

GOOD FEDERATION, CONFEDERATION, BAD FEDERATION: WHY THE AMERICAN CONTROVERSY ON THE FEDERAL UNION SHOULD BE A LESSON FOR THE EUROPEAN UNION

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ABSTRACT. *Good Federation, Confederation, Bad Federation: Why the American Controversy on the Federal Union Should Be a Lesson for the European Union.*

The aim of this paper is that of revisiting the competing doctrines of federalism in the United States, as they are exemplarily prescriptive about the means and finality of the correspondent process of European integration. Considering the three main glosses on the federal idea in the United States as the Anti-federalist idea, the Confederative experiment and the Federalist focus on strong and centralized government, the present paper will substantively argue for the (in)consistencies of these models and acknowledge the limits of American federal experiences in the uncertain context of the European controversies on the topic.

Keywords: *federalism, confederation, US Constitution, federalists, anti-federalists, states, centralized government, devolution.*

REZUMAT. *Federalismul bun, confederația, federalismul rău: de ce controversele americane privind uniunea federală ar trebui să constituie o lecție pentru Uniunea Europeană.* Scopul acestui articol este de a recapitula doctrinele conflictuale ale federalismului american, întrucât ele sunt în mod exemplar prescriptive în privința mijloacelor și scopului procesului integrării europene. Având în vedere cele trei mari accente ale ideii federale în Statele Unite, respectiv, ideea antifederală, modelul experimental confederativ și abordarea federalismului privind ideea unui guvernământ puternic și centralizat, prezentul articol va argumenta pentru (in)consistențele acestor modele și va da seama de limitele experiențelor federale americane în contextul incert al controverselor europene în domeniu.

Cuvinte cheie: *federalism, confederație, Constituția americană, federaliști, antifederaliști, state, guvernământ centralizat, devoluție.*

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Introduction

At first sight, the issue of federalism is not controversial and, at any rate, should not give rise to misunderstandings. Within the widespread conceptions on the idea of federalism, the common world political configuration is, to a large extent, made up of federal institutions and governments. In 1996, one could count ten large federal nations, encompassing about half of the planet's inhabitable land and almost 40 per cent of its population.² These rough statistics shows us that, throughout modernity, the concept of federal state/nation has acquired a deep political meaning that enabled the emergence of federal political systems. Nevertheless, the issues of federalism are far from being completely solved, even though, both normatively and prescriptively, there are strong ideological assumptions in favour of accepting the federal project. The normative framework of federalism was formulated in early modernity by Johannes Althusius, who published *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata* in 1614, while the prescriptive foundations of federalism were established at the end of the 18th century within the dispute between federalists and anti-federalists on the issue of the United States Constitution's ratification. According to numerous scholars and political scientists, federalism was probably the greatest achievement of the American political culture, which should be validated in terms of "the art of government".³ But, as I have announced in the title of my paper, we are still confronting the following dilemma: are there controversies, misconceptions and shortcomings of the federalist ideology and federal institutions? If the answer is yes – and I provisionally assert this – then, what we are looking for is a set of answers to improve federalism. This is the reason why I formulate – also provisionally – a distinction between "good" and "bad" federalism without being dogmatically committed to one form of federalism to the detriment of the other; on the other hand, confederations, although political systems distinct from federations, can be assessed in turn as being "good" or "bad", as the case may be. Consequently, my approach identifies nuances, both positive and negative, in the case of various federalist conceptions. My analysis is a synthetic approach to federalism that attempts to unmask and criticise what I have termed "bad federalism" and to call for melioristic solutions, within the framework of the United States' historical options for federalism.

Out of the four possible attitudes that can lead to the emergence of a federal political system in general, two of them are illustrative of what a "good

² Lowi, Theodore: "Eurofederalism: What Can European Union Learn from United States?", in Anand Menon and Martin Schain (eds.), *Comparative Federalism: The European Union and the United States in Comparative Perspective*, New York: Oxford University Press, 2006, p. 95.

³ Lipson, Leslie: *The Democratic Civilisation*, New York: Oxford University Press, 1964, p. 143.

federation” should be like; these attitudes are consensualism and cooperation. The other two are explanatory for what “bad federation” means; these attitudes are conflictual and anarchic. Even if, etymologically speaking, the meaning of federalism should logically exclude bad institutions and bad practices (i.e., the Latin word *foedus* means “voluntary association among equals”)⁴; there are both outright and collateral political practices that can damage the healthy functioning of federalism. But, if we are to preserve federalism according to the original etymology of the notion, there are at least two positive implications of federalism: contractualism and equal participation of constituent members. Many scholars have argued that the federal regimes worldwide favoured the expansion of political participation, while the issue of contractualism is still problematic. Probably most enlightening about this last observation is the fact that some prominent member states rejected the project of the European Union constitution in 2005. The Lisbon Treaty was ratified as a surrogate, but will it endure?

After World War II, federalism was envisaged as the proper solution to managing the diversity of societies, cultures and regional economic interests worldwide; prior to 1945, federalism had been highly criticised as a form of weak government, unable to cope in the future with the major challenges expected in the 21st century.⁵ The European Union first grew out of one-dimensional institutions (such as the European Coal and Steel Community or Euratom), but progressively adopted federal mechanisms and strategies in the process of decision-making policies. By that time, the United States had already tested the federal system for almost two centuries. There are still major differences between the United States and the European Union federalisms and the main difference between them is formal: while the United States is a nation-state, working within the framework of a constitution, the European Union is a voluntary alliance of states governed by treaties (and this is probably the fundamental unsolved issue of European federalism). However, functionally, both of them exercise power according to the principle of “dispersal of power”.⁶

Before proceeding to an analysis of the American experience of federalism as a possible lesson for the European Union, I add two brief observations that reveal the complexity of the problem: i) first, there is no unanimous agreement upon the normative definition of federalism; still, according to most scholars, there are three basic characteristics of federalism to be incorporated into a satisfactory definition, namely guaranteed separation of

⁴ Gerston, Larry N.: *American Federalism. A Concise Introduction*, New York: M. E. Sharpe, 2007, p. 5.

⁵ Laski, Harold: “The Obsolescence of Federalism”, in *New Republic*, 3/1939, pp. 367-369.

⁶ Sbragia, Alberta: “The United States and the European Union: Comparing Two *Sui Generis* Systems”, in Menon and Schain (eds.), *op. cit.*, pp. 15-16.

powers, decentralisation and coordination;⁷ ii) there are also different designs of federal institutions consistent with two main types of federalisms: executive federalism (e.g., Germany or Austria), in which the federal government provides incentives to local institutions for cooperation and coordination of policies, and dual federalism (e.g., Canada, the United States), in which powers are distributed and separated.⁸

The road to “bad federation”: from the Articles of Confederation to coercive federalism

Detractors of American federalism established that the historical evolution of American federalism could be divided into three main stages: the dual federalism of the Founding Fathers, the cooperative federalism that commenced in the 1930s, and the coercive federalism that started in the 1960s.⁹ The dual model, resulting from the debates over the ratification of the constitution, established federalism as a permanent tension between the component states and the federal union. According to the cooperative design of federalism, the relation between the federal government and the states was conceived in terms of mutual exchanges, while the model of coercive federalism put the states in strict terms of submission. This last model is essentially what I term “the path towards bad federation” and this description postulates the fact that there was a progressive and constant move – with minor exceptions – towards centralisation, especially through the federal use of some tricks, for instance, the federal tax credits and the congressional pre-emption provision.¹⁰ Of course, this brief characterisation may seem a crude over-simplification, but my point is that this devolution is the very mark of “bad federation”.

Scholars dealing with the issue of European Union federalism also seize the failure of federalism; if one recent distinction between territorial federalism and multinational federalism is to be preserved,¹¹ then the immediate explanation for the general failure of federalism is probably connected to the political inability to cope with multinational federalism and with the

⁷ Wachendorfer-Schmidt, Ute: “Introduction”, in Ute Wachendorfer-Schmidt (ed.), *Federalism and Political Performance*, London: Routledge, 2000, pp. 5-6.

⁸ *Ibidem*, p. 7.

⁹ Kincaid, John: “Three Faces of Contemporary American Federalism”, in Iwan M. Morgan and Philip J. Davies (eds.), *The Federal Nation. Perspectives on American Federalism*, New York: Palgrave Macmillan, 2008, pp. 63-81.

¹⁰ Zimmerman, Joseph F.: *Contemporary American Federalism. The Growth of National Power*, 2nd edition, Albany: State University of New York Press, 2008, pp. 187-188.

¹¹ Kymlicka, Will: “Is Federalism a Viable Alternative to Secession?”, in Percy B. Lehning (ed.), *Theories of Secession*, London: Routledge, 1998, p. 127.

implementation of decentralised policies and preservation of ethnic nationalism. In Europe, some relevant examples of such a failure would be the Soviet Union, the Czech Republic, or the former republic of Yugoslavia, which are by now forms of “defunct federalisms”.¹² In brief, this pessimistic view of the future of federalism is applicable not only in the case of the United States, but also with regard to the European Union. The growing tendencies of federal centralisation are best exemplified by the regulatory mechanism of decisions that the European Union institutions adopted, but decisionism is sometimes incongruent with its own assumptions in the European case; the fact that the issues of redistribution, common defence, and macroeconomic stabilisation are still major deficiencies in the functioning of the European Union means that its federal institutions are dysfunctional.¹³ The decision-making processes in the European Union are possibly the most controversial topic even if there are many voices arguing that regulatory analysis in technical terms is needed for the coherent implementation of decisions. Some scholars go so far as to consider regulatory analysis and decision-making efficiency as the new form of rationality in politics.¹⁴

Beyond the linear model of conceiving the historical evolution of American federalism, there is the possibility of characterising the functioning of federal institutions in terms of ups and downs or alternating “bad practices” and “good practices”. An overall analysis applied to the major decisions of the Supreme Court from the beginning of the 19th century until the present day reveals such an alternation: i) between 1803 and 1835, the Supreme Court tended to favour federal government provisions to the detriment of states and individuals; ii) between 1836 and 1937, due to president Andrew Jackson’s opportunity to nominate seven new members to the Supreme Court, the decisions of this institution leaned towards the prerogatives of the states to the detriment of the federal government; iii) in the period 1937-1986, the practice inaugurated by president Roosevelt’s New Deal policies (i.e., welfare state centralisation) received support from the Supreme Court; iv) after 1986, the Supreme Court was predominantly favourable to state rights in matters concerning commerce, civil rights or environment.¹⁵

The original federal project in the United States began on a promising note; the Founding Fathers, driven by diverse reasons and motives, started to

¹² Kavalski, Emilian and Zolkos, Magdalena: “Approaching the Phenomenon of Federal Failure”, in Emilian Kavalski and Magdalena Zolkos (eds.), *Defunct Federalisms. Critical Perspectives on Federal Failure*, Burlington: Ashgate, 2008, p. 1.

¹³ Kelemen, Daniel R.: *The Rules of Federalism. Institutions and Regulatory Policies in the EU and Beyond*, Cambridge and London: Harvard University Press, 2004, p. 160.

¹⁴ McGarity, Thomas O.: *Reinventing Rationality. The Role of Regulatory Analysis in the Federal Bureaucracy*, Cambridge: Cambridge University Press, 1991, p. 304.

¹⁵ Gerston: *op. cit.*, pp. 28, 53-61.

think about the opportunity of designing some federal arrangements in order to replace the ineffective Articles of Confederation, which, during the decade 1777-1787, failed to coordinate public policies beyond the local and state levels. Scholars who explain the birth of federalism in the United States (in political terms) argue that there were two main practical reasons that generated the need to discuss the project of the federal government during the second constitutional convention in Philadelphia from 1787: the refusal of the confederate states to pay a federal tax necessary for the good functioning of the Union and the existence of harsh competition among states because of the introduction of protective tariffs.¹⁶ Other theorists insist that strong economic interests influenced the process of constitutional ratification: western landowners, merchants and delegates who owned private or public securities defended the idea of a constitutional federation, while slave-owners and debtors opposed it for obvious reasons.¹⁷ A compromise had to be achieved between federalists and anti-federalists on two main issues: the principle of representation and the principle of the distribution of power.¹⁸ During the debates among the delegates, it became clear that the only compromising solution was federalism as voluntary association based on the principle of representative government and on the functional principle of the extended republic.¹⁹ In other words, two designs competed for the future destiny of federalism in America: one view insisted on a form of centralised federalism,²⁰ and the other amended this radical view by conceiving the union as a republic with a “federal center”.²¹ The defenders of strong centralised government responded to the pressures of the anti-federalists with their resilience to consider any compromise necessary to the ratification of the federal constitution; *Federalist 39* clearly stated that the new constitutional arrangements were formally republican rather than federal based on the idea that the constitutional provisions would address individual matters rather than states’ businesses.²²

On the two confronting sides were Hamilton and Jefferson. Generally, the Federalist papers received worse criticism than they deserved; but the truth is

¹⁶ Rakove, Jack N.: *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York: Vintage Books, 1997, pp. 26-30.

¹⁷ McGuire, Robert A. and Ohsfeldt, Robert L.: “Public Choice Analysis and the Ratification of the Constitution”, in Bernard Grofman and Donald Wittman (eds.), *The Federalist Papers and the New Institutionalism*, New York: Agathon Press, 1989, pp. 175-204.

¹⁸ Gerston: *op. cit.*, pp. 27-30.

¹⁹ Hamilton, Alexander; Madison, James and Jay, John: *The Federalist Papers*, edited with an Introduction and Notes by Lawrence Goldman, New York: Oxford University Press, 2008, pp. 48-55.

²⁰ Riker, William H.: *Federalism: Origin, Operation, Significance*, Boston: Little Brown, 1964.

²¹ Filippov, Mikhail; Ordeshook, Peter C. and Shvetsova, Olga: *Designing Federalism. A Theory of Self-sustaining Federal Institutions*, Cambridge: Cambridge University Press, 2004, p. 113.

²² Peacock, Anthony A.: *How To Read the Federalist Papers*, Washington: The Heritage Foundation, 2010, p. 70.

that the series of eighty-five essays designed for the foundations of the new federal union were rather persuasive strategies to enforce what in those times seemed a stringent necessity. I do not think that the Founding Fathers thought about centralising the government by any means. Hamilton himself did not seem to share the view according to which the federal design would generate conflicts between the central government and local governments. Instead, Hamilton thought about the federal idea in consensualist terms: the federal project should be a rational contract according to the trust of the citizens in the future of a federal republic.²³ What Hamilton had in mind was the solving of the fiscal issues: writing on the principle of divided sovereignty, he juxtaposed the centralisation strategy because he was aware of the perils and inefficiencies of the states' administration of fiscality.²⁴ But I do not think that Hamilton's perspective on the design of the federal union was as radical as Edmund Randolph's resolution that was aimed at a *de facto* elimination of the states' rights during the Philadelphia Convention of 1787.²⁵ It is probably more accurate to grasp Hamilton and the federalists' project of American federalism as deriving from Leibniz's already classic distinction between state sovereignty and central supremacy. Specifically, *Federalist 27* described the new political arrangements on the basis of a principled distinction between the supremacy of the federal law and the sovereign exercise of public power at the member states level.²⁶ Of course, the principle of federal supremacy was the Achilles heel of American federalism because of the harsh criticism targeted against it in the course of American history. I will exemplify this statement by saying that consistent literature in political theory in the 20th century has attacked the idea of federal supremacy as unsustainable from the redistributive justice perspective.

The federalists sometimes had to use weak arguments because of time constraints; on the other hand, after the success of the constitutional campaign at the end of 1787, there were many times in which the union had to be maintained through bad compromises. The practice of admitting new states to the union in pairs (one slave and one free) during the first half of the 19th century was a case in point; this bad practice had the obvious consequence of generating imbalances and ruptures between the states. According to some scholars, until the Civil War, the basic shortcomings of American federalism were: the principle of federal supremacy, the doctrine of nullification in the states and the constitutional right to secede.²⁷

²³ Hamilton, Madison and Jay: *op. cit.*, pp. 113-117.

²⁴ Rodden, Jonathan A.: *Hamilton's Paradox. The Promise and Peril of Fiscal Federalism*, Cambridge: Cambridge University Press, 2006, pp. 269-270.

²⁵ Zimmerman: *op. cit.*, p. 18.

²⁶ Hamilton, Madison and Jay: *op. cit.*, pp. 131-134.

²⁷ Filippov, Ordeshook and Shvetsova: *op. cit.*, p. 55.

Considering both the advantages and the disadvantages of the federal arrangements, it is probable that the option for assessing the federalists' agenda as "bad" federative thinking is oversimplifying the case. First, if the pillar of the federal project was constitutionalism, and if the constitutional debate was consistent with public choices, then it is rather a misplaced understanding of what "bad federalism" stands for; second, if we are to accept the possibility of "bad federalism", then we have to expand the meanings and implications of the centralisation of power in the federal government beyond the original project of the Founding Fathers.

The "good alternative": Anti-federalists and the idea of limited powers

The theoretical bases of the anti-federalist thought descended from Locke's political philosophy, which was commented and annotated by Thomas Jefferson. Essentially, John Locke grounded the idea of states' pre-eminence over federal union on the ideas of natural rights and private property; Locke's basic assumption is that political liberty is dependent upon economic liberty. Greatly influenced by Locke, Thomas Jefferson derived political liberty from the political economy of John Locke.²⁸ This tradition of thought decisively influenced the anti-federalists' early aspirations and later constituted the framework of the economic and political liberalism in America that left the federalist concept of centralised power outside its mainstream theoretical construction. The anti-federalists were at first reluctant to accept the guiding principles of government proposed by federalists; before and during the second constitutional convention in Philadelphia, they were rather confused about the optimal solutions for the independent states. They feared further conflicts and dissensions among states that resulted from competing commercial interests which is why the anti-federalist delegates in Philadelphia envisaged a working solution with a kind of mixed form of government shared by one national government and state governments, a solution they called the "new federalism".²⁹ But from the very beginning they thought that the idea of limited powers was the pre-requisite for any acceptable central government. In their view, the Articles of Confederation, which they continued to defend, were the very expression of such mixed form of government and not simply a league of isolated states, as the federalists contended. Additionally, they were suspicious that there was a hidden agenda of

²⁸ See Cunningham Jr., Noble E.: *The Life of Thomas Jefferson*, New York: Ballantine Books, 1987 and Boorstin, Daniel J.: *The Lost World of Thomas Jefferson*, New York: Henry Holt, 1948.

²⁹ Storing, Herbert J.: *What the Anti-Federalists Were For. The Political Thought of the Opponents of the Constitution*, Chicago and London: The University of Chicago Press, 1981, pp. 32-33.

the federalists to impose centralisation as the proper governmental conduct in politics; they were also aware of the fact that Benjamin Franklin's previously proposed Albany plan of 1754 was substantially rejected because the colonies sensed the peril of centralisation of power at that time.³⁰ Their suspicious attitude endured even after the constitutional compromise of 1787 was achieved: in the period between October 1787 and April 1788, they published a series of replies to the *Federalist Papers* in the *New York Journal*, pressing for the adoption of some amendments to the fundamental constitutional text, known as the Bill of Rights.³¹ For most anti-federalists, such as Patrick Henry and Melancton Smith, the defence of individual liberties and rights as truly republican virtues came first, while the federal union was a secondary compromising necessity in the service of common defence against external enemies.³² Moreover, they insisted that the guiding principle of the new federal state would be mutual respect of its constituents. Mutual dependence of the states on the federal government was rather an unavoidable necessity and that was the reason why the anti-federalists were very cautious about granting power to a federal government. Prudence was the cornerstone of their behaviour during and after the constitutional convention.

By and large, the two principles which the anti-federalists strongly defended were responsibility to the people and limited powers.³³ These two basic criteria directed the functioning of federalism in the United States to the path of progressive democratisation, first by using the federal constitutional provisions in the states for the elimination of local abuses, and second by "openness, transparency, and accountability in policy-making and implementation".³⁴ Commentators of federal constitutionalism in America observed that the dispute between federalists and anti-federalists on the ratification of the constitution paved the way for the ideological controversies between liberals and egalitarians;³⁵ but it is doubtful whether the original controversy rested on theoretical and ideological considerations. The Founding Fathers aimed at constructing the new constitutional arrangements for practical reasons, and this is why the constitutional text is a general mechanism for configuring powers and establishing limitations against the authority of the federal government. However, the original text of the Constitution hinted at the national government and contained little about state powers.³⁶

³⁰ Gerston: *op. cit.*, p. 20.

³¹ Zimmerman: *op. cit.*, p. 25.

³² Storing: *op. cit.*, p. 24.

³³ *Ibidem*, p. 53.

³⁴ Kelemen: *op. cit.*, p. 222.

³⁵ Gerston: *op. cit.*, p. 31.

³⁶ *Ibidem*, p. 40.

The individual rights and the rights of the states were to be dealt with in some amendments to the Constitution. As far as this paper is concerned, I should say that the tenth amendment is probably the most important, because it stipulates that any prerogative not explicitly granted to the federal government falls in the responsibility of the states or of the citizens. Arguably, this was the most frequently used objection to federalism during the course of American history. Not only did the anti-federalists fear the granting of too much power to the federal government, but more significantly, they had reservations about the positive effects of the representation principle. The anti-federalists considered that one of the logical consequences of the principle of separation of powers would be the non-delegation principle.³⁷ Beyond establishing criteria for the separation of powers and checks and balances, the anti-federalists took a firm stand in order to combat the centralisation of power by thinking about appropriate election mechanisms of the electors and about decentralising the organisation of political parties down to the local levels.³⁸

Asking the question what is to be learned from the American experience of federalism, Theodore Lowi argues that the inspiring principle that drove the American federalism is “dual citizenship”.³⁹ Beyond the simplistic understanding of this principle, its interpretations vary. For instance, dualism can be properly understood by considering the two-fold meaning of the notion of regulation; based on the assumption that, in French, the term is related to both *régle* (i.e., rule) and *réglémentation* (i.e., the practice of imposing rules), federalism itself should be understood dualistically as both the “patronage state” and, respectively, “the regulatory state”.⁴⁰ Undoubtedly, the anti-federalists would have been opposed to both instances of the above-mentioned federal state. Instead, contemporary federalism is largely consistent with the anti-federalist perspective on the attributions, powers and institutions of a *sui generis* federation: independence and territorial politics are functional approaches of federalism in the anti-federalist sense.⁴¹ So, the pressing question is: Is “good federalism” the best possible political regime today? Attempting to answer such a tricky question should start with the premise that the nationalist unitary state is obsolete; while the historical practices associated with the doctrine of the unitary state were based on the concept of political centralisation, “good federalism” insists upon a critique of centralisation and the consolidation of theories of regionalism and

³⁷ Majone, Giandomenico: “Federation, Confederation and Mixed Government: A EU-US Comparison”, in Menon and Schain (eds.), *op. cit.*, pp. 131-134.

³⁸ Filippov, Ordeshook and Shvetsova: *op. cit.*, pp. 233-236.

³⁹ Lowi: *op. cit.*, p. 94.

⁴⁰ *Ibidem*, p. 98.

⁴¹ Dosenrode, Søren: “The EUropean Federation”, in Søren Dosenrode (ed.), *Approaching the EUropean Federation?*, Burlington: Ashgate, 2007, p. 7.

governance.⁴² If we were to speak today about good practices of federalism, this would mean dismantling monolithic powers, resolving particular crises, asymmetries, and incoherent decision-making processes.

On the compromising genius of republican federalism in the United States

If Hamilton became the most vocal supporter of the centralised government idea to be incorporated into an extended form of republican federalism and Jefferson was the mentor of the anti-federalist conception on state and individual liberties, then James Madison was probably the embodiment of the compromising genius who understood that a final solution was not possible without pleasing both sides. For Madison, political behaviour was an applied science of political design; his views on the institutions of federal government were not deductive and theoretical, but rather empirical and circumstantial.⁴³ If one can speak about the theoretical foundations of moderate federalism in Madison, then its sources could be found in Montesquieu. The modern French philosopher thought of federalism as a central authority, necessary for the preservation of collective security and the eradication of corruption; but the counterpart of central authority should be the independence of the judiciary for defending individual rights.⁴⁴ So, both the modern theory and the American design of federal government had the form of a necessary compromise for the peaceful existence of citizens. American constitutionalism did not result from a compromise based on a principled attachment to rigid values, but - according to some recent interpretations - out of the management of strategies in the political procedure of ratification. For instance, game theory perspectives on federalism argued that despite the greater number of anti-federalists, the federalist side won the battle for the ratification of the constitution because of the strategies they used in order to achieve a compromise. Game theorists reject the simplistic approach, according to which there was a polarisation between the two sides, and argue that there were five possible compromising strategies between the extremist unconditional ratification and, respectively, rejection.⁴⁵

Accordingly, the compromising genius should be understood in terms of the compromising strategies: even if two practical issues divided federalists from

⁴² Lähteenmäki-Smith, Kaisa: "The Regions in the New Europe", in Dosenrode, *op. cit.*, pp. 139-164.

⁴³ Cain, Bruce E. and Jones, W. T.: "Madison's Theory of Representation", in Bernard Grofman and Donald Wittman (eds.), *The Federalist Papers and the New Institutionalism*, New York: Agathon Press, 1989, pp. 11-30.

⁴⁴ Richter, Melvin: *The Political Theory of Montesquieu*, Cambridge: Cambridge University Press, 1977.

⁴⁵ Fink, Evelyn C. and Riker, William H.: "The Strategy of Ratification", in Grofman and Wittman (eds.), *op. cit.*, pp. 227-228.

anti-federalists, the deadlock emerged as an attempt to extinguish the most pressing political and economic interests. The delegates at the Philadelphia convention did not necessarily share one agenda or another; rather, they were interested in solving pressing outcomes if the constitution would have been adopted. One pressing issue was political (i.e., the conflict between big states and small states) and the other economic (i.e., the issue of slavery). Two opposing plans resulted from controversies among the delegates, namely the Virginia plan and the New Jersey plan, the former being the expression of the federalist option, while the latter was the embodiment of the anti-federalist position. Politically, the anti-federalists feared that the distribution of powers within the federal states would be an advantage for big states, which would be better represented especially in Congress. Economically, the anti-federalists aimed to exempt slaves from taxation, but counted them for representation purposes. On the other hand, federalists insisted on a strong national government politically and for the taxation of slaves economically. The Connecticut Compromise finally found a middle way out, under the guiding principles of separation of powers and checks and balances.

Today, it is certain that both compromises suggested by Madison underlie what could be deemed as contractualist-type federalism. Various theorists appreciate differently their degree of influence on the federal institutions: Richard Hofstadter noted that the key concept of the federalist design in the United States was the principle of checks and balances,⁴⁶ while Robert Nagel observed that the very possibility of achieving the compromise was the enforcement of the separation of powers principle.⁴⁷ In simple terms, the principle of checks and balances expressed the founders' desire to control the central government and to make the accountability of politicians to the people effective, while separation of powers was about establishing limitations to the federal government's powers.

The final result of the Madisonian compromise appeared as a kind of a mixed government formula starting from the rational premise that for any mechanism of power, for effectiveness at the federal level, a counterpart mechanism should have been employed in order to restore the equilibrium of political forces. For instance, when the Founding Fathers conceived the American political system in the present-day configuration, they thought of juxtaposing the executive appointment mechanism to the selection procedures of representatives, fearing a possible tyranny of the masses. All the components of the American political system illustrate the concerns of the delegates at the Constitutional

⁴⁶ Hofstadter, Richard: *The American Political Tradition*, New York: Vintage Books, 1948, pp. 7-10.

⁴⁷ Nagel, Robert F.: *The Implosion of American Federalism*, New York: Oxford University Press, 2001, p. 16.

Convention to build the new federal republic according to the blueprint of divided sovereignty as, for instance, *Federalist 32* and *62* illustrate. What resulted from the original design of federalism in the United States incorporated the basic principles of a modern federation: statehood, self-determination of entities, members' sovereignty, governmental system, division of powers, legitimacy and participation, and distribution of resources.⁴⁸

American politics and the unfortunate experience of confederation

Paradoxically enough, the confederate design in the United States failed twice in American history. First, during the decade 1777-1787, under the Articles of Confederation, the American colonies attempted to become more powerful; because of both the international context and the controversies among the states, the Articles of Confederation finally failed. Second, during the Civil War (1861-1865), when eleven Southern slave states seceded from the federal union and formed the Confederate States of America; this last experience of American confederalism could not endure, mainly because the states of the new confederation opposed the overall progress of the United States. In both cases, the American confederations were not formally recognised, in the first case because the state-colonies were not independent, and in the second because the confederation emerged as a belligerent state of affairs. Additionally, according to Zimmerman, the first American confederation was New England, which resulted as a confederacy of four colonies: Plymouth, Massachusetts Bay, Connecticut and New Haven. The purpose of building a confederate alliance, as early as 1643, was the common defence against the natives.⁴⁹

Of the two above-mentioned experiences of American confederations, for present purposes, it is significant to discuss the pre-constitutional American confederation under the Articles of Confederation. The principle that guided the formulation of the Articles in 1777 was the governmental autonomy of the states; the small Northeastern colonies believed that voluntary association of states under the provisions of the Articles of Confederation would save their sovereignty in the face of both the British domination and the virtual oppression of centralised government. This form of political organisation was characterised by Lipset as a "loose federal union".⁵⁰ In the decade that preceded the Constitutional Convention in Philadelphia, federal arrangements were practically non-existent because there was no confederate executive, no judiciary, no power to raise standing armies or to sign treaties since the procedure of unanimity was

⁴⁸ Dosenrode: *art. cit.*, pp. 19-24 and "The European Federation", in Dosenrode, *op. cit.*, pp. 185-210.

⁴⁹ Zimmerman: *op. cit.*, p. 14.

⁵⁰ Lipset, Seymour M.: *The First New Nation*, New York: Basic Books, 1963, p. 30.

required for any decisions; under these circumstances, the role of the national state was purely ceremonial in the Articles of Confederation.⁵¹

The confederate ideology did not completely vanish after the creation of the federal state: close reading of the American doctrines of nationalism in the first half of the 19th century (especially in John C. Calhoun and John Quincy Adams) illuminates the remains of the old confederate mind-set that were associated, at that time, with the progressive democratisation of public life in the states and with the isolationist propaganda of Southern democratic nationalists. Unfortunately, the legacy of what I would call the “proto-confederate” thought in America took not only the path of isolationism and political independence of the states, but also the form of the divisionist spirit that culminated with the secessionism of the Civil War period. Moreover, in the 20th century, the confederate conception on the political preserved the secessionist spirit, leading to a new direction that was assumed as the neo-confederate critique of American federalism. The neo-confederate ideology was shaped by the Southern white culture as fundamentally anti-immigrationist, homophobic and anti-democratic.⁵² The manifesto of the new confederation, published by the *Washington Post* in 1995, called for an independent confederation of Southern states in which states’ rights, local control, the removal of federation funding and the preservation of the Christian tradition should be the guiding rules of the new political order.⁵³ Of course, one cannot blame the Articles of Confederation for future misappropriations, distortions and political atavism; but, on the other hand, considering the unfortunate legacy of the confederate idea in the United States, one could deem the confederate provisions as both ambiguous and inconsistent with the present-day conception on the matter. If this is the case, a confederation – following the present approach – would be no more and no less than a bad alternative to federalism.

I do not imply that, under any given circumstances, confederation cannot be a viable alternative to certain shortcomings of federalism. Let us think, for instance, of how problematic federalism is when vertically understood: the vertical assumptions of the federalist mind-set emerge from the existence of an implicit top-down hierarchy considering first the nation-state, then the sovereign states and finally local powers. The vertical organisation of the federal state can generate premises for political disjunction, because of divergent views of the component units on one and the same issue; this situation would evolve into

⁵¹ Gerston: *op. cit.*, pp. 24-25.

⁵² Hague, Euan; Sebesta, Edward H. and Beirich, Heidi: “Introduction: The Neo-Confederacy and the New Dixie Manifesto”, in Euan Hague, Edward H. Sebesta and Heidi Beirich (eds.), *Neo-Confederacy. A Critical Introduction*, Austin: The University of Texas Press, 2008, pp. 1-19.

⁵³ Hill, Michael and Fleming, Thomas: “New Dixie Manifesto”, in *Washington Post*, October 29, 1995.

confederate practices and institutions. The most common distinction between federations and confederations resides in the different formal arrangements: while confederations are usually defined as associations of independent states designed to last for a long time, in which the power is exercised by the state units,⁵⁴ or as associations of states in which the general government is subordinated to regional governments,⁵⁵ federations are formally more consistent because they are maintained through a constitution (instead of treaties of voluntary association). The functioning of federalism in the United States throughout history made the confederate ideas preferable solutions for some certain inconsistencies; for instance, the practice of dissociating the two *foci* of power created the premises for the ideological split of the federal union between the liberalism of federal government policies and the concentration of conservative tendencies in the states. The confederate idea did not lose credibility, but some ambiguities derived from the confederate endorsement of the mixed government principle; furthermore, there is present criticism of the confederate design applied to the understanding of the representation principle. Some critics argue that confederations are prone to favour the interests of the component units to the detriment of the representation of individual rights and liberties in the states.⁵⁶ Considering all the above-mentioned observations, the present-day conceptions upon the shortcomings of the confederate model should be an incentive for introspection about the best future of the European Union. In my view, the association of states that form the present-day configuration of the EU is consistent with the original project of confederation in the United States. However, the Lisbon Treaty of 2009 was likely aimed at consolidating the connections and formal arrangements among the states within the framework of the European Union. Provided the Treaty manages to overcome strong nationalistic and regional impulses in most of the constituent states, it will finally succeed in becoming the best instrument for coordinating various policies of the European Union. The near future will bear witness to how all these goals will be turned to account.

Conclusions: “good” or “better”, “bad” or “worse”

I find it very difficult to answer the following two questions: i) based on a synthetic view on the experiences of both American and European federalisms, is it possible to sketch a normative concept of federalism? And ii), if the answer is yes, could this normative theory be the instrument of analysis for political practices and institutions commonly associated with federalism?

⁵⁴ Dosenrode: “The European Federation”, *art. cit.*, p. 9.

⁵⁵ Wheare, Kenneth C.: *Federal Government*, 4th edition, London: Oxford University Press, 1980.

⁵⁶ Majone: *art. cit.*, p. 121.

Of course, if affirmative answers to both these questions were possible, the controversies on federalism would be rather minor. But I think that such approaches to the topic of federalism are sheer impossibilities. If this is the case, then we should proceed conversely: starting from acknowledging the limits of federalism, we have the possibility of finding out the criteria that can contribute to melioristic approaches to federalism. This is, I think, the best possible way of formulating certain answers to confront the complexities of federalism.

Provisionally, I identify three basic controversial issues regarding federalism: centralisation and decisionism, historical devolution, and future challenges. Centralisation and decisionism reveal dogmatism, devolution reveals incongruence, and unresponsiveness to future challenges is the mark of incompleteness. The crisis of federalism – if there is such a crisis – might also be understood as the result of a plurality of representations and interpretations associated with its occurrences and effectiveness.

Centralisation and decisionism are political practices emerging from dogmatic views upon the pre-eminence of the federal government in all public areas. Most critics of federalism counterbalanced decisionism and centralisation of power by calling for extended political participation and, respectively, decentralisation and regionalism. One can justify his/her options for decentralisation on the grounds of irrational taxation, major differences among political cultures and ethnic societies, or the inopportunity of excluding constituent members from the decision-making processes, at least in emergency situations. If the distinction between vertical and horizontal federalisms can be rendered relevant, then decisionism and centralization are landmarks of the vertical model and the lesson of the American founding experience of federalism should be taught as how anti-federalists attempted – and substantially succeeded – to impose their perspective of horizontal federalism. Current criticism of federalism in the United States has taken a mainly anti-federalist stand by asking for constitutional powers on behalf of the states, or by denouncing some essential omissions of the original conception of the Constitution (e.g., public-private partnerships and constitutional provisions about the connections between the private sectors and federal government). Of course, they indirectly stand for new amendments to the Constitution. Moreover, the critique of vertical federalism (i.e., centralist and decisionist) is ubiquitous: some systematic analyses on the structure of governments and policy-making mechanisms reveal a basic distinction between the cooperative-type federalism in Europe and the dual-type federalism in North America (US and Canada), explaining the differences as dependent on autonomous political cultures and the size of the federations.⁵⁷

⁵⁷ Dosenrode: “The European Federation”, *art. cit.*, pp. 26-27.

As far as “devolutionism” is concerned, Timothy Conlan characterised the process of devolution as progressive developments in the direction of decentralising the political practices of the federal state,⁵⁸ by arguing that devolution refers to progressive but degenerating policies at the federal level to the point of comprehensive centralisation and authoritarian paternalism. So, devolution is the critical phase of what I termed “bad federation”, or the processes of development from “bad” to “worse”. Other scholars, without necessarily assessing federalism, historicised the (d)evolution of American federalism from the dual form of federalism (after the ratification of the Constitution), through cooperative federalism (the end of the 19th century – 1930s), to centralised federalism (from the New Deal policies of the 1930s onwards).⁵⁹

Finally, the reconstruction of the federalist tenets should be the consequence of temporal inadequacies to future challenges: resource management, technological innovations and globalisation are sound examples.⁶⁰ The neo-institutionalist trend in the reconstruction of federalism is considered a narrow-sided perspective because of its fixation on the constitutional/institutional explanatory model and unresponsiveness to future changes. New institutionalism advanced some criteria in order to assess the outcomes generated by federal institutions, as follows: efficiency and transaction costs, stability (i.e., a state of equilibrium), coordination (mutual complementarity of institutions and individuals), distribution of power (the impact of institutional arrangements upon the exercise of power), and representation.⁶¹

There is no such a thing as “infallible good”, “good” as an inherent embedded quality, or “good” as an objective assessment of something; as such, in order to avoid the “bad” reception of this study on the meanings of federalism, it is arguable that, if we are to take, for instance, the Federalist Papers and the founding project of American federalism as a moderate attempt to assume only the “federal center” (and not the federal centralisation as the basic tool for avoiding incongruence and state conflicts) then the federalist project would become a “good federation”. If we are to take the anti-federalist project as a means to preserve unjust economic interests and Southern privileges, then our deference for the anti-federalist opposition would collapse into labelling it as “bad federation”. In a restrictive sense, “good federation” is achieved by eliminating what proved to be obstructive in various historical contexts of federal

⁵⁸ Conlan, Timothy: *From New Federalism to Devolution*, Washington DC: Brookings Institution, 1998.

⁵⁹ Erk, Jan: *Explaining Federalism. State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland*, London: Routledge, 2008, p. 89.

⁶⁰ Gerston: *op. cit.*, pp. 164-168.

⁶¹ Grofman, Bernard: “*The Federalist Papers and the New Institutionalism: An Overview*”, in Grofman and Wittman (eds.), *op. cit.*, pp. 1-4.

conceptions and institutions; on the other hand, what is “good” today may be obsolete and inadequate tomorrow, while a certain “bad” state of things can be the starting point for improvements and corrections. That is our best hope – the fact that “a more perfect” federalism, as Americans put it, is possible one way or another.

BIBLIOGRAPHY

- Boorstin, Daniel J. *The Lost World of Thomas Jefferson*. New York: Henry Holt, 1948.
- Cain, Bruce E., and Jones, W. T. “Madison’s Theory of Representation.” *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman. New York: Agathon Press, 1989, pp. 11-30.
- Conlan, Timothy. *From New Federalism to Devolution*. Washington DC: Brookings Institution, 1998.
- Cunningham Jr., Noble E. *The Life of Thomas Jefferson*. New York: Ballantine Books, 1987.
- Dosenrode, Søren. “Federalism.” *Approaching the EUropean Federation?*, edited by Søren Dosenrode. Burlington: Ashgate, 2007, pp. 7-35.
- Dosenrode, Søren. “The EUropean Federation.” *Approaching the EUropean Federation?*, edited by in Søren Dosenrode. Burlington: Ashgate, 2007, pp. 185-210.
- Erk, Jan. *Explaining Federalism. State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland*. London: Routledge, 2008.
- Filippov, Mikhail; Ordeshook, Peter C. and Shvetsova, Olga. *Designing Federalism. A Theory of Self-sustaining Federal Institutions*. Cambridge: Cambridge University Press, 2004.
- Fink, Evelyn C. and Riker, William H. “The Strategy of Ratification.” *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman. New York: Agathon Press, 1989, pp. 220-255.
- Gerston, Larry N. *American Federalism. A Concise Introduction*. New York: M. E. Sharpe, 2007.
- Grofman, Bernard. “*The Federalist Papers and the New Institutionalism: An Overview.*” *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman. New York: Agathon Press, 1989, pp. 1-5.
- Hague, Euan, Edward H. Sebesta, and Beirich, Heidi. “Introduction: The Neo-Confederacy and the New Dixie Manifesto.” *Neo-Confederacy. A Critical Introduction*, edited by Euan Hague, Edward H. Sebesta and Heidi Beirich. Austin: The University of Texas Press, 2008, pp. 1-19.
- Hamilton, Alexander, James Madison, and Jay, John. *The Federalist Papers*. Edited with an Introduction and Notes by Lawrence Goldman. New York: Oxford University Press, 2008.
- Hill, Michael and Fleming, Thomas. “New Dixie Manifesto.” *Washington Post*, October 29, 1995, pp. 35-36.

- Hofstadter, Richard. *The American Political Tradition*. New York: Vintage Books, 1948.
- Kavalski, Emilian and Zolkos, Magdalena. "Approaching the Phenomenon of Federal Failure." *Defunct Federalisms. Critical Perspectives on Federal Failure*, edited by Emilian Kavalski and Magdalena Zolkos. Burlington: Ashgate, 2008, pp. 1-16.
- Kelemen, Daniel R. *The Rules of Federalism. Institutions and Regulatory Policies in the EU and Beyond*. Cambridge and London: Harvard University Press, 2004.
- Kincaid, John. "Three Faces of Contemporary American Federalism." *The Federal Nation. Perspectives on American Federalism*, edited by Iwan M. Morgan and Philip J. Davies. New York: Palgrave Macmillan, 2008, pp. 63-81.
- Kymlicka, Will. "Is Federalism a Viable Alternative to Secession?." *Theories of Secession*, edited by Percy B. Lehning. London: Routledge, 1998, pp. 109-148.
- Lähteenmäki-Smith, Kaisa. "The Regions in the New Europe." *Approaching the European Federation?*, edited by Søren Dosenrode. Burlington: Ashgate, 2007, pp. 139-164.
- Laski, Harold. "The Obsolescence of Federalism." *New Republic*, 3, 1939, pp. 367-369.
- Lipset, Seymour M. *The First New Nation*. New York: Basic Books, 1963.
- Lipson, Leslie. *The Democratic Civilisation*. New York: Oxford University Press, 1964.
- Lowi, Theodore. "Eurofederalism: What Can European Union Learn from United States?." *Comparative Federalism: The European Union and the United States in Comparative Perspective*, edited by Anand Menon and Martin Schain. New York: Oxford University Press, 2006, pp. 93-117.
- Majone, Giandomenico. "Federation, Confederation and Mixed Government: A EU-US Comparison." *Comparative Federalism: The European Union and the United States in Comparative Perspective*, edited by Anand Menon and Martin Schain. New York: Oxford University Press, 2006, pp. 121-148.
- McGarity, Thomas O. *Reinventing Rationality. The Role of Regulatory Analysis in the Federal Bureaucracy*. Cambridge: Cambridge University Press, 1991.
- McGuire, Robert A. and Ohsfeldt, Robert L. "Public Choice Analysis and the Ratification of the Constitution." *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman. New York: Agathon Press, 1989, pp. 175-204.
- Nagel, Robert F. *The Implosion of American Federalism*. New York: Oxford University Press, 2001.
- Peacock, Anthony A. *How To Read the Federalist Papers*. Washington: The Heritage Foundation, 2010.
- Rakove, Jack N. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Vintage Books, 1997.
- Richter, Melvin. *The Political Theory of Montesquieu*. Cambridge: Cambridge University Press, 1977.
- Riker, William H. *Federalism: Origin, Operation, Significance*. Boston: Little Brown, 1964.
- Rodden, Jonathan A. *Hamilton's Paradox. The Promise and Peril of Fiscal Federalism*. Cambridge: Cambridge University Press, 2006.
- Sbragia, Alberta. "The United States and the European Union: Comparing Two *Sui Generis* Systems." *Comparative Federalism: The European Union and the United States in Comparative Perspective*, edited by Anand Menon and Martin Schain. New York: Oxford University Press, 2006, pp. 15-34.

- Storing, Herbert J. *What the Anti-Federalists Were For. The Political Thought of the Opponents of the Constitution*. Chicago and London: The University of Chicago Press, 1981.
- Wachendorfer-Schmidt, Ute. "Introduction", *Federalism and Political Performance*, edited by Ute Wachendorfer-Schmidt. London: Routledge, 2000, pp. 1-19.
- Wheare, Kenneth C. *Federal Government*, 4th edition. London: Oxford University Press, 1980.
- Zimmerman, Joseph F. *Contemporary American Federalism. The Growth of National Power*, 2nd edition. Albany: State University of New York Press, 2008.