropriate to conceive of von Seydel’s schema as a primitive early framework in which a rubicon of ultimate sovereignty transfer is conceived as lying between the categories of the league (Pufendorf’s ‘system of States’) and the large

⁵⁰² Emerson notes: ‘... It was agreed virtually unanimously that sovereignty was the exclusive possession of the Reich and that this sovereignty was indivisible and, formally, potentially absolute’. This leads him to conclude that the debate about what to call the Principalities was partly ‘... merely a matter of verbalism’.

Merriam expands on the apparently nonsensical destination reached in this regard: ‘... the particularism of the members of the German Empire demanded ... that either sovereignty or statehood be assigned to them. The former quality they could no longer possess; the latter they could retain only by the divorce of the two concepts, sovereignty and statehood. Thus, in response to a demand of the former States for continued recognition, the idea of the non-sovereign State was formed’.

Ibid., p.100.

Merriam, *op. cit.*, pp.197-8.

⁵⁰³ Emerson, *op. cit.*, p.97.

unitary State, as in Figure 20 below. Seen in this light, von Seydel's argument can be understood as a reinterpretation of the nature of the *Bundesstaat*. Where the whole is thought not to infringe upon the sovereignty of the parts, practical examples are to be placed in the league category; and where the parts are thought not to infringe upon the sovereignty of the whole, they are to be placed in the large unitary State category. Thus are the two species of the compound polity, multi-State and single State, to be divided up. While the former are to be considered simple associations of States, the latter are to be considered as merely a form of constitutionalised devolved government within a unitary State.

Though, as was seen, von Seydel himself chose to conceptualise the *Reich* as a league, it was perhaps easier for others to do the opposite, casting it as a unitary State. This was because its upper level possessed *Kompetenz-Kompetenz*, the ability to determine constitutional change⁵⁰⁵; and this tier maintained an attribution of power to the lower tier only by continued self-denial, or 'auto-limitation'⁵⁰⁶.

⁵⁰⁴ *Ibid.*, pp.98-9.

⁵⁰⁵ Emerson describes the power over constitutional change, from which other writers such as Laband had deduced the idea of *Kompetenz-Kompetenz*, as being the possibility within a federal State of almost unlimited amendment of the sub-unit Constitutions by the central State '... without the unanimous consent of the member-States, ... (which) ... might even be carried so far as to destroy the sovereignty of the States'. This feature (often referred to as the 'potentiality of omnicompetence') was particularly pronounced in the German Empire, where Article 78 of the Constitution permitted the central government to make amendments to it by simple legislative action.

Ibid., pp.99, 108.

⁵⁰⁶ The idea of auto-limitation, advanced by Jellinek, Emerson sees following directly from the notion of *Kompetenz-Kompetenz*, which delivered sovereignty into the hands of the central State: '... since the central State had an unlimited right to extend its competence, all the rights of the members must be regarded as derived from the center and dependent upon its continued auto-limitation in their favor'. *Ibid.*, p.99.

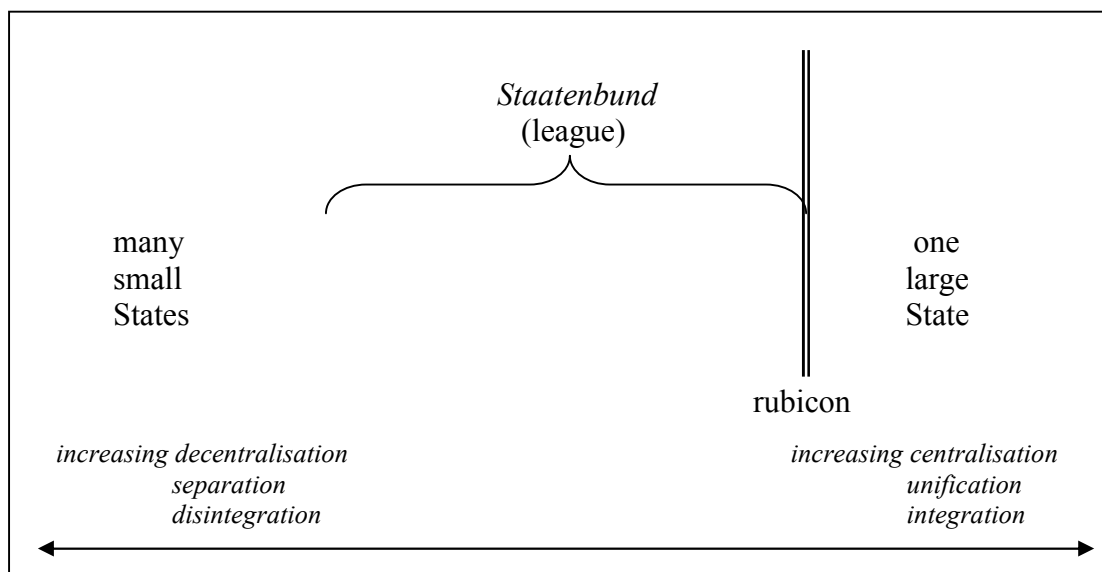


Figure 20 - Von Seydel's Framework of Basic Political Forms

If this may have been how von Seydel saw the world, his legacy, though, is rather different. Many thinkers in both Germany and America at the time took on board his observations regarding the indivisibility of sovereignty. They thus followed him mentally all the way back to Pufendorf's framework of concepts and to the position of dismissing the possibility that the federal State could in fact exist⁵⁰⁷. However,

⁵⁰⁷ Merriam illuminates how the American political science scholarship of the late nineteenth century had mirrored the strong statement of indivisible sovereignty made by von Seydel. Pearson, writing in the introduction to Merriam's work, expands that the aim of the 'liberal-progressive' movement (following Lieber) had been to overturn the old 'conservative' thinking of the founders, in favour of a more modern 'scientific' approach. Thus, the 'natural rights' view of the origins of government was now replaced by the State as the source of all liberty. Says Merriam: '... In Lieber's opinion, the "state of nature" has no basis in fact. ... (He) ... condemned the contract theory as generally held, on the ground that it was both artificial and inadequate'. Merriam sees the new doctrine best stated by Burgess: '... it is the state that makes liberty possible, determines what its limits shall be, guarantees and protects it. ... men do not begin with complete liberty and organize government by sacrificing certain parts of this liberty, but on the contrary they obtain liberty only through the organization of political institutions. The state does not take away from civil liberty, but is the creator of liberty - the power that make it possible'.

Merriam enlarges on the implications of this line of thought, which evinces a clear parallel with von Seydel's conclusions: '... From the principle that sovereignty is a unit, it follows that the so-called "federal state" is an impossibility. What seems such, is either a number of sovereign states, having an equal number of local governments and a common central government, or one sovereign state having a central government and several local governments. ... The political system of the United States is a dual government, with the ultimate sovereignty resting in the nation. ... The so-called "states" are not sovereign or semi-sovereign, but merely organs of government for the nation'.

Merriam, Charles *A History of American Political Theories* (Transaction, 2008), pp.299-313.

Originally published in 1903.

Pearson, Sidney 'Introduction to the Transaction Edition' in Merriam, *op. cit.*, pp.xiii-xxi.

subsequent generations in the twentieth century appear to have been less keen to deny in the name of theoretical principle what was observed in practice. This less reductionist position could perhaps be read as simply modifying the post-Philadelphia framework of Waitz based on divided sovereignty (see Figure 19 above, on page 241), by overlaying an indivisible conception of sovereignty. The scope of his *Bundesstaat* concept is thus narrowed, while leaving the rest of his schema intact. The latter would now be thought to occupy only the space to the right (the more integrated side) of the rubicon, being henceforth considered to be founded upon a single State. This is illustrated below in Figure 21.

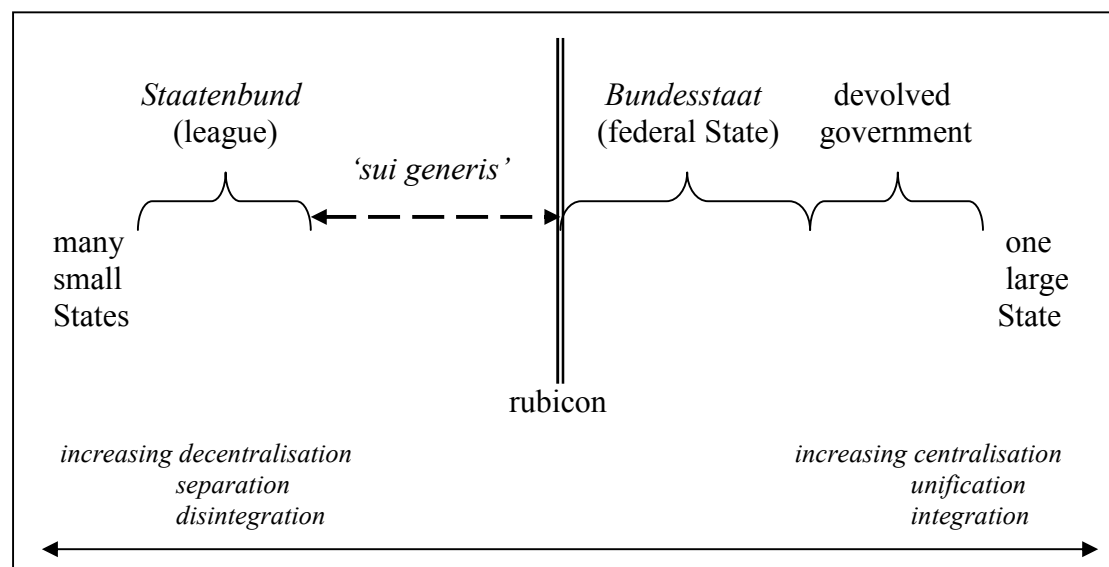


Figure 21 - The German Legacy: the *Sui Generis* Gap

We seem to arrive here at a clear picture of what the term federal State or federation is thought to mean today. This is observed to be less all-embracing than Waitz' original conception, which had also encompassed the more decentralised multi-State part of the compound space in which sovereignty resides in several peoples (in addition to the more centralised single State part in which sovereignty resides in one people). It will be recalled from the previous chapter that originally, after Philadelphia, the two

had been considered equally plausible models in that single zone of the ‘compound republic’, thought to have mixed elements of the ‘federal’ and the ‘national’ and thus to have represented a hybrid of the ‘league of States’ and ‘unitary State’ forms. Indeed, the compact among States view appears to have been the initially predominant understanding of the American polity. This point in the historical development of the federal concept, therefore, appears to be where one section of our conceptual schema of basic political forms is lost, and where a void of conceptual space opens up: the ‘*sui generis*’ gap. Until the multi-State variant of the compound is recognised as a distinct political form, it would seem clear from the analysis, the framework of integratory concepts within political science will remain incomplete.

Conclusions

In this eighth chapter, we have investigated the impact of the German debate upon the development of federalism. First, we noted how, in contrast with the earlier American debate, this one was from the start explicitly theoretical. In this context, a coherent idea of sovereignty as an indivisible conception was quickly seen to be restored, and the incoherent notion of divisible sovereignty rejected. Secondly, we considered the possible legacy of this change upon mankind’s incrementally evolving framework of basic political forms. In particular, a ‘*sui generis*’ gap was seen to open up between the models of the confederation and the federation.

The German experience of regional integration took one stage further the theory of federalism. It is observed to have sharpened conceptual categories and given final form to the steadily-emerging distinction between confederalism and federalism with which we are familiar today: the radical opposition of the models of the confederation of States and the federal State, in the concepts of the *Staatenbund* and the

Bundesstaat. This development is seen to have fed back into American political thinking subsequently, towards the end of the nineteenth century. It was via this route, it seems, that the terminology we employ today entered usage in the English language.

The reassertion of indivisible sovereignty by the German theorists represented, in some respects, the culmination of the whole theoretical debate on the nature of modern federalism begun at Philadelphia a century before: the discussion appeared to have come full circle. Yet, arrival at this destination is seen to remain at odds with the continuing employment today of a divisible conception in the mainstream understanding of the federal concept in political science. This inconsistency presents both a problem and a challenge to scholars currently, in particular in the context of analysis of the most recent example of regional integration to occur: the European case. It is to examination of the debate on this instance that we now turn, in Chapter 9.

Chapter 9

The Impact of the European Debate

Application of the concept of federalism in seeking to analyse the outcome of the European instance of regional integration beginning after World War Two and still on-going today, the European Union, remains highly controversial. For the first three decades of the project's life, the concept was a taboo in academic discussions, with the vast majority of scholars rejecting its use as an analytical tool. Yet there has been, in recent years, a steadily growing willingness within the academy to draw insights into the emerging polity's nature and functioning from the domain of federalism, and in particular from comparative federalism - even if the precise relevance of the concept in this new context continues to be somewhat unsettled. This chapter examines the way that the literature has gradually begun to apply the federal idea in relation to the European case and considers some of the discussions that have taken place in this connection. Whilst the nature of these contributions has been relatively disparate and disconnected, in comparison with the more sequential progression of argument observed in the German case, which was more tightly focussed around a specific set of issues, nevertheless, as I will attempt to show, there has in fact been a not inconsiderable outpouring of inter-related writing in this instance spread across time, country and discipline. Such works share in common a concern with grappling with the rather puzzling quality that the EU exhibits; and this is a theme that has only strengthened more lately, as the anomalous character of the order has become ever more evident with the continued deepening of integration. Today, I suggest, the

confluence of the several streams of diverse thought into a broader and more integrated river of intellectual exchange, means that we can now justifiably talk of a 'debate' underway. This is seen to confront not only the relevance of federalism to the EU case. It also considers the very nature of the federal concept, and, indeed, the nature of sovereignty within this context - if in a rather inconclusive manner at present.

The chapter itself attempts to take the debate one stage further, by offering a suggestion as to how the uncertainty persisting at the current frontier of research may be confronted. It proposes that the key to a more coherent and better-functioning concept of federalism may be found to lie in restoring an indivisible conception of sovereignty to the heart of the notion. Such a perspective, it is put forward, does not mean that the federal State is a logical impossibility - as has until now been commonly supposed. It simply means that our idea of what federalism is is mistaken. The concept, I advance, should be understood not as 'a division of sovereignty', but as 'a division of the powers flowing from sovereignty'. More fully, it should be defined not as 'a division of sovereignty between two levels of government', but as 'a division of the powers flowing from sovereignty between two levels of government that are of equal status'. The idea of a structural parity between the two levels - thought to be the core essence of federalism - is seen to enter now not as a division of *sovereignty* between two *governments* (since not only is sovereignty not divisible, but also governments are not the holders of sovereignty; rather, as emerged in Chapter 7, it resides in the people). Instead, the idea enters as *equality of status* between two governments, which are both understood to be holders of shares of powers *delegated* from the source of sovereignty. Only in this way, I posit, can a rational and complete schema of intermediate political forms be worked out.

The chapter is divided into four sections. First, it identifies how the EU moved into the '*sui generis*' gap upon entry into force of the SEA in 1987. Secondly, it investigates the quest among scholars over the past three decades to address the conceptual conundrum that the EU has posed in this context, in particular by applying insights drawn from the realm of federalism. Thirdly, it observes a need to qualify the 'post-sovereignty' thesis current in the discipline. Fourthly, it attempts to establish how the prevailing conceptual void in the discipline's schema of basic political forms may now be closed by clarifying the definition of federalism.

I. The EU After the Single European Act: Into the '*Sui Generis*' Gap

From the time of the demise of plans for a European Defence Community (EDC) and accompanying European Political Community (EPC) in 1954, which marked the death-knell of the idea of 'constitutional' or 'big bang' federalism, the move to federation in a single jump, the concept was banished from both scholarly and political debates on European integration until almost the turn of the millennium. Against a background of, first, Gaullist hostility to the supra-national institutions of the Community in the 1960s, then economic stagnation ('Euro-sclerosis') in the 1970s, and, later still, staunch Thatcherite defence of 'national sovereignty' in the 1980s, the original federal (and political) ambition of the project, manifested in the Schuman Declaration's clear goal of a European federation, was laid aside - and even possibly forgotten⁵⁰⁸. Instead, a slower, more pragmatic and more incrementalist approach to integration was adopted - the so-called 'Monnet method' of small steps -

⁵⁰⁸ The Schuman Declaration of 9 May 1950, drafted for the French Foreign Minister Robert Schuman by Jean Monnet, announced the creation of a community in coal and steel open to the participation of all European countries. It characterised the proposed joint organisation as '... the first step in the federation of Europe' and '... the first concrete foundation of a European federation'. Full text available on European Navigator, URL=<http://www.ena.lu>.

and the economic aspect of the project stressed. In this setting, as Kelemen and Nicolaidis observe, for the first part of the EU's life, both the dominant theoretical accounts seeking to explain European integration, inter-governmentalist and neo-functional, '... rejected the relevance of federal comparisons'⁵⁰⁹.

Taylor and Wallace saw the EC emerging in the early 1980s as a confederation, being then still considered an institutional arrangement of inter-governmentalism in which decisions were primarily taken with the unanimous consent of all member States⁵¹⁰. This decisional mode, in which each member State retained a 'veto' over common legislation, was then thought to justify the normal colloquial association of confederalism and sovereignty, as in the phrase 'a confederation of sovereign States'⁵¹¹. Upon signature of the SEA, however, as was noted in Chapter 2, a series of supra-national elements began to be added tightening the level of integration and giving the political system an ever more federal complexion. In particular, the introduction of a generalised rule of qualified majority-voting (QMV) for matters related to implementing the single market appeared to fundamentally transform the nature of the beast. It meant that national governments could find themselves out-voted on issues for the first time, thus having to implement European-level policy

⁵⁰⁹ Kelemen, Daniel and Nicolaidis, Kalypso 'Bringing Federalism Back In' in Jorgensen, Knud Erik, Pollack, Mark and Rosamond, Ben (Eds.) *Handbook of European Union Politics* (Sage, 2007), p.301.

⁵¹⁰ Taylor, Paul 'The Politics of the European Communities: The Confederal Phase' in *World Politics*, Vol. 27, No. 3, 1975.

Taylor, Paul *The Limits of European Integration* (Croom Helm, 1983).

Wallace, William 'Europe as a Confederation: the Community and the Nation-State' in *Journal of Common Market Studies*, Vol. 21, No. 1-2, 1982.

⁵¹¹ Exemplifying this mainstream thinking, Nicolaidis considers the EU today to be '... more than a particularly strong version of a confederation of sovereign states'. Maignette, likewise, considers the EU to have already moved beyond confederalism, characterising the form as one '... born of an international treaty concluded between sovereign states, where all decisions are unanimously adopted by state representatives'. In such arrangements, he says, States preserve their sovereignty '... by establishing only loose forms of international cooperation'.

Maignette, Paul *What Is the European Union? Nature and Prospects* (Palgrave, 2005), p.5.

Nicolaidis, Kalypso 'Our European Demoi-cracy' in Nicolaidis, Kalypso and Weatherill, Stephen (Eds.) *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003), p.143.

internally with which they disagreed. In this regard, the absolute authority of national sovereignty clearly now appeared to have been transgressed - and the term confederation no longer seemed appropriate. The move towards 'sovereignty-sharing' (or what was thought to be so) and federalism seemed to have begun in earnest.

Only five years later, at Maastricht, a further significant expansion of fields and strengthening of powers was undertaken in response to the fall of the Berlin Wall and the collapse of Soviet Communism in 1989, which had brought in its wake the twin pressures of the reunification of Germany and potential enlargement to include all of the countries of Eastern Europe. The signing of the Treaty on European Union (TEU)⁵¹² saw several new elements introduced in order to 'deepen' the level of integration in preparation for 'widening': two additional 'pillars' alongside the existing economic pillar covering foreign and home affairs, proposals for a single currency and central bank, another extension of QMV, a procedure of 'codecision' in legislation between the Council and the Parliament, and a concept of European citizenship. With more modifications subsequently made at Amsterdam⁵¹³, Nice⁵¹⁴ and most recently Lisbon, the European construction appeared to move consistently in a more integrated and centralised direction throughout the 1990s and into the new millennium.

This gradual progression is charted in Figure 22 below, with the emerging Euro-polity being seen to enter the *sui generis* space between confederation and federation on the signing of the SEA, and to move steadily further to the right within this zone towards (though not into) federation over time. The framework elaborated here, it will be noted, is that inherited from the German debate (see Figure 21 on page 248).

⁵¹² Signed in Maastricht on 7 February 1992 and entered force on 1 November 1993.

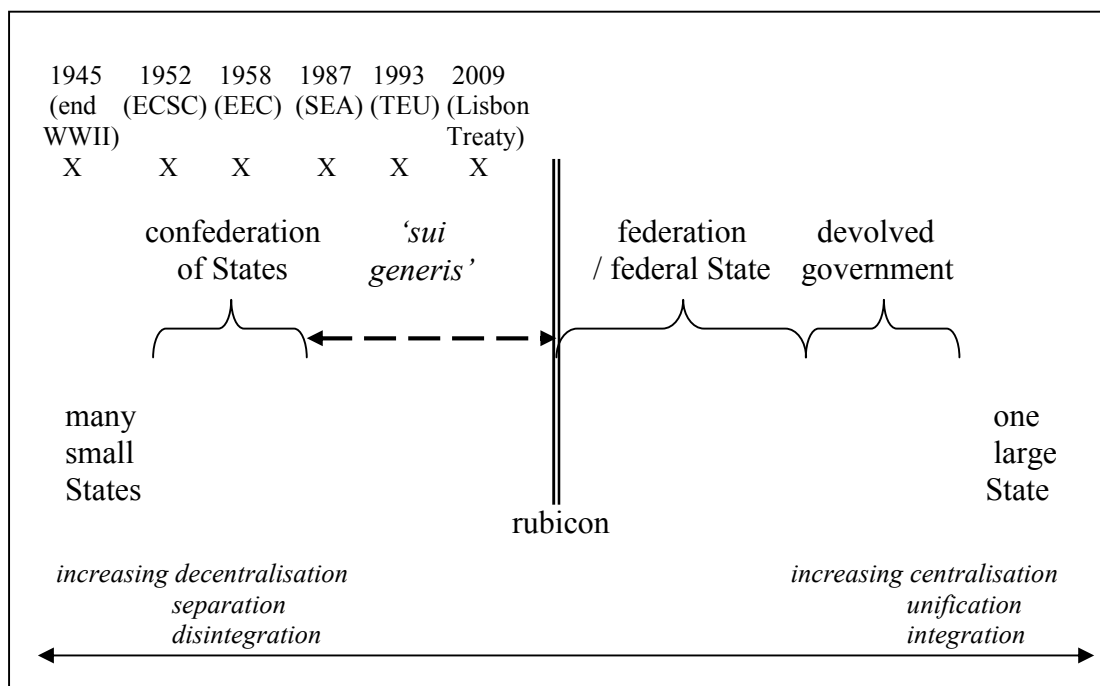


Figure 22 - The EU After the Single European Act: Into the 'Sui Generis' Gap

This perspective on the development of the EU is seen to fit with the present well-established consensus conceptualisation of the polity within the discipline as being 'more than a confederation, but less than a federation'. We recall here the quotations from Marquand and Laffan presented in Chapter 1 in this connection (see page 29). We find many other authors corroborating this view. For example, Hueglin and Fenna see the EU as a novel type of political system '... somewhere between federation and confederation'. It is, they say, '... more than a confederation ... At the same time, ... (it) ... is not a fully developed or conventional federation'⁵¹⁵. The inference that we can draw from this consistently-held scholarly perspective seems clear: the EU is thought to be neither one thing nor the other. It is seen as neither a confederation nor a federation, but as lying somewhere *in between* these two forms.

⁵¹³ Treaty of Amsterdam, signed on 2 October 1997 and entered force on 1 May 1999.

⁵¹⁴ Treaty of Nice, signed on 26 February 2001 and entered force on 1 February 2003.

⁵¹⁵ Hueglin, Thomas and Fenna, Alan *Comparative Federalism: a Systematic Inquiry* (Broadview, 2006), pp.13, 35.

It has not become so integrated as to cross the line into the territory of the federation or federal State; on this point academic opinion is unequivocal. There is a wide consensus of opinion that the EU is not a State. So it cannot be a federal State. Burgess puts the commonly-held view among scholars of federalism: ‘... Clearly, the EU, even with its EC *acquis communautaire*-based pillar, is neither a “state” nor a “federal state”’⁵¹⁶. Pinder believes the control of armed force to be central to the equation, seeing this decisive feature as presently lacking: ‘... in general the EU has, with the single market, the single currency, and its budget, the main instruments of economic policy to be found in federal systems. It does not need much more. ... Another suggestion is that Economic and Monetary Union (EMU) will lead inevitably to a federal state. But a federal state has to have power over armed forces; and this does not follow from the adoption of the Euro’⁵¹⁷. From a legal stand-point, Piris offers a number of reasons that the EU is not a federal State, as was noted earlier (see footnote 87 on page 37). Writing more recently, he emphasises the point: ‘... the EU’s partial federalism will not replace the present European Nation States. Nobody is working today to build a European State’⁵¹⁸. Finally, from an international relations background, Menon contrasts the EU with the ‘nation state’ of the US and notes that in the case of the former it is the constituent member States that remain the ‘sovereign nation states’. He thus concludes: ‘... What differentiates the Union from a state, therefore, is the fact that it is made up of states’⁵¹⁹. We observe, then, a firm consensus, crossing a wide range of scholarly perspectives, that the EU is not a federal State and is not likely to become one, in all but the very long term.

⁵¹⁶ Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.276.

⁵¹⁷ Pinder, John *The European Union: a Very Short Introduction* (Oxford University Press, 2001), p.78.

⁵¹⁸ Piris, Jean-Claude *The Lisbon Treaty: a Legal and Political Analysis* (Cambridge University Press, 2010), p.331.

⁵¹⁹ Menon, Anand *Europe: the State of the Union* (Atlantic, 2008), pp.217-29.

On the basis that the EU exhibits a strong resistance to leaving the *sui generis* zone - it neither looks set to break up imminently, nor to progress forward to full federation - and thus increasingly shows attributes of stability and permanence, for quite some length of time now scholars have been asking how we should conceptualise the political construct that it has come to represent in precise terms. These voices seek an answer to the question *Of what is the EU an instance?*⁵²⁰ As Nugent observes, writing in 2005: ‘... For many years there has been an ongoing debate amongst scholars of European integration as to the nature of the European Union. How is it to be characterised?’⁵²¹.

McCormick points to the perplexing, and increasingly pressing, nature of the concern: ‘... The European Union’, he says, ‘... is still a puzzle and a mystery to most people, and we are still some way from agreeing just what it is. It is more than a typical international organization, because it has much greater powers over its members, but is not yet a state or a superstate. So what is it?’⁵²². Lister expresses the growing sense of dissatisfaction at the existing ‘default’ characterisation, in view of the apparent institutionalisation of the provisional that has occurred as time has moved forward. He says: ‘... Strictly speaking, every government and every community over which it holds sway is *sui generis*. However, it is the task of scholarship to find the patterns and similarities among them that help us understand the nature and potential of the various forms of governance’⁵²³.

⁵²⁰ Rosamond observes attention being directed from the mid-1990s to the troublesome question of ‘... what sort of entity is the EU?’ He notes that Caporaso terms this the ‘ontological phase’ of EU studies. Rosamond, Ben *Theories of European Integration* (Palgrave, 2000), p.150.

⁵²¹ Nugent, Neill ‘Foreword’ in Maignette, *op. cit.*, p.ix.

⁵²² McCormick, John *Understanding the European Union: a Concise Introduction* (Palgrave, 2002), p.2.

⁵²³ Lister, Frederick *The European Union, the United Nations, and the Revival of Confederal Governance* (Greenwood, 1996), p.17.

A contrary line of argument, appearing to lend additional weight to the *sui generis* styling, is found in the idea of ‘exceptionalism’⁵²⁴. This we briefly explore here, for we see embodied in it an alternative assumption to the linear pathway of integratory forms posited in this thesis.

Magnette sees the roots of such thinking as lying in the search for ‘... another language to conceptualize contemporary politics’⁵²⁵, in the context of a perceived post-sovereign age in which the idea of a powerful and autonomous State is increasingly challenged by an ever more globalised world. Scholars writing in this vein, he says, suggest that we should

‘... do away with these classical concepts, inherited from seventeenth-century political theory. We should accept that the world has changed so much that we need a paradigm shift (Rosenau 1997). In their opinion, we should substitute a more realistic concept of “multi-level governance” for the old-fashioned idea of “government” (Marks et al. 1996). It is indeed tempting to insist on the uniqueness of the EU, to see it as a *sui generis* polity ...’⁵²⁶.

Magnette himself, however, appears to reject this line of argument ‘... first and foremost because it underestimates the persistent strength of historical states’. The latter, he believes, will continue to be ‘... the Union’s cornerstone, and the successive enlargements have always made the perspective of the states’ absorption by a centralized Europe more unlikely’⁵²⁷.

⁵²⁴ For a debate on the so-called ‘n=1’ problem, including some sceptical commentary on both the exceptionalist claim and the impossibility of comparison in the case of the EU, see Caporaso, James, Marks, Gary, Moravcsik, Andrew and Pollack, Mark *Does the European Union Represent an n of 1?*, Paper written for the *ECSA Review*, Vol. 10, No. 3, 1997, URL=<http://aei.pitt.edu/54/01/N1debate.htm>.

⁵²⁵ Magnette, *op. cit.*, p.190.

⁵²⁶ *Ibid.*, p.190.

⁵²⁷ *Ibid.*, pp.190-1.

Hine, likewise, sees the exceptionalist premise as underscoring much of the recent flowering of the academic literature. He is led, however, to dismiss the notion that ‘... discussion of the institutional framework of the EU requires a different lexicon from that used to describe political institutions at national level’. Of this ‘developmental’ argument, he says: ‘... to claim that what is being generated is somehow new and unique, borders on the metaphysical. While the EU’s constitution may be a moving target, at any particular moment it is a target’⁵²⁸.

The most direct assault upon the idea has come from Fabbrini. Echoing the view of Lister, he says firmly: ‘... it does not seem convincing to claim that the EU is a polity without any precedent, in the modalities of both its formation and its functioning, in the history of the democratic world ... every political system is exceptional per se’. He sees the perception of uniqueness as stemming from the ‘governance’ approach, which has ‘... reached its highest mark at the EU level, where many decisions are the outcome of diffused processes of political interaction organized around mobile networks more than fixed structures’. This he sees as reflective of a ‘post-Statist’ conception of contemporary politics. He goes on to assert that ‘... if one wants to challenge the exceptionalist’s argument, it is not only appropriate but necessary to identify the institutional structure ... which accompanies the governance network of the EU’. This form he identifies as ‘... a species of a genus of democratic polities which are compound rather than unified’, drawing a comparison between the EU and ‘... another continental federal experience like the American one’⁵²⁹.

⁵²⁸ Hine, David ‘Constitutional Reform and Treaty Reform in Europe’ in Menon, Anand and Wright, Vincent (Eds.) *From the Nation State to Europe: Essays in Honour of Jack Hayward* (Oxford University Press, 2001), pp.120-1.

⁵²⁹ Fabbrini, Sergio ‘Is the EU Exceptional? The EU and the US in Comparative Perspective’ in Fabbrini, Sergio (Ed.) *Democracy and Federalism in the European Union and the United States: Exploring Post-national Governance* (Routledge, 2005), pp.3-6.

Thus, we find in the literature today quite a considerable restlessness with the prevailing consensus position that the EU should be placed alone among political systems in the ‘Other’ category. We turn next to consider how scholars have attempted to come to terms with the identification problem implicit in this inability to classify the entity.

II. The Quest to Address the Identification Problem

Writing in *What Is the European Union?* (2005), Magnette is perhaps the first author to tackle the identification problem head-on. He appears driven, in part, by a normative concern to address the lack of public understanding of the existing EU that appears to dog debate about the European project and moves towards further integration. This, he reasons, stems directly from difficulties conceptualising the polity:

‘... More than a half-century after its foundation, the European Union still remains a contested polity.
... Latent Euroscepticism may often be understood as the expression of fears and worries prompted by major power changes.
... As citizens, we realize that our historical state is now part of a broader “thing”, without understanding precisely what this means. In other words, the contested nature of the EU is not only due to the cost of “adjustments”, it is also the consequence of the difficulty European citizens and leaders have in conceiving the “nature” of this new framework’⁵³⁰.

I share this perspective that difficulties of classification hamper public discussion and debate, reinforcing the idea the EU is somehow ‘incomprehensible’. For at a basic level of analysis, it seems, explanation of its character fails.

⁵³⁰ Magnette, *op. cit.*, pp.189-90.

As was noted earlier, Magnette himself draws the conclusion that the EU will most likely remain halfway between the two ‘ideal types’ of a federal State and an inter-governmental arrangement (see footnote 142 on page 68). He expands on this assessment as follows: ‘... in a typology opposing “states” and “inter-state regimes”, the EU would clearly fall within the second category, but sub-categories would be needed to distinguish it from other, much less sophisticated, international regimes’⁵³¹. This is a helpful starting point, reflecting the mainstream view that it will remain a multi-State polity. He goes on to shine a light for us on the extent of recent entrepreneurial activity seeking to combine and remould existing concepts to capture the EU’s originality, within these contours:

‘... Scholars have endeavoured to forge new concepts in order to make sense of the EU. Following those who argue that the EU is “less than a federation, more than a regime” (Wallace 1983), constitutional scholars have labelled it a “federation of states” (Beaud 1995) to distinguish it from the classic notions of the federal state and confederal union. Highlighting its dynamics more than its legal nature, political scientists have seen it as a form of “intergovernmental federalism” (Quermonne 2004) or of “institutionalised intergovernmentalism” (Menon 2003). The semantic reflection is only in its early phases. It will probably take time for scholars, leaders and citizens to agree on a “concept” encapsulating the EU’s nature. In the meantime, these are very useful working definitions, which help us understand the primarily intergovernmental nature of the EU, while acknowledging that it is more institutionalized and more entrenched in domestic contexts than other international regimes’⁵³².

In a similar vein to the above authors, Hueglin and Fenna have proposed ‘treaty federalism’⁵³³, Majone ‘compact federalism’⁵³⁴ and Kincaid ‘confederal federalism’⁵³⁵

⁵³¹ *Ibid.*, p.192.

⁵³² *Ibid.*, p.192.

⁵³³ Hueglin and Fenna, *op. cit.*, pp.13, 63.

⁵³⁴ Majone, Giandomenico ‘Federation, Confederation, and Mixed Government: a EU - US Comparison’ in Menon, Anand and Schain, Martin (Eds.) *Comparative Federalism: the European Union and the United States in Comparative Perspective* (Oxford University Press, 2006), p.137.

⁵³⁵ Kincaid, John ‘Confederal Federalism and Citizen Representation in the European Union’ in *West European Politics*, Vol. 22, No. 2, 1999.

as synthetic formulations. These would all, it seems, be consistent with the concept of multi-State federalism, espoused by Kelemen and Nicolaidis (see the quotation on page 41) and supported by the logic of this thesis. Indeed, Beaud's concept, just as Jacques Delors' 'federation of nation states'⁵³⁶, would also seem to reflect this territory precisely. Possible confusion here, however, and hence a reason for the latter's only lukewarm reception and failure to gain traction, could be seen to lie in the significant likelihood of generating misunderstanding, since the term 'federation' has today become synonymous with 'federal State'. We need, it seems clear, a new term.

Magnette in fact lends his support to such an approach. Of the traditional divide between confederation and federation, he says:

'... Admittedly, nothing in principle prevents us from overcoming the intellectual deadlock of this dichotomy by creating a new concept able to account for ... (the EU's) ... hybrid character. Creating a third term would allow one to make the Union's originality (irreducible to historical precedents) understood'⁵³⁷.

Whilst Majone wisely cautions that '... Occam's razor prescribes not to introduce new terms unless they actually improve our understanding of the processes and phenomena under investigation'⁵³⁸, nevertheless where they are found needed to give a name to a distinct conceptual category previously unobserved - a 'cognitive void' - then they should be employed unhesitatingly, it seems plain. Refamiliarisation with the theory of concept-formation expounded by the scholars such as Mill and Sartori should help us clarify our thinking in this regard, and thus overcome our inhibitions.

⁵³⁶ Delors, Jacques 'Europe Needs an Avant-Garde, But ...' in *Centre for European Reform Bulletin*, No. 14, 2000,

URL=http://www.cer.org.uk/publications_new/publications_bulletin_2000.html.

⁵³⁷ Magnette, *op. cit.*, p.5.

⁵³⁸ Majone, Giandomenico *Dilemmas of European Integration: the Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005), p.v.

This last point needs qualifying, however. For we do, in fact, appear to observe a suitable name already in existence - though it is not widely recognised (yet) as a distinctive term referring to a novel class of political structure: 'federal union'. This, I suggest, could provide the required third term between confederation and federation⁵³⁹.

Let us now turn back a little in time from this recent discussion to consider how the academic community has specifically begun to apply the concept of federalism to the identification problem from the early 1980s, as this may further illuminate our understanding of the exact point that the literature has reached today. We consider successively here the approaches of four specialist scholars of federalism, Forsyth, Elazar, Burgess and Watts.

⁵³⁹ We may usefully note, at this juncture, that the German Foreign Minister, Joschka Fischer, sought a new term in his influential Humboldt University speech of 2000 that provided the initial impulse behind the recent constitutional process. Leben sets his proposal in context: '... When studying groupings of states, and the European Union is undoubtedly a grouping, classical constitutional theory knows only two possible types: the confederation of states and the federal state. Can there be a third type, a federation but not a federal state, as Joschka Fischer's speech seems to suggest?'. The simple solution, he notes, to what Fischer identified as the '... tension ... between the communitarisation of economy and currency on the one hand, and the lack of political and democratic structures on the other', would be to set up a federal State; but '... it is just this simple solution that the German minister refrains from invoking, since he knows that merely mentioning it would raise such hostility among some EU states as practically to prohibit debate. That is why he imagines another solution, which he calls a federation rather than a federal state (*Föderation*, not *Bundesstaat*)'. The subtle nuance here, however, appeared to become lost in translation, the title of Fischer's speech in German, *Vom Staatenverbund zur Föderation*, emerging in French and English simply as *De la Confédération à la Fédération* and *From Confederacy to Federation*, respectively. As Fischer commented of this problem shortly afterwards: '... We sought a neutral word in German instead of, and in place of, federation. Translated into French or English, it still remains federation; so we resigned ourselves. We have to accept the fact that federation is the word that best suits'.

Leben concludes: '... It is easy to see why the word federation embarrassed the German Minister: in ordinary language, just as in the language of constitutionalists, "federation" immediately evokes the "federal state," and this is what has to be avoided'. Indeed, Leben notes, '... There is evidence of the fact that the choice of the term "federation" raised a problem ... In the Chevènement-Fischer dialogue ..., the French Minister of the Interior said, in connection with the European Union, that it "It is neither a federation nor a confederation. It is something that has never been described anywhere, and does not even resemble the Holy Roman Empire of the German Nation"'. In this review, we see that practical political needs serve to reinforce the already independently strong scholarly case for a new term. Fischer, Joschka *From Confederacy to Federation: Thoughts on the Finality of Integration*, Speech at the Humboldt University, Berlin, 12 May 2000, printed in Joerges, Christian, Mény, Yves and Weiler, Joseph (Eds.) *What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer* (European University Institute, 2000), pp.5, 19, 31.

Leben, Charles 'A Federation of Nation States or a Federal State?' in Joerges, Mény and Weiler, *op. cit.*, pp.101-3.

Forsyth's *Unions of States: the Theory and Practice of Confederation* (1981) may be considered the first major such contribution. As was outlined in Chapter 3, he elaborates a complete schema of forms, with his new concept of the 'union of States' being understood to occupy the entire spectrum between the 'interstate' and 'intrastate' worlds. The *sui generis* gap is thus for the first time closed off (see the discussion on pages 85 - 87). His definition of confederation, it becomes apparent upon close inspection, is now actually a strengthening one, with the three terms 'union', 'federal union' and 'confederation' being defined as synonyms (he says the terms '... will be used interchangeably throughout the study to mean the same thing'⁵⁴⁰). Confederation is thus framed as a fully federal form - and, on this remodelled conceptual basis, arguably rightly. Forsyth considers that the union of states form is '... specifically "federal" in nature', on the grounds that '... it is based on a *foedus* or treaty between states, and not on a purely one-sided assertion of national will'⁵⁴¹.

In a later piece, Forsyth points to the prior meaning of the concept that he is here moving beyond, and which appears to remain, in fact, still the dominant conception in the mainstream literature today: a league among sovereign States (as was outlined above - see footnote 511 on page 254). This reveals the uncertainty presently prevailing in the field as to precisely what confederalism is (that is, as to the definition of the term)⁵⁴². I read Forsyth as reinventing the concept, shifting its meaning away from a 'league' (Wheare's understanding) to refer to his concept of 'union' (reflecting

⁵⁴⁰ Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), p.2.

⁵⁴¹ *Ibid.*, p.1.

⁵⁴² Kelemen and Nicolaidis comment: '... Defining the relationship between confederalism and federalism in the light of the actuality of the EU, and seeking to better understand how the concepts interrelate, is a central challenge for EU federal scholarship today (Law 2005)'. Kelemen, Daniel and Nicolaidis, Kalypso 'Bringing Federalism Back In' in Jorgensen, Pollack and Rosamond, *op. cit.*, p.307.

the *sui generis* zone). He explains the basis for his new conception in the following terms:

‘... The distinction between confederation and federation was invented in the nineteenth century ... Unfortunately this distinction, which began as a useful instrument, has tended to become frozen into a rigid antithesis, and it is widely assumed that with the help of a few simple criteria all federal systems can be popped into two separate pigeon-holes. In practice it is not as simple as this ...
Walter Hallstein, the first President of the Commission, demonstrated how a rigid adherence to the confederation-federation antithesis caused the Community to disappear from the federal map. If, he argued, a confederation was defined, in the customary way, as a body which does not possess legislative powers that directly affect the individual members of the union, then the EEC was more than a confederation. On the other hand, the EEC was clearly not a state, and hence was also not a federation, according to the customary definition of the term. What was the Community then? Hallstein was wary of calling it a federal body, and preferred to refer to it simply as a “Community”, but he also interestingly termed it a “union of states”⁵⁴³.

Confederation, then, defined in ‘the customary way’ is a league; and the union of States form is - in this earlier terminology - ‘more than a confederation’, a stronger form.

Elazar seems to adopt the same approach, in *Exploring Federalism* (1987) (apparently arriving at it independently of Forsyth). A complete schema is likewise seen in his elaboration of eight forms of ‘federal arrangement’ (see the quotation from Burgess on page 34), in which the forms of the league and the confederation are distinguished as separate categories. Thus we observe something of a general departure in the specialist literature of federalism at around this juncture, in seeking to strengthen the meaning of confederalism. Writing later in *Constitutionalizing Globalization: the Postmodern Revival of Confederal Arrangements* (1998), he is explicit on this point

(unlike Forsyth, who simply institutes the change implicitly), in arguing that the EU has become the leading example of the ‘postmodern confederation’:

‘... Why turn to old terminology to describe new phenomena? It would be possible to invent new terms, but in political language as in so many other things there are great virtues in continuity, even if that continuity embraces certain changes. Certainly the term “democracy” as we use it today is not what the Greeks meant by democracy when they invented the term 2,500 years ago ... The important thing is that there are fundamental connections ... that justify the use of the same term. ... it is not only useful but advisable to maintain continuities where they exist, as they do in the realm of confederal arrangements’⁵⁴⁴.

Writing in *Federalism and European Union: the Building of Europe, 1950-2000* (2000), Burgess also openly adopts an expansive approach. Like Forsyth and Elazar before him, he implicitly understands confederalism as a form stronger than a league, and thus as part of genuine federalism. It is the novelty of the European enterprise in particular that drives him to review the prevailing orthodoxy of the discipline and its

⁵⁴³ Forsyth, Murray ‘The Political Theory of Federalism: the Relevance of Classical Approaches’ in Hesse, Jens and Wright, Vincent (Eds.) *Federalizing Europe? The Costs, Benefits and Preconditions of Federal Political Systems* (Oxford University Press, 1996), p.32.

⁵⁴⁴ The three examples of the postmodern confederation that Elazar identifies are: the EU, the Caribbean Community (CARICOM) and the Commonwealth of Independent States (CIS). Just the same way as federations, such confederations are understood to be ‘... compound polities or species of the genus federalism’ - thus now more than a league.

He sets up an overarching umbrella category labelled ‘confederal arrangements’, which encompasses the forms of the ‘confederation’, the ‘league’ and the still looser ‘inter-jurisdictional functional authority’. The redefinition of confederalism (a genuine *shift*) is thus seen to take place in tandem with a *broadening*. He foresees a continuing trend for the creation of new confederal arrangements, and the strengthening of existing examples towards full confederation.

In elaborating upon the juncture at which the European enterprise is thought to have become a confederation from a league, his view is consistent with the analysis of this thesis: ‘... While some, including this writer, have been arguing that the European Union had been in the process of reviving confederation as a form of government at least since the 1970s and that by the time of the Single Europe Act, adopted in 1987, the EC had moved from being a confederal arrangement to a confederation, the Maastricht Treaty affirmed and constitutionalized the confederation beyond any doubt’.

Elazar, Daniel *Constitutionalizing Globalization: the Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield, 1998), pp.4, 11-2, 40, 113.

basic conceptual categories. Reflecting upon the ‘intellectual puzzle’⁵⁴⁵ that the EU poses today, he observes that it is

‘... not a federation but it is also more than a confederation understood in the classical sense. It exists, then, in a kind of conceptual limbo, a twilight zone ... The nature of its origins and development have combined to shape a peculiar, unique form of union the like of which we have never seen before. History is of only limited assistance. However, if it has no historical precedent how are we supposed to classify it? Without resorting to a neologism it remains the task of political science to address the ever-present problem of classification. In these circumstances we are compelled to rely upon the conventional language of political science. This is why I have chosen to describe the EU as a species of “new” confederation, thus acknowledging the basic form out of which it has grown but beyond which it has evolved’⁵⁴⁶.

In proposing the ‘... reconceptualization of an old category’⁵⁴⁷ and the ‘recycling’ of a historical concept which has ‘... the merit of being familiar’⁵⁴⁸, we see that Burgess is a third author who advocates a shift in the meaning of the concept. In this body of literature, then, we may discern a ‘new confederalist school’ both arguing for, and itself instituting, a strengthened meaning of confederalism.

As was noted in Chapter 1, Watts takes up Elazar’s conceptual schema of basic forms and develops it into a framework of ‘federal political systems’. Thus, he likewise has separate league and confederation categories. The EU after Maastricht, he says, is a ‘hybrid’: it is ‘... basically a confederation ... although it has increasingly incorporated some features of a federation’⁵⁴⁹. This equivocation could perhaps be interpreted as mentally clinging, to some degree, to the older meaning of confederalism (or itself still a slightly weaker interpretation of the form than the above authors). For if the polity is a confederation, then it is a confederation: it either

⁵⁴⁵ Burgess, *op. cit.*, p.270.

⁵⁴⁶ *Ibid.*, pp.41-2.

⁵⁴⁷ *Ibid.*, p.48.

falls into the conceptual category by reference to its attributes, and the defining attributes of the concept, or it does not. There is surely no need to allude to federation. This would seem like saying a person is a man, but has some features of a woman. Any man will do, as both man and woman are species of the larger genus, human. Confederation and federation (in the new confederalist school's conception of the former term) are both federal forms. So they will share features in common. This should be neither surprising nor prompt a need for comment or qualification.

The problem I observe here, and more generally within the discipline, is that the classification systems elaborated often have gaps and zones of overlap within them; that is, they are neither mutually-exclusive nor jointly-exhaustive. This seems to happen because attributes are employed selectively to the individual categories in an '*ad hoc*' manner, in a case by case construction of the attributes perceived to belong to each political form. Such frameworks, then, lose value compared with more rigorous applications of the hierarchical method of taxonomy, as the negative categories are not always identified alongside the positive, leading to the opening up of conceptual voids. The underlying weakness, here, would seem to be (as Sartori intimated may be the case - see page 16) that analysts sometimes lack an adequate training in logic, in '*... the logical structure and procedure of scientific inquiry*'.

In similar vein, when Burgess suggests that the '*... conceptual boundary between federation and confederation ... (is) ... blurred*'⁵⁴⁸, the need for reconsideration of the methodological basis surfaces. In holding this view, he explicitly draws upon the perspectives of Sidgwick, who suggests that there are no '*impermeable watertight compartments*' for concepts, and of Greaves, who writes that '*... alliance shades into*

⁵⁴⁸ *Ibid.*, p.43.

⁵⁴⁹ Watts, Ronald *Comparing Federal Systems in the 1990s* (Queen's University Press, 1996), pp.8-9.

league, league into confederation, confederation into federal state, federal state into unitary state'. It is probably, therefore, the latter who inspires Burgess' belief that '... one conceptual category can shade off into another'⁵⁵¹. This understanding, however, must be false. For whether a practical example represents an instance of a conceptual category must be simply a matter of determining whether the example has, or has not, each of the properties specified in the definition of the concept (see the conclusion reached on page 25). As far as the dividing line between (new) confederation and federation is concerned, the distinguishing attribute seems clear: the number of States, many or one.

There may, certainly, be doubt as to whether an attribute of a concept is held by a practical example - it may be difficult to determine or ambiguous, for example - but this does not mean that the concept itself is unclear. On the contrary, its boundaries should be, if well-constructed, precise and sharp. Uncertainty, we may conclude, then, should be properly understood to enter from time to time in the *application* of concepts - not in the concepts themselves. If this logic is correct, we see that concepts, far from being 'blurred' and 'shading into' one another, in fact have clearly delimited boundaries. It is on this basis that I argue that my taxonomical unfolding of basic political forms founded on the State has merit - that is, it is a good one, suitable for the conduct of valid social science. It may not be the best, or indeed the only possible unfolding; however, it is argued to be an adequate one, since it embodies a rigorous application of the taxonomical approach, leading to a framework of contiguous and non-overlapping categories. A political system founded on the State thus classified will fall into one, and only one, conceptual category. The possibility of confusion

⁵⁵⁰ Burgess, *op. cit.*, pp.264-5.

⁵⁵¹ Burgess, Michael *Comparative Federalism: Theory and Practice* (Routledge, 2006), pp.24-6.

arising from gaps and zones of overlap, stemming from a non-taxonomical treatment, is here absent.

It may be more natural for scholars immersed in the American tradition (such as Watts and Elazar) to apply a strong conception of confederalism - for the term there took on a meaning beyond the mere inter-governmentalism of a league after 1789⁵⁵². Indeed, we may observe a third possible sense to the term, stronger still, which only adds to the potential for confusion surrounding its meaning. Fortunately, this can be quickly discounted. For in addition to possible meanings as (i) a league and (ii) a union of States (forms 2 and 3 in my elaboration in Chapter 3 - see Figure 10 on page 91), the term could also be understood to imply a federation (form 4), in view of both Canada and Switzerland being formally designated as such. Watts, however, makes clear that both are federal States today, the official stylings being thus no more than historical hang-overs. There is a wide consensus on this point. He states clearly: ‘... Switzerland, after a brief civil war, transformed its confederation into a federation in 1848. Canada became the third modern federation in 1867’⁵⁵³. He enlarges on the development of both polities as follows:

⁵⁵² Its return to this meaning, following the American Civil War and the German development of the *Staatenbund* vs. *Bundesstaat* dichotomy, interestingly for the social scientist, appears indicative of how the meaning of concepts can weaken as well as strengthen over time.

⁵⁵³ Watts, *op. cit.*, p.3.

‘Switzerland (1848)

The Swiss Confederation, which had existed in various forms since 1291, broke down in the brief Sonderbund Civil War of 1847; a new constitution in 1848 converted it into a federation. ...⁵⁵⁴.

‘Canada (1867)

Second only to Russia in territorial size, Canada became a federation in 1867. While the term “Confederation” is used by Canadians this refers to the process of bringing provinces together into a federation in 1869 rather than the adoption of a confederal structure. ...⁵⁵⁵.

We can, then, be firm in rejecting usage of confederation to refer to the concept of a federal State. This then reduces the uncertainty down simply to forms 2 and 3. Two leading choices for a possible nomenclature would seem to present themselves at this juncture, which could be equally valid paths to follow. Both terminological approaches would seem to be, in fact, already in current usage. Indeed, they seem to reflect a disagreement between two camps in the scholarly community about the appropriate meaning and usage of confederalism.

⁵⁵⁴ Switzerland is still nominally a confederation. Its official title, in Latin, is *Confoederatio Helvetica* (CH); in French, *Confédération suisse*; and in German, *Schweizerische Eidgenossenschaft*, an old word meaning ‘Oath Fellowship’. The need to choose between a *Staatenbund* and a *Bundesstaat* has thus been avoided in the German language, although the French translation would seem to suggest the former (when in reality now the latter). Article 1 of the current Swiss Constitution dating from 1999 reads: ‘Art. 1, Swiss Confederation, The Swiss People and the Cantons of Zurich, Berne ... and Jura, form the Swiss Confederation’. The document itself is headed ‘Federal Constitution of the Swiss Confederation’, but this is no more than a restatement of the title of the earlier Constitution of 1874, at which time the distinction in meaning between the terms confederal and federal had not fully emerged. *Ibid.*, p.20.

⁵⁵⁵ The word confederation is not mentioned in the Constitution Acts of 1867 and 1982 (the British North America Act of 1867 was renamed the Constitution Act of 1867 upon ‘patriation’ of the Canadian Constitution in the Constitution Act of 1982). The closest reference is in the Preamble to the former where the three founding provinces expressed their desire to be ‘... federally united into One Dominion under the Crown of the United Kingdom’. The historical caveat on language clearly applies here as well. *Ibid.*, p.21.

Option 1 is to restrict the meaning of confederation to the league form (form 2), and employ the term ‘federal union’ to refer to the union of States (form 3). This is the approach of Nicolaidis and Pinder⁵⁵⁶.

Option 2 is to deploy a strengthened meaning of confederation, advancing it to refer to the union of States, so that the latter is now designated by both the terms confederation and federal union. This then leaves form 2 being exclusively designated by the name league. This is the approach of Forsyth (and of the remaining new confederalists - although they do not employ the term federal union).

These two possibilities, Option 1 and Option 2, would, therefore, seem to reflect weak and strong conceptions of the meaning of confederalism respectively, as illustrated in Figure 23 below:

⁵⁵⁶ Pinder, writing in *European Community: the Building of a Union (1995)*, notes that federal union and federation are to be distinguished, and in this he seems to echo Forsyth. He says: ‘... A federal Union and federation are rational solutions to problems that face European states at the end of the second millennium. A federal Union requires a single market, economic and monetary union, and a common external policy, with co-operation on security; a federal state requires control of armed force as well. Both are governed by federal institutions, based on the rule of law, for which the independent Court of Justice is the ultimate juridical authority, and on representative government, which can be achieved through majority voting in the Community’s Council, co-legislation by the Council and the European Parliament, and the Commission, with full executive competence, responsible to the Parliament. Following the principle of subsidiarity, member states retain control over their domestic affairs’.

Pinder, John *European Community: the Building of a Union* (Oxford University Press, 1995), p.240.

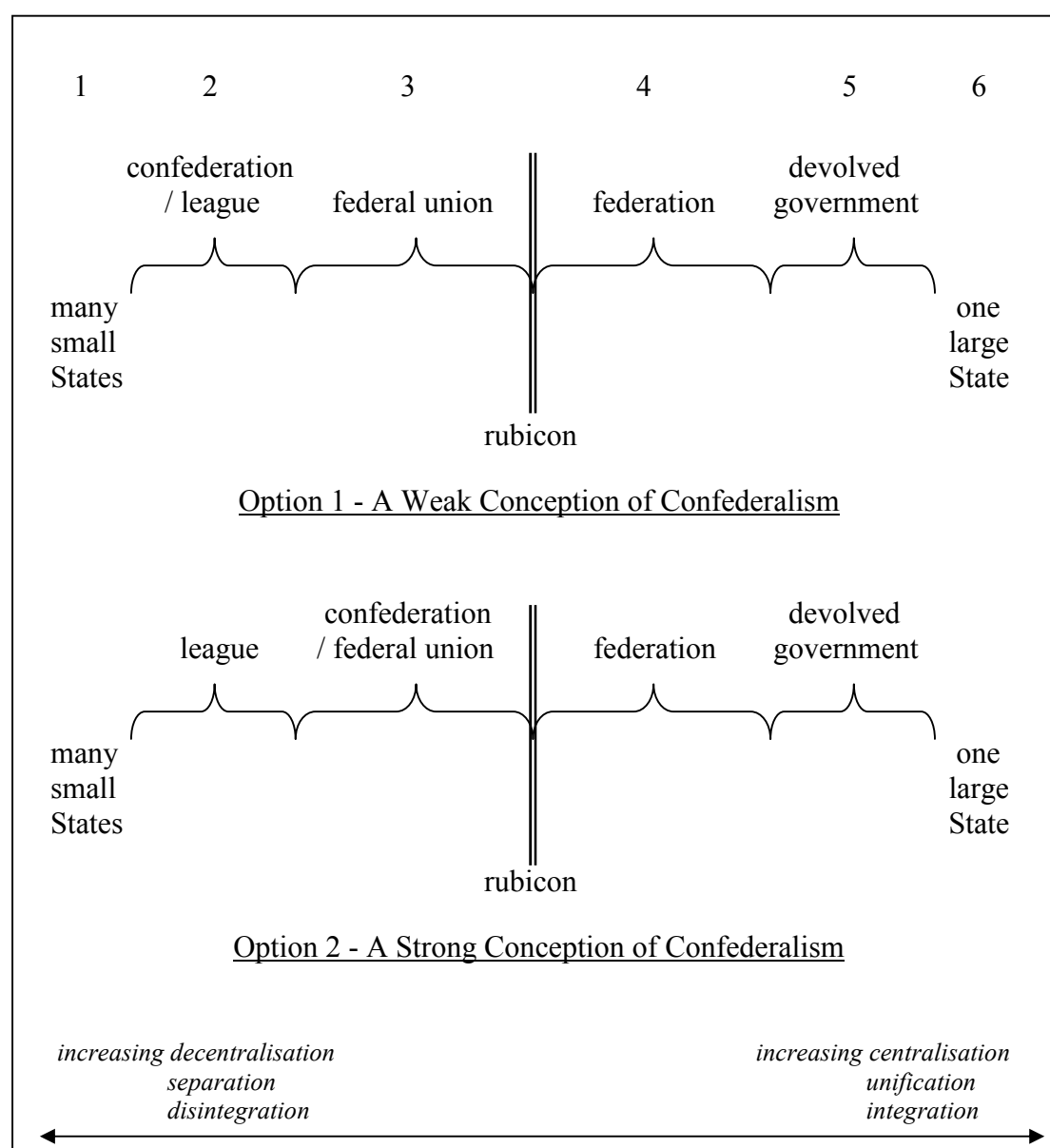


Figure 23 - Two Options for a Nomenclature

Other possibilities for terminology could, indeed, be envisaged. The important points would seem to be: (i) that we give a name to the *sui generis* space, representing the discrete political structure of the union of States; and (ii) that, whichever route is taken, political scientists define their terms well so that clear communication can take place. In relation to the first point, we appear to have lacked a name for one class of basic political form to date. In relation to the second, it is not always evident that scholars do define their terms sufficiently fully, and thus understand what each other

means by them. This would seem particularly pronounced in the case of the concept of confederalism today, where for some time misunderstanding seems to have been quite widespread. I follow Sartori in advocating as high a level of standardisation and uniformity in the discipline as possible, for the progress of social science. For scholars do not then have to define terms each time they use them (a very laborious task, which in practice most do not undertake) and can take their meanings for granted (i.e. as understood). This is the advantage of having a standardised set of basic terms and concepts in any scientific field. It greatly lessens the danger of miscommunication that is inclined to follow with multiple concurrent definitional approaches. My own preference here is for Option 1, keeping confederation at league (a weak conception); and this is the nomenclature that I have adopted throughout the thesis.

One reason I favour this approach is that we seem to be experiencing a ‘blockage’ at the present time, with the mainstream scholarship failing to follow the lead of the specialist scholars of federalism in adopting a strengthened conception of confederalism. Despite clear reworkings by the new confederalists, and further supported by others such as Kincaid and Majone⁵⁵⁷, there seems a strong resistance to taking up the proposed new conceptualisation. The reason seems to be that the term has developed too deep a mental association with inter-governmentalism and a league among sovereign States, particularly on the European side of the Atlantic. As has been seen, it is thought to represent a stage that the EU has already developed well beyond; and the connotations of undisturbed national sovereignty it carries seem to contradict the prevailing understanding in Europe that has become deeply-rooted over

⁵⁵⁷ Majone appears to draw on Elazar’s work in adopting a stronger conception. If it is the case, he argues, that the more limited ends of ‘the confederal option’ offer the only way out of the dilemma that the EU will not become a federal State, then ‘... it is important to examine more closely the normative and conceptual foundations of the confederation model’. Majone, *op. cit.*, p.211.

fifty years that integration implies the ‘sharing of sovereignty’. On this view, confederalism is thought to be the very *antithesis* of federalism, to oppose it - irrespective of what a more historically-enlightened understanding of the concept, particularly coming from the other side of the Atlantic, might suggest as valid. The fight against such well-entrenched associations seems an uphill task, which at present appears to be resulting in a stalemate between the two conflicting terminological approaches.

Where do such mental linkages come from? Here we have to look back in the post-war history of the European project, and in particular to the near collapse of the institutional framework in the early 1960s. In this period, French President Charles de Gaulle sought to quash the supra-national ambitions of the Community institutions, and thus presented in 1960 a plan for a rival ‘Europe of the States’, an ‘imposing confederation’⁵⁵⁸, intended ultimately to absorb the EC in a purely inter-governmental framework. When France’s partners unsurprisingly rejected the resulting ‘Fouchet’ plans, relations deteriorated and France eventually withdrew from the EC’s Council of Ministers in 1965, returning several months later only on the basis on the Luxembourg Compromise which insisted upon voting exclusively by unanimity. Soutou distils the most basic level of analysis by which all political structures came to be judged in the light of this development: ‘... The litmus test was the voting arrangement: majority vote in any European organization meant integration; unanimity rule meant the States remained sovereign’⁵⁵⁹. It was this clear dichotomy, it seems, and the association of de Gaulle’s confederal plan with unanimous voting that

⁵⁵⁸ Cited in Burgess, Michael *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), p.79.

⁵⁵⁹ Soutou, Georges *Towards a European Confederation? (From de Gaulle’s Return to Power to the Milan European Summit; 1958-1985)*,
URL=<http://www.paris4.sorbonne.fr/e-cursus/texte/CEC/soutou/soutou.htm>.

entrenched a rigid, if somewhat artificial, distinction between the concepts of federalism and confederalism in the European mind.

After this near-death experience, and the subsequent firm hostility in pro-integration circles to reinstating a purely inter-governmental mode of decision-making, one can see why, as Majone puts it, ‘... the confederal option has been practically banned from the discourse about the future and finality of the Union’⁵⁶⁰. The word has had, in both scholarly and political debates, near-taboo status from this time forward. This mindset of a weak understanding of confederalism appears to have been reinforced in more recent years by two usages in precisely this mould: first, French President François Mitterrand’s 1989 proposal for a ‘European Confederation’, a two-tier structure through which the core EC of Western Europe would have been loosely linked with the former Communist States of Eastern Europe⁵⁶¹; and, secondly, Belgian Prime Minister Guy Verhofstadt’s plan for a ‘two-speed’ Europe or Europe of ‘concentric circles’, in which a confederation would have constituted the more weakly integrated outer ring⁵⁶². In the minds of European political élites today, it seems, the meaning of confederation remains well-entrenched as a league among sovereign States, and thus conceived as a backward step and an unpalatable idea. Politicians are careful to avoid the term for this reason; and, likewise, the mainstream scholarship,

⁵⁶⁰ Majone, Giandomenico ‘Federation, Confederation, and Mixed Government: a EU - US Comparison’ in Menon and Schain, *op. cit.*, p.136.

⁵⁶¹ Mitterrand proposed ‘... a European Confederation, in the true sense of the term, which will associate all the States of our continent in a common and permanent organisation of trade, peace and security’.

Cited in Deloche, Florence *La France et l’Elargissement à l’Est de l’Union Européenne*, Les Etudes du CERI, No. 46, October 1998, p.6,

URL=<http://www.ceri-sciencespo.com/cerifr/publica/etude/etude.php>.

⁵⁶² Verhofstadt wrote: ‘... In such a scenario, Europe will comprise two concentric circles: a political core, a “United States of Europe” based on the eurozone, and surrounding it a confederation of countries, or “Organisation of European States”’.

Verhofstadt, Guy ‘Forging “United States of Europe” Is Key to the Future’ in *European Voice*, 1 December 2005.

perhaps aware of the likely adverse reaction in the political domain, refrains from pushing it⁵⁶³.

In the light of this review of how specialist scholars of federalism have attempted to apply the federal idea in attempting to confront the identification problem implicit in the product of European integration over recent decades, then, the most striking feature is perhaps the extent to which they have attempted to employ more specifically the concept of *confederalism* in this regard. Such thinking appears attractive (and, indeed, on the right track) in stressing the aspect of multi-State federalism that the EU has come to embody⁵⁶⁴. However, their advocacy of the term

⁵⁶³ There may be a number of reasons for the unenthusiastic reception of new confederation. First, it may seem like an unhealthy attempt at stretching a concept beyond its natural bounds. Secondly, the reconceptualisation may seem like simply a 'cut-and-paste' job. Alternatively, it may be the case that the change is just taking time to be recognised and to bed in.

⁵⁶⁴ Majone emphasises '... Words do matter. To say that the European Union is not a federation but a confederation has far-reaching consequences. A federation, as the term is generally used today, is a state. A confederation is not a state but a union of sovereign states, which together pool certain powers for mutual advantage; it is a contractual arrangement among otherwise independent partners, not an expression of popular sovereignty'.

Majone, Giandomenico *Dilemmas of European Integration: the Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005), p.vi.

appears to meet with a strong opposing inertia (or even resistance) in the broader field at the present time⁵⁶⁵.

We may conclude, therefore, that while the quest to come to terms with the novel nature of the EU polity appears to be making progress, nevertheless issues remain to be addressed. It is to one possible avenue for acquiring greater certainty that we turn our attention in the fourth section of the chapter: clarifying the definition of federalism by restoring the core meaning of sovereignty as an indivisible authority notion to the heart of the concept. First, however, in the third section, we consider the history of the idea of sovereignty in greater detail, and come to see how the currently dominant interpretation of the nature of the concept in the discipline needs to be reassessed.

⁵⁶⁵ The term federal union also carries historical connotations. They are, however, of a sort apparently less threatening to the idea of integration. Pre-Forsyth, the term was almost always used as a synonym for federation - the single central zone of 'sovereignty-sharing' - and this usage is in fact still current today, with many authors continuing to make no distinction at all between the two terms. Two past associations are perhaps significant in this regard. The first is found in the 'Memorandum on a European Federal Union' of the French Foreign Minister, Aristide Briand, of 1930. This drew from the vision of a federation on the American model, a 'United States of Europe', that had been set out by Richard Coudenhove-Kalergi in his *Pan-Europa* (1923) (Briand was then honorary president of the eponymous political movement). However, it was so heavily hedged around with caveats as to effectively neuter the federal aspect and make it an exclusively inter-governmental proposal. The 'general principle', the plan stressed, would be that '... in no case and in no degree may the formation of the Federal Union ... affect in any way any of the sovereign rights of the States ... It is on the level of absolute sovereignty and of complete political independence that the understanding between European nations must be brought about'. The second association comes from the movement for European unity established in Britain in 1938, Federal Union, which is still in existence today. This organisation, according to Mayne and Pinder, made '... a staggeringly effective appeal to the British mind' in the dark days of descent into a war, in part inspiring the aborted proposal for Anglo-French Union in June 1940. It had, in Article 1 of its statutes, the following aim: '... To obtain support for a federation of free peoples'.

Brian Memorandum cited in Harryvan, Anjo and van der Harst, Jan (Eds.) *Documents on European Union* (Macmillan, 1997), pp.30-1.

Mayne, Richard and Pinder, John *Federal Union: the Pioneers, a History of Federal Union* (Federal Trust, 1990), pp.24-8.

III. The Need to Qualify the ‘Post-Sovereignty’ Thesis

We have observed, at various points in the journey of this thesis, the outlines of political history in Europe since the Middle Ages. As the work of scholars such as Hueglin and Elazar has made clear, this can be characterised in three broad phases⁵⁶⁶.

The first was an era of diffused power structures that had developed organically, in which the various levels of authority (for example, religious communities, guilds, cities, provinces, nations and empire) existed in ‘... overlapping and uncoordinated circles of power’⁵⁶⁷, under the natural law of God in Christendom⁵⁶⁸. Steadily growing conflicts between the levels, resulting in mounting turbulence and bloodshed, led in the late sixteenth century to the rise of the Bodinian theory of sovereignty: the idea that power must be centred in one place in the name of order and stability. This was a logical progression, and indeed necessity, to avoid the uncertainty and contention flowing from competing claims to represent legitimate authority⁵⁶⁹.

In this context, secondly, following the Reformation, the old medieval governing order was decapitated, with the Holy Roman Empire fragmented and eventually dissolved, and links to the Catholic Church in Rome severed. Power was now

⁵⁶⁶ Elazar, *op. cit.*.

Hueglin, Thomas *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfrid Laurier University Press, 1999).

⁵⁶⁷ Hueglin, *op. cit.*, p.2.

⁵⁶⁸ Jackson comments: ‘... A striking impression that the middle ages convey to anyone looking back from our vantage point ... is one of astonishing diversity concerning political authority. ... The medieval map was not a territorial patchwork of different colours which represent independent countries under sovereign governments whose population had clearly conceived national identities. Instead, it was a complicated and confusing intermingling of lines and colours of varying shades and hues. “Europe was not divided up into exclusive sovereignties, but was covered by overlapping and constantly shifting lordships”’.

Jackson, Robert ‘Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape’ in *Political Studies*, Vol. 47, No. 3, 1999, p.435.

⁵⁶⁹ Hueglin says: ‘... A new generation of modern political thinkers, from Machiavelli to Bodin and Hobbes, would identify the root of the problem as a dispersal of political power. As Thomas Hobbes put it so incomparably, “a Kingdome divided in itselfe cannot stand”’.

Hueglin, *op. cit.*, p.2.

amassed at the centre of each emerging nation, with all lower orders subordinated to the centre's will⁵⁷⁰. In this way, the world moved into the 'modern' era of the nation State from around 1648, with the Peace of Westphalia and the end of the Thirty Years' War⁵⁷¹.

Jackson tells us that:

'... The great transformation from medieval to modern ... involved at its core the institution of the sovereign state ... Most scholars ... see the seventeenth century and particularly the Peace of Westphalia which settled the bloody thirty years' war (1618 - 1648) as the best historical reference point for symbolizing that fundamental turn in European political life. ... The institution of sovereignty sorted out the uncertainty and indeed the confusion around the question of authority that existed in the middle ages. The new sovereign state escaped from the medieval system of dispersed authority and successfully established and enforced its own centralized authority'⁵⁷².

Thirdly, it is possible to discern, a movement in progress today towards the dispersal of governing powers away from the centralised grip of the nation State through federalism. Elazar locates the end of World War Two in 1945 as the starting point of

⁵⁷⁰ Hinsley notes that Machiavelli had sought to provide a solution to the political and religious upheavals by arguing for the throwing off of restraints to monarchy from both above and below, '... wholly freeing the activities of the Prince from external religious and internal customary limitations'. He sees Bodin following Machiavelli's lead in this respect, in believing that '... only the acceptance that some authority wielded central and unlimited power within the political society could bring chaos to an end'.

Hinsley, Francis *Sovereignty* (Watts, 1966), p.121.

⁵⁷¹ This long struggle had pitted the Catholic forces of Empire (the Hapsburgs, with their dominions of Austria, Spain, the Spanish Netherlands and most of Germany and Italy) against Protestant (the Protestant princes of Germany, supported by Sweden and Denmark). It concluded after the Catholic French forces, under Cardinal Richelieu's influence, sided with the Protestant.

The main outcomes of the conflict were three-fold. First, the principle of the Peace of Augsburg of 1555 that the religion of a State should be that of its ruler ('*cuius regio, eius religio*') was now accepted. Secondly, there was a qualified recognition of freedom of worship. Thirdly, the political power of the Church was ended, Pope Innocent X disputing the Peace of Westphalia's validity and declaring the Treaties of Münster and Osnabrück to be null and void.

Philpott, Dan 'Sovereignty' in Zalta, Edward (Ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2003 Edition),

URL=<http://plato.stanford.edu/archives/sum2003/entries/sovereignty/>.

⁵⁷² Jackson, *op. cit.*, pp.438-9.

this latest phase, in view of the rapid proliferation of federal arrangements from this time (though the exact juncture could be a matter of debate).

Having established this perspective of the way in which mankind has developed incrementally the political machinery of regularised, ordered and peaceful government from the initial starting state of affairs inherited from medieval times, the key point that we need to grasp now emerges quite easily. It seems that we have become confused between, on the one hand, the requirement for an identifiable source of *final* authority over a distinct territory or political community; and, on the other, the claim that *all* authority need be exercised centrally by that same source. Certainly the former is necessary - as the urgency of the move from the warring chaos of the first stage to the second made clear⁵⁷³. However, it does not follow from the requirement to create a State and identify clearly the ultimate well-spring of political authority within that State - the final point of referral in case of dispute, thus able to end the disorder - that the totality of power need be exercised by that same body. A conditional delegation of authority to lower orders may be enacted, it seems, whilst ultimate authority (and the right of recall) remains centralised. This would have been perfectly imaginable in theory in the seventeenth century, as it is in varying degrees actual practice today. Then, however, the mechanisms of constitutional government were not so well developed or understood, and personal rivalries figured more

⁵⁷³ It comes as no surprise to learn that Bodin published his *Six Books of the Republic* in 1576, only four years after the St. Bartholomew's Day Massacre of 1572 in which 20,000 Huguenots had been slaughtered across France (an event in which Hueglin and Fenna believe he almost lost his own life). Hinsley illuminates the period and the pressures impelling Bodin to develop his new philosophy: '... Bodin's book was a direct outcome of the confusion brought about by civil and religious wars In the midst of this continuing chaos, in which the allied elements of feudal and Protestant disaffection pressed the right of resistance to extremes on the basis of customary and divine law, and in which supporters of royal power used Roman law and Divine Right to assert that the powers of the French Crown were absolute and unlimited, Bodin worked to find some basis of ideas on which the harmony of the political community could be restored'. Hinsley, *op. cit.*, p.120. Hueglin, *op. cit.*, p.88.

prominently. The priority for statesmen and monarchs seems to have been to avoid giving legitimacy to any alternative claims to authority by annihilating all competing centres of power and wielding full authority in person.

In this context, the idea of ‘indivisible sovereignty’ grew up as meaning the concentration of *all* powers in one site - rather than as only (and more appropriately) the concentrated location of the supreme power of delegation and recall of (derivative) powers.

On this understanding, it appears the case that the federal evolution in train today - the third phase in the historic progression - represents simply the belated realisation by mankind that the conditional delegation of powers (either upwards or downwards) is entirely possible on a constitutionalised basis, whilst the State remains the clear site of final authority. It can be understood to represent the movement towards the division or sharing of the powers flowing from sovereignty among two (or more) levels of government, whilst sovereignty itself remains undivided.

However, contrary to the mainstream narrative of federal scholars today, this movement represents a progression *forwards*, and not a *reversion*. Elazar, for example, has presented the third ‘federal’ phase as a movement back to the first ‘overlapping’ phase from the second of ‘hierarchy’ and ‘centralisation’ under ‘sovereignty’, which he sees as discredited. It is in this sense that he characterises the shift underway as a ‘rediscovery’ of the earlier Althusian federal vision, and the

abandonment of the Bodinian one⁵⁷⁴. Hueglin also thinks in this vein, for example when praising Althusius' vision and saying it did not occur to Machiavelli, Bodin and Hobbes to '... search for general principles that might stabilize the old order in a constitutional sense as a pluralized yet shared system of governance'⁵⁷⁵. Such logic appears mistaken because the first phase lacked a clear ordering concept of sovereignty and the State, which the third retains. So there is no need (indeed, it is wrong) to castigate 'sovereignty' and to contrast this concept *against* federalism, as an antonym - as tends to be the view expressed in the literature at present⁵⁷⁶. For the two are far from mutually-exclusive; rather, I argue, they are properly understood to be complementary.

Some scholars even go so far as to suggest that the third phase of moving to federal relationships globally entails a move to a 'State-less' world (this appears to be the thrust of much of the 'post-Statist' and 'post-sovereign' strand of argument in the

⁵⁷⁴ In his 'matrix' model of federalism, he seems to confuse over-lapping spheres of authority operating today within the context of the State, with over-lapping spheres of *final* authority in the old medieval order. The two are not the same.

Elazar, Daniel *Exploring Federalism* (University of Alabama Press, 1987), p.37.

Elazar, Daniel 'The United States and the European Union: Models for Their Epochs' in Nicolaidis, Kalypso and Howse, Robert (Eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001), p.34.

⁵⁷⁵ Hueglin, *op. cit.*, p.2.

⁵⁷⁶ Crick, for example, observes of the history of political ideas: '... The theory of federalism was put forward to contradict that of sovereignty'. Similarly, Heywood says: '... It has been suggested ... that liberal democratic principles are the very antithesis of sovereignty in that they argue for a distribution of power amongst a number of institutions, none of which can meaningfully claim to be sovereign. This is particularly evident in the case of federalism, which is based upon the paradoxical notion of shared sovereignty'.

Crick, Bernard 'Sovereignty' in Sills, David (Ed.) *The International Encyclopedia of the Social Sciences* (Macmillan and Free, 1968), p.77.

Heywood, Andrew *Key Concepts in Politics* (Palgrave, 2000), p.38.

literature mentioned above)⁵⁷⁷. Yet, the more conservative federal scholars halt before this conclusion to which such transformational thinking leads, with its apparently anarchical implications. Pinder, for example, is clear that a world without the ordering concept of the State would be a regressive move back towards the chaos of prior centuries⁵⁷⁸. This is surely right. Scholars of federalism, it seems, should resist the temptation to denigrate sovereignty, since in doing so they are throwing out the baby with the bath-water. In fact, it remains a key organising concept and building block of the modern, peaceful and democratic world. The current (third) historic phase of evolution in a federal direction *combines* Statehood with a dispersal of actual governing powers; whereas in the first phase, actual powers were dispersed without any clear idea of Statehood, that is, of the location of sovereignty, of underlying final authority. So we observe, in this regard, a need to qualify the post-sovereignty thesis.

Elazar does seem in the end - despite the antipathy displayed toward 'Statism' throughout his work - to acknowledge the need for some such concept; and he reaches the pragmatic conclusion that, anyway, Statehood will not vanish in its entirety.

⁵⁷⁷ Authors writing in a 'post-Statist' view include Elazar, Hueglin, Keating, MacCormick and Shaw. Such writers, in different ways, entertain the idea of the progressive obsolescence of the State. MacCormick, at the more extreme end, in *Questioning Sovereignty* (1999) writes: '... In Europe today, former understandings of state and nation seem out of date ... review of the idea of "sovereignty" ... (reveals) ... the possibility that the countries and peoples of Europe can succeed in transcending sovereignty, going beyond the sovereign state, without at the same time simply transferring sovereignty from states to the union, as in the "super-state". This is a profoundly exciting possibility that can become an actuality only if people truly grasp its possibility intellectually and in their political imagination'. The EU, he believes, is in the process of becoming a 'post-sovereign commonwealth'. He then poses a valid question, but chooses the wrong answer: '... The key question becomes whether there can be a loss of sovereignty at one level without its inevitable and resultant re-creation at another. Is sovereignty like property, which can be given up only when another person gains it? Or should we think of it more like virginity, something that can be lost by one without another's gaining it - and whose loss in apt circumstances can even be a matter for celebration? This book is dedicated to the latter view. The case to be made here is one welcoming the prospect of Europe beyond sovereign statehood'.

Since this 'post-Statist' argument is based on false premises, its conclusions appear somewhat hazy and are liable to mislead. MacCormick himself considers 'confederation' an apt term to describe the emerging EU. This may be an appropriate designation not because (as he posits) of the disappearance of the State, but rather because Statehood remains at the level of the member States: a (new) confederation of sovereign States.

MacCormick, Neil *Questioning Sovereignty* (Oxford University Press, 1999), pp.v-vi, 126.

Reflecting on the nature of the change he sees occurring to a world of federal arrangements, and in particular the foreseen proliferation of the form of the postmodern confederation, he says:

‘... Let us understand the nature of this paradigm shift. It is not that states are disappearing, it is that the state system is acquiring a new dimension, one that began as a supplement and is now coming to overlay (and, at least in some respects, to supersede) the system that prevailed throughout the modern epoch’⁵⁷⁹.

Of the quality that marks the component units of the confederation, he says, this

‘... may still be called “statehood” and “sovereignty,” but with a very different meaning than those terms had during the modern epoch. The modern terms may survive, but implicit within them will be federal limitations of one kind or another, somewhere between the constituent states of federations and the sovereign states defined and recognized by modern international law’⁵⁸⁰.

Although the broad view here is clearly illuminating, the finer detail appears rather woolly and should be recognised as such; but without greater precision on basic principles, on the nature of sovereignty and of federalism, it is the best that Elazar can do. Certainly, it is the case, as Elazar suggests, that the States are likely to continue to be ‘hollowed out’ by twin pressures of globalisation and localisation (so-called ‘glocalisation’) and powers delegated to both higher and lower levels⁵⁸¹. However, they are also likely to remain the bed-rock of his anticipated future worldwide and multilateral confederal arrangements⁵⁸², and as such they will continue to be genuine

⁵⁷⁸ This opinion has been expressed by Pinder in conversation with the author on several occasions.

⁵⁷⁹ Elazar, Daniel *Constitutionalizing Globalization: the Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield, 1998), p.19.

⁵⁸⁰ *Ibid.*, p.147.

⁵⁸¹ It is in the sense of hollowing out that the post-Statist and post-sovereign thesis has merit. However, it properly means to imply the death of centralisation, and not the death of the State - and thus would more accurately be termed ‘post-centralised Statism’ / ‘post-unitary Statism’; or perhaps more simply ‘post-centralism’ / ‘post-unitarism’.

⁵⁸² Elazar, *op. cit.*, p.147.

and complete States⁵⁸³. So to suggest that the State will be anything less than ‘... the sovereign states defined and recognized by modern international law’ (as in the quotation above) seems a dangerous notion, threatening to create misunderstanding and ambiguity where none exists presently.

Nothing in the essential character of the State will change, I argue in this thesis: the people of each, the political community clearly defined, will remain the repository of sovereignty, ultimate political authority. The powers flowing from sovereignty may, indeed, be more widely distributed in future than before, to the most appropriate level of government according to the principle of subsidiarity, but the underlying foundation will remain unaltered.

IV. Closing the Conceptual Void by Clarifying the Definition of Federalism

In this thesis, I see the route to sound understanding as lying in the clear and consistent of application of principles (as in other fields). Indeed, it is the collection of several valid principles into a well-ordered set that yields a coherent system of thought. Only in this way, it seems, can order be brought out of chaos and sense made of complex subjects, such as the one confronting us presently: the nature and characteristics of the set of basic political forms in political science.

In this connection, I argue, it is necessary to go all the way back to very first principles, in order to establish a valid system of concepts. To date, it would seem that this has not been fully achieved, and thus inconsistent principles are seen to clash, and the system ‘crashes’ so-to-speak. This is largely, I perceive, because such clarity of

⁵⁸³ As Bogdanor observes of the member States of the EU today, they ‘... still exist as states in the fullest legal and political sense, and are still perceived as such in the outside world’. Bogdanor, Vernon ‘Federalism and the Nature of the European Union’ in Nicolaidis and Weatherill, *op. cit.*, p.52.

inputs was not in fact possible: the concepts of the social world have been evolving steadily over centuries, in parallel with the progressive development of human relations and political life. Indeed, it is only very recently that some notions appear to have neared the point of completing their journeys and arriving at settled states. For example, the important concept of sovereignty at the heart of federalism has been undergoing a transition.

The assertion by James that this notion reaches the end of its historical trajectory in the form of popular sovereignty, from its monarchical origins, was noted in Chapter 3 (see page 72), and appears well supported by modern democratic practice. The argument deployed in the founding example of representative government in America, in which sovereignty was convincingly claimed for the people, would seem to provide firm backing for the perspective. As James Wilson said in his speech in the Pennsylvania State Ratifying Convention:

‘... if the question was asked, where the supreme power resided, different answers would be given by different writers. ... (Sir William) ... Blackstone will tell you that, in Britain, it is lodged in the British Parliament; and I believe there is no writer on this subject, on the other side of the Atlantic, but supposed it to be vested in that body. ... if the question was asked of some politician, who had not considered the subject with sufficient accuracy, where the supreme power resided in our governments, he would answer, that it was vested in the state constitutions. This opinion approaches near the truth, but does not reach it; for the truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people. ... the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of *Locke* seems to be the only one that pointed towards even the theory of this great truth’⁵⁸⁴.

⁵⁸⁴ Cited in Elliot, Jonathan *Debates of the State Conventions, on the Federal Constitution*, Vol. II (Washington, 1836), pp.425-6.

Yet, my claim that it is the British people that is the sovereign body in the UK, not Parliament (as traditionally believed), may be met with scepticism in some quarters - initially, at least. Nevertheless, the position that, in the modern democratic age, it is the *people* of every State who represent the ultimate source of political authority from which all governing powers flow seems one that is well-founded and capable of general application (in that it can be applied to all democratic States in the world today). Thus, it is one that I am content to hold.

Once a firm base of well-founded principles has been established, a coherent system of thought can then be built up by moving forward from a starting premise in logical sequence. The successive steps gradually flesh out a solid framework for thinking about the subject at hand. In relation to our concern here, the vital starting premise appears to be the requirement for a concept of final authority in settled political systems. We may thus develop the mental schema for a set of basic political forms along an integratory pathway in the following manner:

1. For a political society to be stable, a concept of full and final authority - that is, of sovereignty - is needed, in order to give definitive settlement to disputes, without recourse to any higher authority in the external sphere.
2. This is located in modern democratic States in the body of the people, the body politic.
3. The people establish the rules for the exercise of the powers flowing from sovereignty in a Constitution.
4. Governing powers may be divided by a Constitution among more than one level of government.

5. Governing powers may be delegated to higher levels, to be pooled with those of other States and exercised collectively by supra-national bodies; or they may be delegated to lower levels, to be divided up and exercised separately by sub-national bodies.
6. The term delegation implies the granting to a third party by the sovereign body of the right to exercise certain of the powers flowing from sovereignty on a conditional basis, i.e. subject to later recall. The ownership of such powers is thus not permanently transferred.
7. Where the higher level of government is of subordinate status to the lower level, the confederate principle operates and the political system established is a confederation of States.
8. Where the lower level of government is of subordinate status to the higher level, the devolutionary principle operates and the political system established is one of devolved government within a unitary State.
9. Where the two levels of government are of equal status, the federal principle operates.
10. Where the two levels of government are of equal status and sovereignty resides in the several peoples of the component parts, the political system established is a federal union of States.
11. Where the two levels of government are of equal status and sovereignty resides in the single people of the whole, the political system established is a federal State.

12. A rubicon of sovereignty transfer lies between the two federal forms, to cross which is to alienate sovereignty.
13. The term alienation implies the permanent transfer of sovereignty itself.
14. For a process of regional integration, crossing the rubicon represents the point at which several sovereign peoples fuse into a single sovereign people, and a federal union of States becomes a federal State.
15. For a process of regional disintegration, crossing the rubicon represents the point at which one sovereign people fragments into several sovereign peoples, and a federal State becomes a federal union of States.
16. Movement in either direction may be achieved today by open democratic process, through a referendum, thus securing the consent of the existing sovereign body to the proposed change.

Presently, we see that the scholarship appears somewhat distant from this thinking; and the difficulty here is clearly seen to lie with conceiving the true nature and location of sovereignty as an indivisible authority notion located in the body of the people.

This weakness presently pervades the literature on federalism in particular, where the idea of divided sovereignty has become almost synonymous with the concept. Goldsworthy expresses the mainstream view, when he says: ‘... In standard federal systems, sovereignty has been divided and distributed among so many different institutions that it no longer makes much sense to talk about sovereignty at all’⁵⁸⁵.

⁵⁸⁵ Goldsworthy, Jeffrey ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Walker, Neil (Ed.) *Sovereignty in Transition* (Hart, 2003), p.423.

This is thought to be a reflection of the post-sovereignty / post-Statist thesis. In this vein, Burgess has come to see sovereignty as now ‘outmoded’, ‘emptied of substance’, and therefore ‘simply irrelevant’⁵⁸⁶; Walker sees critics considering it a ‘superannuated’ concept⁵⁸⁷; Elazar conceives federalism to be a ‘radical attack’ upon the idea⁵⁸⁸; and Riley believes it to be simply incompatible federalism, even going so far as to consider the latter a ‘... theory of anti-sovereignty’⁵⁸⁹. The apparent rationale for this mistaken dismissal of the concept seems to lie in a conception of sovereignty as implying the centralisation of all power(s). However, as noted above, sovereignty properly understood refers not to the centralisation of governing powers, but the centralisation of the *source* of those powers. Thus, in their observation (and, in some cases, advocacy) of a trend today towards the distribution of governing powers across multiple levels of government, often through federalism, and from this deducing the end of sovereignty, these scholars have rejected an important concept⁵⁹⁰.

It is in this sense that I argue that much of the difficulty with understanding federalism today, and its relationship with Statehood and sovereignty, has to do with a long-standing mixing and confusion in the literature of sovereignty and the powers

⁵⁸⁶ Burgess, *op. cit.*, p.15.

⁵⁸⁷ Walker, Neil ‘Preface’ in Walker, *op. cit.*, p.vii.

⁵⁸⁸ Elazar, *op. cit.*, p.109.

⁵⁸⁹ Cited in Goldsworthy, *op. cit.*, p.445.

⁵⁹⁰ This explains, I believe, what may be considered a ‘Statehood resilience paradox’ in the discipline: the problem that although the literature both observes and predicts the progressive erosion of sovereignty, the sovereign State remains firmly entrenched at the heart of modern political life. As the Senior Expert Group, a collaboration of several former British diplomats, puts it: ‘... There are those who argue that globalisation, multinational corporations and organisations, the internet, the speed of modern transport and communications etc mean that the concept of the sovereign state does not have a future. But the abolition of the nation state does not figure on any serious agenda. Ask any European politician whether his or her country is a sovereign nation state and you will receive an emphatic “yes” for an answer, even if further probing would reveal consciousness of the limitations on its freedom of action’. In order to respond to the decline in effectiveness, it seems, the nation State reacts by delegating its powers to higher and lower levels. Nevertheless it retains itself the final authority, including the power of recall.

Senior Expert Group *Sovereignty and the EU*,

URL=<http://www.euromove.org.uk/index.php?id=6495>.

flowing from sovereignty⁵⁹¹. While the dispersal of some of the powers flowing from sovereignty to higher and lower levels can be admitted (even possibly encouraged), centralisation of sovereignty itself remains vital - indeed, part of its core of being. In some respects, therefore, we come to see the journey of evolution that the concept of sovereignty (in its core authority sense) is presently undergoing represents its separation into two distinct notions. The true meaning of sovereignty is seen to be the remaining part of the concept, stripped to its essential foundations, after actual governing powers have been distributed away from the centre: the final and absolute political authority located in the body of the political community. This thinking I conceive to be the key idea underlying the thesis, and the rethinking of federalism that I propose in it⁵⁹².

Let us now turn to evaluate in greater detail the American case, and attempt to pinpoint the precise source of the confusion that emerged then. It will be recalled from Chapter 7 that the source of ultimate political authority, of sovereignty, had been

⁵⁹¹ The matter is further complicated by the existence of core and peripheral meanings to sovereignty (as was noted in Chapter 3 - see page 74). We recall that the core meaning concerns authority and the peripheral meaning, also in wide circulation, concerns power (in the sense of effectiveness). While the latter may be in decline, the former is not. Conflation of the two notions compounds difficulties already arising from the conflation of sovereignty and the powers flowing from sovereignty (both authority notions) - as was observed, for example, in the writing of Wallace (see footnote 164 on page 77).

⁵⁹² For a full account of this idea, originally developed by Calhoun, see Merriam, Charles *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press, 1900), pp.170-1.

Merriam elaborates the key points of his philosophy as follows: '... It is true that the supreme power itself, the essential and vital principle in the State, cannot be divided; in strict logic this is inconceivable and impossible. There is a distinction, however, between the sovereignty itself and the powers or attributes belonging to it; between the sovereignty as the essential principle of the State and the exercise of the powers emanating from the sovereignty, as for example the legislative power and the executive power. These do not constitute the sovereignty itself but are merely certain sides of it, certain of its qualities. Now these powers or attributes may be divided without impairing the unity and integrity of the principle which lies back of them. ... What has been given up in such a case is not the power or principle itself, but only a temporary right to exercise of the same; not the sovereignty, but the conditional right to exercise sovereign attributes. ... Such a transfer is not, however, equivalent to an abandonment or alienation of the sovereignty of the State. This principle is something beyond powers such as those enumerated here. Sovereignty is not - and here is really the essence of Calhoun's argument - the sum of all these various powers, but on the contrary they must be regarded as emanations or outgrowths from the supreme power. Sovereignty is something integral, indivisible, unified, deeper than all the forms of its manifestation. It is not legislative, executive, or judicial powers, not their sum, or aggregate, but the vital principle of the State, out of which all these powers arise and on which they rest'.

fudged at Philadelphia in the need to reach agreement on a system of joint government: whether one people or many, one political community or several, as the base on which the new Union would stand had not been agreed upon and had thus been obfuscated. At the time, James Wilson's 'sovereignty of the people' notion was thought to have been the key that had unlocked the door to a new world, beyond the former opposition of the two contrasting locations of sovereignty: decentralised in a 'federal' government (a league among several sovereign States) and centralised a 'national' government (a single large sovereign State). According to this view, neither the State legislatures nor the new national legislature would be sovereign under the new Constitution: for 'the people' alone were now deemed to be the source of sovereignty.

In this conception, the body of the people, it was thought, could be considered in 'two views' (see the quotation from Wilson himself on page 223). On the one hand, it could be conceived as comprising several parts (the 'people of State A', 'people of State B', etc.), each one delegating a share of powers *separately* to the respective State government; and, on the other, it could be conceived as being a single whole ('one people'), delegating the remaining share *collectively* to the federal government. This thinking is illustrated in Figure 24 below:

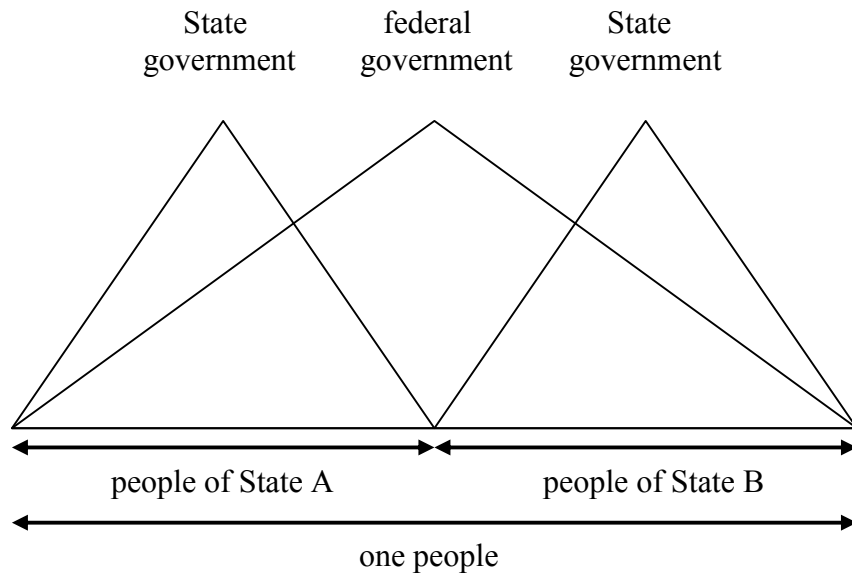


Figure 24 - Wilson's Popular Sovereignty View

The fault in this logic is now seen to lie in considering the body of one people, the body politic, to be capable of being constituted in two different ways simultaneously. The US Civil War provides strong evidence that this idea was false - if only to demonstrate what was in fact already conceptually demonstrable before (and had, in fact, been argued by some): that a stable and well-ordered State must have an identifiable source of final authority in order to settle internal disputes (in the absence of any higher authority in the external sphere), and that this must of necessity be a single source. As Samuel Johnson had put the point clearly in 1775: ‘... There must, in every society, be some power or other from which there is no appeal’⁵⁹³. President Lincoln restated the point in 1861: ‘... What is a “sovereignty,” in the political sense of the term? Would it be far wrong to define it “A political community, without a political superior”?’⁵⁹⁴. In this light, Americans could have constituted, at Philadelphia, a single sovereign political community, from which the parts could not secede without the prior permission of the whole; or they could have constituted

⁵⁹³ Cited in Wood, Gordon *The Creation of the American Republic 1776 - 1787* (University of North Carolina Press, 1969), p.349.

several sovereign political communities, each one able to depart from the common enterprise at their own discretion, i.e. unilaterally and at will. In the end, in the absence of an explicit provision on secession (either permitting or prohibiting it) in the Constitution, Americans were forged by the fire of armed conflict into one political community - and shown to have become so beyond doubt.

The diagrams that Forsyth offers of the federal union of States and the federal State illustrate plainly the two possible conceptual positions on this logic; and as such they provide good representations of the two forms of the compound polity, bottom-up and top-down respectively (Figures 25 and 26 below). The principal difference between these two structures is seen to lie in the basis of authority upon which each stands: several peoples for the federal union of States and one people for the federal State. A clear conceptual schema, it seems, would entertain no third position.

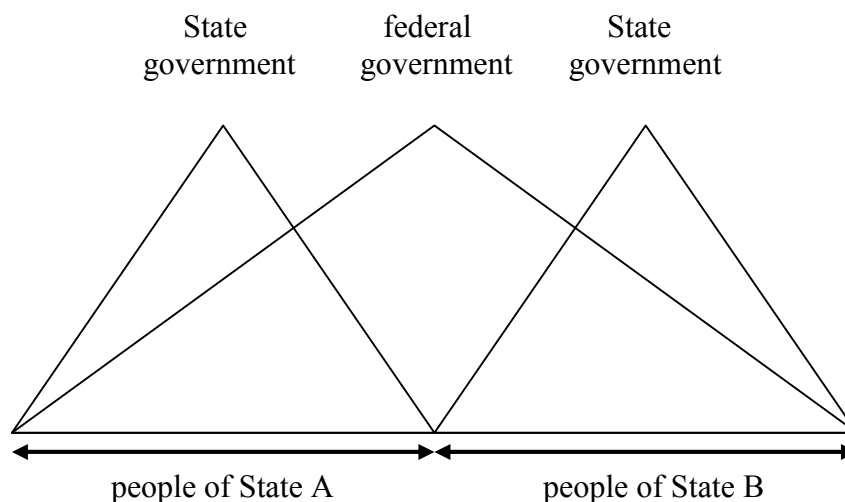


Figure 25 - Forsyth's Depiction of the Federal Union of States⁵⁹⁵

⁵⁹⁴ Lincoln, Abraham, Message to Congress in Special Session, 4 July 1861.

⁵⁹⁵ Forsyth, Murray *Unions of States: the Theory and Practice of Confederation* (Leicester University Press, 1981), p.125.

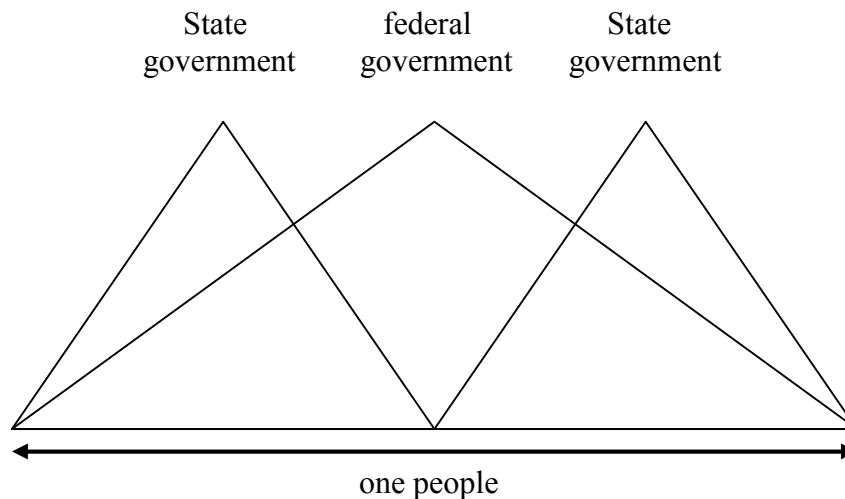


Figure 26 - Forsyth's Depiction of the Federal State⁵⁹⁶

On this view, in the model of the federal union of States, the several peoples each delegate a share of their governing powers separately to their respective State governments; and they pool the remaining share and delegate this collectively to the common federal government. In the model of the federal State, by contrast, the single people delegates a share of its governing powers to the common federal government; and it divides up the remaining share and delegates this in fragments to the several State governments.

We may at this point extend the diagrammatic representations to cover the entire spectrum of possibilities along an integratory pathway. This yields a schema of six basic political forms, as in Figure 27 below. The height of the triangles indicates the relative standing of each level of government (i.e. whether they are of co-ordinate status, as in the two federal forms; or of superior / subordinate status, as in the forms of the league and devolved government). It will be observed that the framework matches the taxonomical unfolding set out in Chapter 3 on page 93.

⁵⁹⁶ *Ibid.*, p.126.

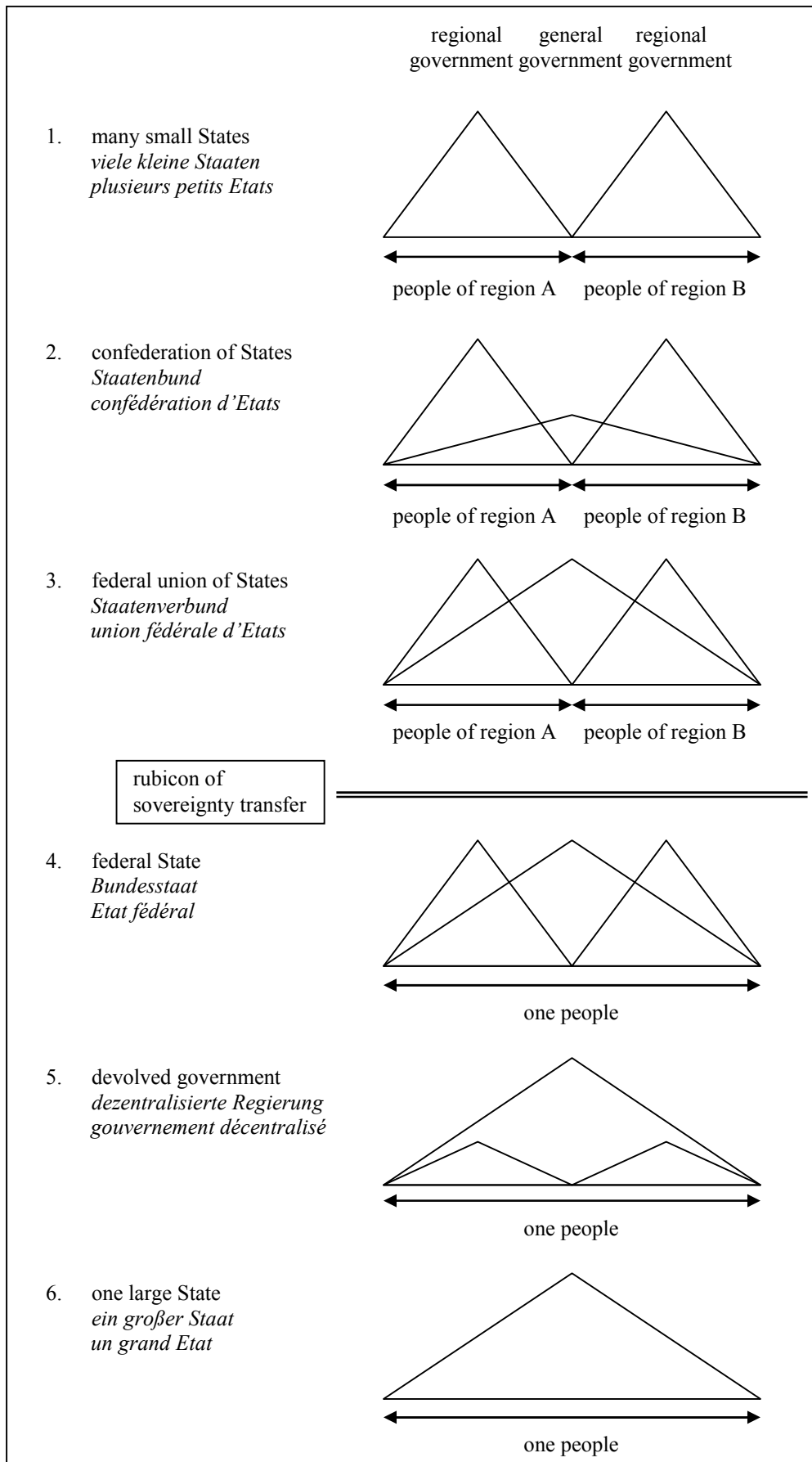


Figure 27 - A Schema of Basic Political Forms

Three comments on the above figure are pertinent. First, I have now replaced Forsyth's nomenclature ('State' and 'federal' governments) with Wheare's ('regional' and 'general' governments), for purposes of consistency with my earlier definitions. Secondly, I have offered translations of the English name of each political structure into German and French. My intention here is to contribute towards enhancing scholarly communication across the linguistic divide, in the context of the on-going European discussion today. All too often, it seems today, debates are conducted in national 'silos', with a resulting incompatibility of concepts and terminology. This is not least in view of different historical experiences with the foregoing. However, if achieving a certain standardisation of concepts and their usage represents an important part of the scholarly endeavour, then it would also seem that achieving interoperability across the linguistic boundaries that artificially segment the academic realm must also be given due attention. Thirdly, I have selected the name *Staatenverbund* for the third form, the federal union of States, following Joschka Fischer and before him the German Federal Constitutional Court (the *Bundesverfassungsgericht*)⁵⁹⁷, as possibly the most suitable in the absence of an obvious alternative in the German language. This may appear too similar to the name of the second form, *Staatenbund*, however, and so an entirely new term may be needed.

Such a framework implies a clear view of the nature and location of sovereignty; and this has in fact been arrived at before in the literature, in the American political science scholarship of the late nineteenth century. As Merriam tells us:

'... The results of the American development finally took scientific form at the hands of J.W. Burgess, in *Political Science and*

⁵⁹⁷ Federal Constitutional Court of Germany, Judgement of 12 October 1993, in Cases 2 BvR 2134/92 and 2 BvR 2159/92, *Treaty of Maastricht*, BverfGE, Vol. 89, p.155.

Comparative Constitutional Law (1892). Sovereignty is here conceived as the “original, absolute, unlimited, universal power over the individual subject and over all associations of subjects;” as an essential quality of the State, indeed the most indispensable mark of statehood. ... The strongest objection to the recognition of the absoluteness of sovereignty arises, it is pointed out, from the general failure of publicists to distinguish clearly between *State* and *Government*. One fears to place unlimited power in the hands of the ordinary Government, and failing to distinguish between this and the State, declares against supreme power in general. In strict analysis, however, the “Government is not the sovereign organization of the State. Back of the Government lies the constitution, and back of the constitution the original sovereign State which ordains the constitution both of Government and liberty”⁵⁹⁸.

Sovereignty, then, lies not in governments; and not in constitutions; but in the people underlying both⁵⁹⁹. As Lieber had brought out earlier, it is an indivisible authority notion, whose very existence is necessary for the development of a harmonious social life - and in this we find echoes of Althusius’ and Madison’s emphasis on the end of political life being ‘association’. The conclusion to be drawn here is that *all* powers in fact stem from the body of the political community - and none from elsewhere. In *Political Ethics* (1838), Lieber defined sovereignty as

‘... “the right, obligation and power which human society or the State has to do all that is necessary for the existence of man in society.” It is the natural outgrowth of the society, as essential to the community as the right to breathe is to a man. It constitutes the vital principle of the State, is inseparable from its existence; to conceive of its alienation by the State is impossible’⁶⁰⁰.

A significant - and apparently inescapable - logical corollary of the elaboration in Figure 27 is the existence of a rubicon of sovereignty transfer between the two federal

⁵⁹⁸ Merriam, *op. cit.*, pp.179-80.

⁵⁹⁹ When Bogdanor says that it follows from Wheare’s definition of federalism that ‘... it must be the constitution, rather than the national government, that is supreme’, in fact it is necessary to go back one stage further to the people. It is this body that is fully supreme, as nothing else lies behind it. Bogdanor, Vernon ‘Federalism and the Nature of the European Union’ in Nicolaidis and Weatherill, *op. cit.*, p.49.

⁶⁰⁰ Merriam, *op. cit.*, pp.173-4.

forms, which must be crossed for movement between them in either an integratory or disintegratory direction (i.e. from several political communities to one political community, and from several States to one State; or vice-versa). In the American example, an attempt was made to 'get around' this requirement. The pre-existing political communities in the States were thus not unambiguously seen to be enlarged or fused into one political community. The idea that the former situation could be maintained whilst a higher level of political community was simply grafted on was introduced in Wilson's concept, and the two views allowed to persist together until the Civil War. Concurrence was shown, however, to be a mistaken doctrine in 1861 with tragic consequences; and eventually, after the Civil War, it was rejected with the majority coming to the conclusion, as Woodrow Wilson noted, that there had been '... the virtual creation of a central sovereignty' and that the States no longer held sovereignty:

'... In the federal state self-determination with respect to their law as a whole has been lost by the member states. They cannot extend, they cannot even determine, their own powers conclusively without appeal to the federal authorities. They are unquestionably subject to a political superior. They are fused, subordinated, dominated'⁶⁰¹.

As Bennett notes, however, with the march of time this clear position of sovereignty held indivisibly by the national political community, the American people, has faded from view (not helped by the Supreme Court's adherence to the divided sovereignty view):

'... Interest in the nature of sovereignty and in pinpointing its location in the union waned as the country got farther and farther away from the War and the issues which it involved. "State sovereignty" and "national sovereignty" were to survive to the twentieth century and continue to be used as symbols in rallying

⁶⁰¹ Wilson, Woodrow 'Political Sovereignty' in *An Old Master and Other Political Essays* (Scribner's, 1893), pp.91-3.

opposition to or support for federal legislative measures and federal court decisions; but sovereignty as illimitable power in the hands of some determinate superior had all but ceased to be appealed to by 1900. Since then it has not been invoked in explicit terms by any prominent American writer or political leader'⁶⁰².

In this connection, the question of European 'citizenship' in the case of the EU, supposedly introduced at Maastricht, comes to the fore. For the moment, most commentators remain agreed that this is still little more than a virtual concept, only 'supplementing' in a limited way national citizenship, which remains primary. James comments in this regard that the move from a treaty-based international organisation to a constitution-based sovereign State

'... is what may happen in respect of the European Union, and which some hope will happen. But although, over the last 40 years, this grouping has grown in strength and resources, and is not the usual type of international organization, it is also not anywhere near becoming a single state. Most of its members presently display a keen desire to maintain their sovereign individuality, as do its aspirant members. They do not wish to become units within a federal state. For as long as those desires are maintained, the European Union will continue to be represented on the political maps and in most international activity, by fifteen (or more) states rather than one'⁶⁰³.

The question is begged, of course, what happens when such desires change. The logical corollary of the preceding analysis would seem to be that in the democratic age such a transition would only be effected by a specific - and open - act of establishing a sovereign State and a corresponding sovereign people: a 'constitutional moment', complemented appropriately by the establishing of a Constitution. In view of the discrete nature of political community and sovereignty,

⁶⁰² Bennett, Walter *American Theories of Federalism* (University of Alabama Press, 1964), p.195.

⁶⁰³ James, Alan 'The Practice of Sovereign Statehood in Contemporary International Society' in *Political Studies*, Vol. 47, No. 3, 1999, p.468.

then, the two possibilities would seem to be a treaty-based federal union of States and a Constitution-based federal State.

In this connection, the question is raised: what was the nature of the ‘EU Constitution’ (see footnote 95 on page 39). Was it a Constitution, or was it a treaty?⁶⁰⁴ Further, was it a constitutional moment, a parallel with Philadelphia, as the Convention’s chair, Valéry Giscard d’Estaing, clearly hoped it would be (to equal measure of approbation and criticism)⁶⁰⁵. There was evidently a good deal of muddle created, as I have argued elsewhere⁶⁰⁶, by Giscard’s subtle tinkering with his initial choice of title, *Constitutional Treaty for Europe*, amending it half-way through the Convention to *Treaty Establishing a Constitution for Europe*. Though apparently a mere nuance, the difference was crucial - and perhaps largely responsible for the text’s failure at the ratification stage. For the first may be said to have characterised - appropriately - a treaty (noun) with certain constitutional (adjective) aspects. The second appeared to inaugurate a Constitution (noun) by the process of a treaty. The latter thus seemed intended or destined to move the EU across the rubicon to a federal State - even though this was later denied by its supporters. Hans-Jürgen Papier, the President of the German Federal Constitutional Court, notes the contention generated by this ambiguous usage among constitutional lawyers:

‘... In Germany it is by no means undisputed whether a supranational organisation such as the European Union (EU) can have a Constitution. By some, this is denied on the grounds that only states can have a Constitution; instead, they refer to the document in question as a fundamental treaty. In most cases, however, it is argued that the concept of a Constitution is not just

⁶⁰⁴ See Eleftheriadis, Pavlos *Constitution or Treaty?*, Federal Trust Constitutional Online Paper No. 12/04,

URL=<http://www.fedtrust.co.uk/constitutionalpapers>.

⁶⁰⁵ Menon, Anand and Schain, Martin ‘Introduction’ in Menon and Schain, *op. cit.*, p.1.

⁶⁰⁶ Law, John ‘Right Product, Wrong Packaging: Not “Constitution”, but “Constitutional Charter”’ in *Journal of Contemporary European Research*, Vol. 3, No. 1, May 2007, URL=<http://www.jcer.net>.

restricted to states but that it can, with a modified meaning and content, also be applied to supranational institutions’.

He goes on to note that, in effect, and despite its (arguably misleading) packaging, the text retains the essence of an external treaty among States, rather than becoming the internal founding document of a single State:

‘... The present draft Constitutional Treaty is not aimed at providing the European Union’s self-empowerment, ie it does not claim direct and non-derived sovereignty. The Member States, which retain their sovereignty under international law, remain the masters of the Treaties, ie also of the Constitutional Treaty, even after the Treaty’s entry into force. This, however, could change if the procedure by which the Treaty is amended that has been suggested so far, ie an amendment by the intergovernmental conference, were changed in such a way that in the future, amendments of the Constitutional Treaty would be possible through decisions taken by the institutions of the European Union, ie without the process of ratification under international law’⁶⁰⁷.

Here we see emerge, then, a second critical distinguishing feature between the two federal forms: the procedure for constitutional change. In particular, we note the distinction to be drawn between, on the one hand, a unanimous decision-procedure under a treaty arrangement, in which the consent of every party to the text is required and the sovereignty of the members is thus preserved; and, on the other, a majoritarian procedure under a Constitution, in which *Kompetenz- Kompetenz* is ceded to the whole and no individual member can meaningfully any longer claim sovereignty.

A third and final critical factor, emerging in the thought of Pinder above, is the control of armed force. This would seem closely related to the right of secession, the former being in practice necessary to give effect to the latter. Which of these three features is decisive in determining the location of sovereignty? The answer would

⁶⁰⁷ Papier, Hans-Jürgen *Memorandum to the House of Lords Select Committee on European Union*, 13 November 2003, URL=<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47we14.htm>.

appear not entirely clear. However, it may be posited that with all three held by one or other level of government, a federal system can be clearly identified as comprising either one State or many States. On this basis, it would seem that confusion can be avoided if the three ‘critical transition factors’ of (i) the right of unilateral withdrawal, (ii) control over constitutional amendment, and (iii) control of armed force, are kept together in a bundle and transferred at the moment when the rubicon is crossed. This transition, then, would occur at the same moment as a Constitution is adopted by popular vote from a treaty (for a process of integration), or a treaty arrangement is adopted from a Constitution (for a process of disintegration). We may summarise the features of the two possible political forms as follows:

	Federal union of States	Federal State
founding document	treaty	Constitution
number of States	many	one
location of sovereignty	in many peoples	in one people
right of unilateral withdrawal	yes	no
constitutional change	by unanimity	by majority
control of armed force	with the parts	with the whole

Figure 28 - Critical Transition Factors

Two comments are pertinent to the above table. First, as came out of the discussion in Chapter 7, the right of nullification cannot be entertained in either federal form, for the sake of preserving the uniform application of the legislation of the general level of government. Either a member State must bring conflicting national law (including, it would seem, constitutional law) into line with federal law, or it must withdraw from the Union. These would seem to be the only two well-founded conceptual positions.

Secondly, in a federal union, the control of armed force cannot be centralised and must remain subject to unanimous decision-making (at least for the key decisions initiating operations, if not for subsequent implementation). In the case of the EU's foreign policy arrangements, this remains the practical reality at the present stage of integration, with 'co-operation' only where member States agree being the *modus operandi*. This is likely to remain the case for the foreseeable future, not least in view of the significant disagreements brought to light during the Iraq crisis of 2003, in which British and French views on the use of military force were shown to be fundamentally opposed. This highlighted both the extreme political sensitivity of the domain and the impossibility of deciding on such matters by majority vote, in circumstances where democratic politics remains entrenched within distinct national fora (that is, within multiple national *demos*i, rather than a single European *demos*).

Let us turn now to consider specifically the implications of this analysis for the nature of federalism. At this point in the journey of Part 2 of the thesis, we arrive at the full framework of basic political forms set out at the end of Part 1, with the '*sui generis*' void inherited from the German debate seen to be closed off. The two crucial theoretical planks necessary for the construction of a valid federal concept are identified as the reinstatement of a conception of sovereignty as an indivisible authority notion and the recognition of a distinction between sovereignty and the powers flowing from sovereignty. On the basis of this firm foundation, we may now clarify the definition of federalism as follows:

federalism: a form of government in which the powers flowing from sovereignty are divided between two levels of government that are of equal status

The two structural manifestations of the federal form may in turn be established by incorporating additionally the Statehood attribute:

federation: a political system composed of one State, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status

federal union: a political system composed of many States, in which the powers flowing from sovereignty are divided between two levels of government that are of equal status

We in fact find further support for this line of thinking through careful examination of the recent constitutional debate in Europe. As was noted in Chapter 1, the European Convention had broached the question of federalism in the context of attempting to identify a ‘definition of the Union’. The initial draft of Article I.1, prepared by the Praesidium of the Convention, which Giscard chaired, ran as follows:

‘... Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled ...], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis’⁶⁰⁸.

An extensive debate on this definition took place on the Convention floor in which numerous amendments were proposed: these were grouped under some sixty-seven

⁶⁰⁸ European Convention *Draft of Articles 1 to 16 of the Constitutional Treaty*, 6 February 2003, CONV 528/03, Article I.1.1, URL=<http://register.consilium.eu.int/pdf/en/03/cv00/cv00528en03.pdf>.

headings in the analysis provided by the Convention's Secretariat⁶⁰⁹. Reactions to inclusion of the concept of federalism were many and varied, mingling with mixed reactions to the Praesidium's characterisation of the key features of the European enterprise and concern over the removal of the long-standing commitment to 'ever closer union'. The French and German delegates, Foreign Ministers Dominique de Villepin and Joschka Fischer respectively, promoted Delors' formulation of a 'federation of nation States' to characterise the entity⁶¹⁰. The British government delegate, Europe Minister Peter Hain, at the time submitted an interesting interrogative on the meaning of federalism, which it is worth reviewing here:

'... Greater integration depends upon people seeing it clearly recognised that the Union remains a Union of states, as well as of people, and that sovereignty flows from the member states to the Union, not the other way round. Is that what is meant by a "federal basis"? We have tried to clarify this because, as drafted, there is an implication of some inherent power in the Constitution other than the powers delegated by the Member States'⁶¹¹.

This response is indicative of the depth of prevailing uncertainty surrounding the meaning of federalism. For federalism is commonly thought, according to the textbooks, to imply a notion of 'divided' or 'shared' sovereignty - that *both* levels of government have a *permanent* stake in *original* sovereignty. However, we appear to see here a contrasting notion of sovereign powers *flowing* from their single source to

⁶⁰⁹ European Convention *Reactions to draft of Articles 1 to 16 of the Constitutional Treaty - Analysis*, 6 February 2003, CONV 574/1/03,

URL=<http://register.consilium.eu.int/pdf/en/03/cv00/cv00574-re01en03.pdf>.

⁶¹⁰ Echoing the earlier Fischer-Chevènement dialogue (see footnote 539 on page 264), Nicolaidis notes the same 'problem of vocabulary' being raised. Observing difficulties identifying the EU, she comments: '... Does the semantic solution then lie with composite terms, qualifiers for the federal label? This was the line taken in the Convention by the Franco-German couple which, true to expectations, came to the rescue. Fellow conventioners-cum-foreign ministers de Villepin and Fischer lobbied for Delors' "federation of nation-states" as conveying the synthesis of union of peoples and of sovereign states. Instead of the old mantra that the EU is more than a confederation and less than a federation, let us simply acknowledge that it is both. Somehow however, most of their colleagues seemed to read this new grand compromise as another "cut-and-paste"'. Nicolaidis, Kalypso 'Constitutionalizing the Federal Vision?' in Menon and Schain, *op. cit.*, p.63.

be dispersed among the levels. In Hain's response we perhaps see manifested the reluctance of European member States to let go of a notion of indivisible sovereignty that has been the founding principle of their own internal systems of government for a number of centuries⁶¹².

Hain is not alone in expressing this derivative view of the powers flowing from sovereignty in the federal concept. Former European Commissioner Chris Patten uses similar language about sovereignty 'flowing' in his recent book:

'... The power that is transferred in Europe's laws and treaties flows from the democratically elected parliaments and governments of the nation states to the institutions established to manage shared sovereignty; it does not flow down from *those* institutions to the nation states'⁶¹³.

In such thinking, and contrary to the mainstream view, we in fact observe that some practitioners in Europe have come close to a conceptually well-founded idea of federalism, in which sovereignty is held indivisibly at a single point, reflecting the source of all authority, and the powers flowing from sovereignty are delegated among the various levels. The resistance to giving up such a notion of sovereignty, it seems, is not an obstacle to the application of federalism in Europe, but rather fully consonant with it.

⁶¹¹ Hain, Peter *Suggestion for Amendment of Article 1 of the Constitutional Treaty*, URL=<http://european-convention.eu.int/Docs/Treaty/pdf/1/Art1Hain.pdf>.

⁶¹² For example, the British Government had stated prior to the Convention: '... The ultimate guarantee of Parliamentary sovereignty lies in the power of Parliament to repeal all or any of the Acts which give effect to the EU Treaties in this country'. The German Federal Constitutional Court had expressed a similar view.

A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003 (Her Majesty's Stationery Office, 2003), p.23.

⁶¹³ Patten, Chris *Not Quite the Diplomat: Home Truths About World Affairs* (Penguin, 2005), pp.119-22.

Conclusions

In this ninth chapter, we have considered the impact of the European instance of regional integration upon the development of federalism. First, we observed how the EU moved into the *sui generis* gap with the entry into force of the SEA in 1987. Secondly, we examined how scholars have in recent years embarked on a quest to address the identification problem implicit in the inability to classify the entity. Thirdly, we observed a need to qualify the ‘post-sovereignty’ thesis prevalent in the discipline, in view of the continuing relevance of ideas of Statehood and sovereignty to political life. Fourthly, we identified how the conceptual void in the schema of basic political forms may now be closed by clarifying the definition of federalism.

The latter may be achieved, we saw, by restoring an indivisible conception of sovereignty to the heart of the federal concept, and by distinguishing between sovereignty and the powers flowing from sovereignty. Both these ideas are, in fact, found to have substantial support in the literature stemming from the American and German debates on the nature of federalism. It is this earlier thought, it seems, that points the way towards the construction of a valid federal concept today.

Chapter 10

Conclusion

We began this thesis by noting uncertainty presently prevailing in the scholarly literature over the meaning and definition of federalism, and hence over the appropriate manner of using the term to characterise political systems. This led us to consider the formulation of the concept, and to pose the following research question:

What can be learnt from the evolution of federalism over time for the construction of a valid federal concept today? To set about answering this question, we searched for the origins of the federal idea and then proceeded to investigate how both the concept and terminology of federalism developed subsequently, through the three principal shaping instances of regional integration, American, German and European.

This historical inquiry revealed the federal idea to have both secular and religious roots. We saw how these fused together in the pioneering instance of modern federalism occurring in America in the late eighteenth century, as the secular federalism of liberal enlightenment writers like Locke mixed with the covenantal philosophy of the early Calvinist settlers. At this initial stage, federalism and confederalism meant the same thing: a league among sovereign States, formed on the basis of a treaty. The first American union formed under the Articles of Confederation, we noted, represented just such a structure. The Philadelphia Convention, in seeking to create a stronger framework and correct some of the deficiencies inherent in this type of political order, was then seen to inaugurate the

first ever ‘compound polity’, combining the pre-existing model of a decentralised system of States with the opposite extreme of a large unitary State, to form a novel hybrid of these two prior mental constructs. As *The Federalist Papers* reminded us, upon ratification in 1789 the founding text of the second union was considered ‘... neither a national nor a federal Constitution, but a composition of both’⁶¹⁴.

Gradually over time, we saw, this original language came to shift, and the terms ‘federal’ and ‘confederal’ came to separate, with the former advancing to refer to the new compound form (alone) and the latter being left behind at league. The change of terminology, however, was not completed for over seventy years. Right up to the Civil War, we noted, the term ‘confederated States’ remained the usual description of the American Union. It was only towards the end of the nineteenth century, in particular after the German theorists had developed the distinction between the terms *Bundesstaat* and *Staatenbund*, to contrast their *Reich* with the earlier *Bund*, that the terms ‘federal State’ and ‘confederation of States’ became common currency in the English language via American political science, and the new conceptual and terminological framework, opposing federalism and confederalism, finally began to bed down.

The unfortunate legacy of this incremental, pragmatic and experimental process of conceptual innovation into previously uncharted territory in the middle zone along the integratory pathway, we saw, was an incomplete schema of basic political forms. The introduction of the flawed notion of ‘divided sovereignty’ at an early stage was seen to be ultimately responsible for the opening up, at a much later date, of a void of conceptual space between the forms of the confederation and the federation, termed

⁶¹⁴ Madison, James, Hamilton, Alexander and Jay, John *The Federalist Papers* (Penguin, 1987), No. 39, p.259. Originally published in 1788.

'sui generis'. This is the situation we inherit today, a century on from the close of the German debate. Scholars in the rationalist school of concept-formation, such as Mill and Sartori, were seen to argue that such a state of affairs is unsatisfactory for the conduct of political science because it fails to categorise all political systems. It does not meet the key requirement of a taxonomical unfolding that the constituent classes should be mutually-exclusive and jointly-exhaustive.

Restoring an indivisible conception of sovereignty to the federal idea, I suggest, offers a potential remedy to this problem. This is argued to be a rational response, since it allows for the construction of a coherent concept of federalism from first principles. Such a reformulated concept yields two institutional forms, the federal union of States and the federal State, where before only the latter was known. It thus closes the conceptual gap and furnishes a complete taxonomical framework. In principle, there is no inherent reason why federalism, distinguished by the characteristic of equality of status between the two levels of government established, should necessarily have to occur within the structure of a single State - although we have tended almost universally to assume so to date. The sharing of governing powers, it seems, could logically just as well manifest itself within a multi-State setting. With sovereignty clearly defined as an ultimate authority notion - the final and absolute source of political authority located in the body of the political community - a federal system of constitutionally divided powers could, conceptually, be as easily derived from an arrangement where sovereignty is understood to reside in the several peoples of the component parts, as one where it is thought to reside in the single people of the whole.

The idea of a locus of sovereignty now emerging here, stemming from its determinate indivisible nature, is seen to imply as a logical corollary the notion of a 'rubicon' of

sovereignty transfer. This in turn implies, in democratic political systems, a clear, explicit and open procedure of transferral at some juncture (an instant in time) mid-way through processes of regional integration or disintegration. Stable, well-ordered and peaceful polities, avoiding the resort to force, it seems plain, maintain at all times a clear conception of the location of final authority and hence sovereignty, which alone is capable of giving definitive settlement to internal disputes (in the absence of any higher authority in the international sphere). Such polities are said to be 'political systems founded on the State' - Statehood and sovereignty being intimately-related concepts, the former the institutional expression of the latter. Not all political systems will maintain a clear locus of final authority; and to advocate keeping such an understanding is a normative argument that is not made here. Nevertheless, it may be observed that stable systems do maintain a clear conception of the location of sovereignty and unstable ones (potentially, at least) do not.

The idea that a written constitution may delineate precisely the powers of each respective level of government under federalism, and thus represent a *division* of sovereignty, was shown disproved in the American case by the observed need for a third party arbiter to rule on grey areas within the text. No constitution, however detailed, can foresee every eventuality. The location of sovereignty in its true indivisible sense thus returns to centre stage, being of vital importance in determining whether, in such eventualities, the parts must submit to the rulings of the federal court, or may choose not to and leave the union altogether.

The idea of the 'compound polity', which must be considered the essence of federalism, now emerges from this analysis as really encompassing two forms, instead of one (being most commonly conceived presently simply as a synonym for the model

of a federal State). Understood in this new light, the US and the EU both appear as compound polities - the former a federal State, the latter a federal union of States. Hence, the use of the lens of comparative federalism to analyse these polities is seen to have merit from a theoretical standpoint; and, in this light, the variety of insights that scholars have recently come to discover from such activity seems less surprising. Indeed, comparison of the EU with other federal systems, such as Germany, Switzerland and Canada, could well bring additional understanding and is an obvious direction for future enquiry and cross-border scholarly collaboration. Furthermore, as the leading instance of the decentralised federal form, comparison with other examples of regional integration appearing to begin to follow behind, such as the Africa Union (AU), the Association of Southeast Asian Nations (ASEAN) and the South American Union of Nations (UNASUR), could in time bring similar benefits as the EU - US dialogue. This, though, remains more a possibility for the future than a realistic option for the present, with co-operation in the latter examples being still currently at the embryonic stage.

It follows from this analysis that the EU is appropriately conceived today as a federal form - and not federal meant here in a loose or second best sense, not partly federal, but fully so, since it is understood to be an instance of a federal union of States and thus of the 'compound' genus. The 'federal non-State paradox' - the fact that the EU looks federal, but is not a federation - thus in fact reveals itself to be no paradox at all, once the concept of federalism is properly understood and defined. Equally, continuing to view the EU a '*sui generis*' form, in view of its supposed irreducibly novel and unique characteristics, appears now to have less sure foundations in the light of the significant parallels revealed between the American and European experiences by historical research into the former case. For the US was once itself

thought of in just such terms, as the words of Madison make clear: the new America after Philadelphia, he thought, was ‘... “emphatically *sui generis*” ... “so unexampled in its origin, so complex in its structure, and so peculiar in some of its features” that the traditional “political vocabulary” did not “furnish terms sufficiently distinctive and appropriate”’⁶¹⁵. As de Tocqueville foresaw so presciently, however, things would eventually move on from this state of affairs so that the puzzling conceptual anomaly would be addressed by political science. The EU appears to be treading a similar path today.

Constructing a valid concept of federalism, it seems, boils down in the end to the addition of one short phrase. We only need to insert four words in the definition of the term, amending its formulation from ‘a division of sovereignty between two levels of government that are of equal status’ to ‘a division of the powers flowing from sovereignty between two levels of government that are of equal status’. Though apparently a small change, nevertheless the difference is crucial, since it excises the unhelpful and contradictory notion of divided sovereignty at the heart of the concept. In this way, I argue, greater clarity could be brought to the field and the range of basic political forms illuminated. The problem of conceptual confusion would be lessened, allowing a clearer scholarly focus on substantive issues. For much of the uncertainty and contention surrounding the ‘F-word’, and its relevance to the European case of regional integration, it seems, can be explained by the misformation of the federal concept prevailing up to this moment in time.

⁶¹⁵ Cited in McCoy, Drew *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge University Press, 1989), pp.149-50.

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